ABORIGINAL SENTENCING AND MEDIATION INITIATIVES: THE SENTENCING CIRCLE AND OTHER COMMUNITY PARTICIPATION MODELS IN SIX ABORIGINAL COMMUNITIES

By Ross Gordon Green

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Abstract

Anglo-Canadian law has typically provided little opportunity for direct participation by victims and community members. Short of the creation of independent Aboriginal justice systems, such participation is most readily accommodated in sentencing and mediation. The imposition of an alien justice system on Canadian Aboriginal communities led to systemic inequities and its authority has been strongly resisted. Through a conjoint revision of sentencing practices by members of the judiciary and local community members, a variety of innovative sentencing practices have been implemented.

This study analyzed community sentencing and mediation in Canadian Aboriginal communities and investigated six initiatives in central and northern Manitoba and Saskatchewan. Case law and secondary materials relating to Aboriginal justice and sentencing provided a context for these case studies. A theoretical framework based on legal pluralism and post-colonialism facilitated interpretation of study data. Sixty-six interviews were conducted with fifty-one respondents who were members of the communities studied or were lawyers, police, probation officers and judges involved with these communities.

Four community participation models were identified: circle sentencing, the sentence advisory committee, the Elders' or community sentencing panel and the local mediation committee. Community members described estrangement from and resistance to the prevailing court system and conventional sentencing practices; and feelings of empowerment, in particular for participants in community sentencing and

mediation. All initiatives involved varying degrees of relationship between formal (state) and informal (local) systems of law and social control. Judges in turn were able to access local systems of social control, based on knowledge and peer pressure, to increase the effectiveness of sentencing.

These approaches have developed almost exclusively in rural Aboriginal communities. A combination of available local systems of social control and the communal nature of Aboriginal society has assisted in the development of these initiatives. Despite such concerns as the potential for local political interference and the role and protection of victims, the evolution of community sentencing and mediation appears to have had an empowering effect on Aboriginal communities. The continued development of such initiatives will depend upon many factors including local community and judicial support (both local and appellate) and accessability of treatment facilities.

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Within the Faculty of Law at the University of Manitoba, I am especially indebted to my supervisor Professor Anne McGillivray for her advice, encouragement, support and patience throughout this year. I appreciate the commitment and assistance of my internal reader Professor David Deutscher and of Dr. DeLloyd Guth, Chair of Graduate Studies. Many others from the Faculty of Law assisted me including: Professors Lee Stuesser, Trevor Anderson, Alvin Esau, Brian Schwartz, Barney Sneiderman, Cam Harvey, Freda Steel, John Irvine, Neil Campbell, Wendy Whitecloud, Director of the Academic Support Program and Simon Helm. I also appreciate the help of the Faculty's support staff including Sue Law, Margaret Dufort and Cheryl Hapko and the assistance of the entire staff at the E.K. Williams Library including Reference Librarian John Eaton, Reference Assistant Gail Mackisey and Circulation Supervisor Susanne Wallace.

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During my year of study, I travelled to six Aboriginal communities in Manitoba and Saskatchewan. I received assistance, advice and support from many people during my field work. In Saskatchewan these people included: Harry and Adelle Morin and Brian Brennan of Sandy Bay, Dorothy and Cyril Roy of Cumberland House, Judge Claude Fafard, Sid Robinson and Robin Ritter of La Ronge, Gerry Morin and Earl Kalenith of Prince Albert, Judge Bria Huculak of Saskatoon and the entire staff of the Legal Aid Area Office in Melfort. In Manitoba, these people included: Joyce Dalmyn and Judge William Martin of the Pas, Berma Bushie of Hollow Water, James Goertzen and Kathy Belaja of Daughin and Judge Murray Sinclair, Judge Robert Kopstein and Bill Macdonald of Winnipeg. I also thank Judge Barry Stuart of Whitehorse, Yukon and Rupert Ross of Kenora, Ontario for their comments during my study.

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PART ONE: PROBLEMS WITH ESTABLISHED SENTENCING PRACTICES IN ABORIGINAL COMMUNITIES

Chapter One: Introduction

1.1 Choice of Topic and Purpose of Study

Through my experience as a criminal defence lawyer practising in central Saskatchewan from 1986 through 1994 and as a lecturer in the Criminal Procedure Section of the Law Society of Saskatchewan Bar Admission Course, I became interested in the problems associated with sentencing of Aboriginal offenders and consequent reform of such practices. In June of 1993, I attended a conference of the Northern Justice Society in Kenora, Ontario. Several presentations focused on inadequacies of prevailing sentencing practices in Aboriginal communities and suggestions for reform. As a result, I was motivated to pursue research in this area.

The decision in *R. v. Moses*[1] articulated concerns about prevailing Anglo-Canadian sentencing practices in Aboriginal communities and presented a new sentencing approach: circle sentencing.[2] In introducing this process, Judge Barry Stuart stated:

> For centuries, the basic organization of the court has not changed. Nothing has been done to encourage meaningful participation by the accused, the victim. or by the community .... If the objective of the sentencing process is now to enhance sentencing options, to afford greater concern to the impact on victims, to shift focus from punishment to rehabilitation, and to meaningfully engage communities in sharing responsibility for sentencing decisions, it may be advantageous for the justice system to consider how court procedures and the

[1] (1992), 71 C.C.C.(3d) 347 (Yuk. Ter. Ct.).

[2] Through which the sentencing hearing was conducted in a circle format containing the judge, defence and Crown counsel, police, the offender, the victim, the probation officer and assorted community members. All circle members participated in arriving at an appropriate sentence.

> physical arrangements within court-rooms militate against these new objectives.[3]

These comments crystallized many of my experiences appearing with Aboriginal offenders at sentence. Unfamiliarity with and fear of the prevailing court system often appeared to stifle meaningful participation by Aboriginal offenders, victims and local community members. In September, 1993, I requested formation of a sentencing circle for a woman who had pleaded guilty to stealing money from the Kinistin band of east central Saskatchewan. The resulting sentencing circle[4] was conducted December 3, 1993 at the Kinistin Reserve Community Hall. Local community members showed genuine interest, participated in designing the offender's sentence and requested a role in the supervision of her probation order. The positive impact on my client further inspired my study of sentencing reform.

The purpose of this study was to identify, describe and evaluate sentencing initiatives functioning in Canadian Aboriginal communities which were characterized by increased participation of victims, offenders and local community members. Specific initiatives in six Aboriginal communities of Manitoba and Saskatchewan were studied in depth. These communities were Sandy Bay, Pelican Narrows and Cumberland House, Saskatchewan and Hollow Water First Nation, Waywayseecappo First Nation and Mathias Colomb Cree Nation (Pukatawagan), Manitoba. Such reforms were analyzed with respect to origin, relationship to systems of local and state control

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[3] *Supra* note 3 at 355-356.

[4] *R. v. Thomas* (3 December 1993), Kinistin Reserve (Sask. Prov. Ct.), which was the first sentencing circle within the Melfort area provincial court circuit.Judge Eric Diehl of the Provincial Court of Saskatchewan presided at the circle. This circle is hereafter called "the Kinistin circle."

and future progress and development. Given the short history of these initiatives,[5] conclusions respecting their impact upon offenders, victims and local community members would have been premature.[6] Only preliminary observations on such impact were feasible. Despite this limitation, analysis and comparison of these initiatives provided valuable insight into perspectives held by initiative participants respecting justice and sentencing practices. Inter-relationships between such initiatives and local systems of social control were also identified and this, in turn, facilitated consideration of the applicability and transferability of such approaches to other communities.

1.2 Methodology

In choosing appropriate methodology, lack of formal records of cases dealt with by way of sentencing circle[7] and the relatively low number of such cases[8] suggested insufficient data for a meaningful statistical analysis. A qualitative methodology was

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[5] All initiatives studied commenced within the prevailing court structure in or after 1992.

[6] During the course of my study, Judge Claude Fafard of the Provincial Court of Saskatchewan in La Ronge, commented on several occasions that it was too early to form any final conclusions about the impact of circle sentencing in Northern Saskatchewan.

[7] My initial interest was with the communities of north-east Saskatchewan which had experienced the introduction of circle sentencing in Saskatchewan. However, I discovered no record had been kept by the Provincial Court, the RCMP or local community members of specific sentencing circles conducted. Indeed, during a telephone interview with Judge Bria Huculak December 7, 1994 she indicated that the court in La Ronge did not keep track of sentencing circles as she and Judge Fafard were "not interested in statistics."

[8] During a telephone interview with Judge Claude Fafard of the Provincial Court of Saskatchewan on December 16, 1994, he stated he had conducted, at most, 30-40 sentencing circles, involving approximately 60 offenders(across all of the court points he serves in northern Saskatchewan). In comparison, approximately 300 sentencing circles had been conducted in The Yukon of September, 1994 as indicated in my interview with Judge Barry Stuart by telephone 30 September 1994. Judge Stuart is currently undertaking a study of Yukon recidivism rates. See M. Nemeth, "Circle of Justice: Northern Villagers Take Part in Sentencing" *Macleans* (19 September 1994) 52 at 53.

instead chosen. Qualitative research "produces descriptive data: people's own written or spoken words or observable behaviour"[9] and has a significant history among social-science researchers.[10] Martyn Hammersley described the use and acceptability of qualitative methodology:

> In the social sciences over the past thirty years there has been a tremendous growth in the use and acceptability of what has come to be called "qualitative method": research using "unstructured" forms of data collection, both interviewing and observation, and employing verbal descriptions and observations rather than quantitative measurement and statistical analysis. One of the features of this recent period of growth is that qualitative method has become institutionalized as a largely self-sufficient approach to social research, with its own literature, both substantive and methodological.[11]

Qualitative research is inductive not deductive. Taylor and Bogdan note that:

> Researchers [using qualitative methodology] develop concepts, insights, and understanding from patterns in the data, rather than collecting data to assess preconceived models, hypotheses, or theories. In qualitative studies researchers follow a flexible research design. They begin their studies with only vaguely formulated research questions.[12]

As I had not adopted or formulated a hypothesis explaining the introduction, development and impact of community sentencing reforms, qualitative methodology was best-suited to my study. Qualitative methodology utilizes "interviewing,

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[9] S. Taylor & R. Bogdan, *Introduction to Qualitative Research Methods: The Search for Meanings*, 2d ed. (New York: John Wiley & Sons, 1984) at 5.

[10] See B. Berg, *Qualitative Research Methods for the Social Sciences* (Boston: Allyn & Bacon, 1989) where the author comments at 2 that "qualitative research has left its mark conceptually and theoretically on the social sciences. The lasting contributions to social understanding from qualitative research as well as the sheer number of contributing social thinkers are significant."

[11] *M. Hammersley, The Dilemma of Qualitative Method: Herbert Blumer and the Chicago Tradition* (London: Routledge, 1989) at 1.

[12] Taylor & Bogdan, *supra* note 9 at 5.

observation, participation and continuing data analysis to generate information"[13], an approach suited to my study as data available respecting these initiatives would necessarily arise from observations of local sentencing practices[14] and interviews with initiative participants.

A recognised danger of qualitative methodology is the effect a researcher, as observer and interviewer, has on people interacted with and situations observed. This so-called "Hawthorn Effect"[15] suggests people will alter their usual or routine behaviour upon learning they are subjects in a research study. While recognizing the influence of my presence as a participant observer,[16] every effort was made to minimize the level of intrusion.[17] A further concern respecting this methodology is

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[13] A. McGillivray & D. Ish, *Co-operatives in Principle and Practice* (Saskatoon: Centre for Study of Co-operatives, 1992) at 30-31. Also see M. Hammersley & P. Atkinson, *Ethnography Principles in Practice* (London: Routledge, 1983) at 2 where the authors describe a participant observer as one who "participates , overtly or covertly, in people's daily lives for an extended period of time, watching what happens, listening to what is said, asking questions, in fact collecting whatever date are available to throw light on the issues with which he or she is concerned."

[14] The term "sentencing practice" is used to describe sentencing in the Provincial Court and mediation outside of court. Both involve the disposition of a criminal offence.

[15] Berg, *supra* note 10 at 61. This effect is named after a study conducted at the Hawthorn Plant of the Western Electric Company in which researchers initially thought changed worker output was in reaction to lighting conditions but later discovered the change was due to the attention given workers by the researchers. See R. Grinnell & M. Williams, *Research in Social Work: A Primer* (Illinois: Peacock, 1990) at 185.

[16] For example, during observation of the sentencing circle committee in Cumberland House on December 13, 1994, I assisted the committee by providing the name of a Mental Health worker in Nipiwan. The committee then included specific reference to this person in their recommendations respecting a young offender.

[17] In preparation for my field trip to Sandy Bay in October 1994, I spoke with my contact Harry Morin by telephone on September 19, 1994. I asked Harry if I would be allowed to attend and participate in the sentencing circle scheduled for October 19, 1994. He responded that it was not his decision to make as it was up to the people in the circle but that he did not personally have a problem with me participating. I subsequently spoke by telephone with Judge Bria Huculak on October 12, 1994 who cautioned me against scrutinizing people to closely during my field trip (she was concerned that people would act differently if they thought they were being studied). Upon arriving in Sandy Bay on October 18, I discussed this concern with Harry and we agreed that I could attend the circle but that I would remain outside the formal circle so

uncertainty regarding accuracy of individual accounts and the possibility of "hidden agendas" on the part of interviewees. However, as qualitative methodology focuses on understanding a social situation from an interviewee's own perspective, "[t]he researcher seeks not 'truth' or 'morality', but rather a detailed understanding of other people's perspectives."[18] Although the account may be motivated by hidden psychological or social factors, the explanation given "is not merely an important component in understanding social response: it is the place to begin the search for understanding."[19]

In preparation for field interviews, Gilbert Comeault[20] of the Manitoba Provincial Archives was consulted.[21] Use of a high quality tape recorder was also arranged. Identification of communities to be studied was assisted through contacts

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as to be as unobtrusive as possible. The fact I am a non-Aboriginal man not part of the communities studied raised the potential for inducing or aggravating the Hawthorne Effect.

[18] Taylor & Bogdan, *supra* note 9 at 6. See also N. Denzin & Y. Lincoln, *Handbook of Qualitative Research* (London: Sage Publications, 1994) who state at 2:

> [Q]ualitative researchers study things in their natural setting, attempting to make sense of, or interpret, phenomena in terms of the meanings people bring to them. Qualitative research involves the studied use and collection of a variety of empirical materials - case study, personal experience, introspective, life story, interview, observational, historical, interactional, and visual texts - that describe routine and problematic moments and meanings in individuals' lives.

[19] This approach was presented by Professor Joseph Raz of the Oxford University Law Faculty in a lecture given at the University of Toronto in September 1987 subsequently described and adopted in McGillivray & Ish, *supra* note 13 at 30.

[20] A person with extensive experience in conducting oral histories in Aboriginal communities.

[21] He provided advice and information on interviewing technique including a written "Oral History Information Package" which contained a selected bibliography and described oral history methodology, interviewing techniques and equipment usage. See also J. McKillop, "Oral History: The Spoken Record" (1987) *Dawson & Hind* (summer ed.) at 8-10 and P. Thompson, *The Voice of the Past: Oral History* (Oxford: University Press, 1978) at 165-185.

with judges and lawyers in Saskatchewan and Manitoba. Sandy Bay[22] became the first court location in Saskatchewan to experiment with sentencing circles[23] in 1992 and had subsequently accepted this approach.[24] Pelican Narrows had recently experienced introduction of circle sentencing and, with significant input from the Peter Balantyne Cree Nation, had developed a sentencing circle committee, to which Judge Fafard routinely referred cases. The committee independently conducted community circles and made sentencing recommendations to the court.[25] Cumberland House had experienced introduction of circle sentencing and, during 1994, embarked on a mediation/diversion project by which local community members were handling disposition of cases referred by the police and court. In addition, this committee served a sentencing advisory function to the court.[26] Mathias Colomb Cree Nation (Pukatawagan), Manitoba was identified by the director of Legal Aid in the Pas, Manitoba,[27] as a community that had been experimenting with circle sentencing in various forms in conjunction with its Justice Committee. Hollow Water First Nation, Manitoba was chosen because of interesting local community developments in justice initiatives revolving around holistic treatment of sexual abuse victims and

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[22] Located 190 kilometres north-west of Flin Flon, Manitoba.

[23] C. Fafard, *Sentencing Circles: A Progress Report* (La Ronge, Saskatchewan, undated) [unpublished] at 2.

[24] Interview by telephone with Judge Claude Fafard (19 September 1994).

[25] *Ibid.*

[26] Huculak interview, *supra* note 17.

[27] Discussion with Joyce Dalmyn at Northern Justice Conference (June, 1993) Kenora, Ontario.

victimizers[28]. This community had recently extended their approach to include local participation in circle sentencing within the provincial court system.[29] Waywayseecappo First Nation, Manitoba was identified by Associate Chief Judge Murray Sinclair[30] as a community in which community elders had become regularly involved in the sentencing process through the Elders Advisory Council.

All communities were, to varying extents, isolated from and north of the larger urban centres of Manitoba and Saskatchewan. All communities were serviced by a circuit provincial court[31] and received police services through the Royal Canadian Mounted Police (RCMP). All communities had experienced, in recent years, a change in the procedure by which some offenders were sentenced in provincial court. However, each community appeared to have a distinct experience respecting the introduction and development of community sentencing suggesting an interesting comparison and contrast.

"Gatekeepers"[32] were identified for each community through which access was

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[28] As described in R. Ross, "Duelling Paradigms? Western Criminal Justice Versus Aboriginal Community Healing" in R. Gosse, J Youngblood Henderson & R. Carter, eds., *Continuing Poundmaker & Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994) 241 at 243-248.

[29] K. Rollason, "Ceremony Heralds Healing: Ancient, Modern Ways Meet in Native Justice Venture" *Winnipeg Free Press* (11 December 1993) A15.

[30] Of the Provincial Court of Manitoba.

[31] Which accessed the communities of Sandy Bay, Pelican Narrows, Cumberland House and Pukatawagan by airplane. Hollow Water does not have a regular court sitting but special sittings have been held in this community to conduct sentencing circles. Waywayseecappo is serviced by a circuit court which travels by road.

[32] As discussed in Taylor & Bogdan, *supra* note 9 at 20-27. The authors described, at 20, entrance into an organization as usually achieved through the permission a person in charge otherwise called a "gatekeeper". They said this analogy also applied to isolated communities as access to the internal processes

negotiated.[33] Although some local factors effected access to individual communities,[34] these "gatekeepers" were of significant assistance in facilitating field trips taken to each community.[35]

Ethical concerns were addressed in designing study methodology[36]. Formal approval of the study's design was obtained in advance from the Legal Research Institute at the University of Manitoba Faculty of Law in its capacity as faculty ethics committee. Prior to all interviews, the nature of my research was explained to and consent was obtained from subjects.[37] Prior to any observations of court or community processes, consent was obtained from appropriate persons within the community or formal court system.

Data collected included records of interviews[38] with judges, crown and defence counsel, police officers and local community members and observations of specific

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requires permission from a key local player.

[33] These included local persons involved in the community sentencing initiatives and judges and defence counsel attending these communities.

[34] For example, no local accommodation was available in Pelican Narrows which meant that I had to stay in Sandy Bay, 70 kilometres to the north.

[35] Field trips were taken to Sandy Bay and Pelican Narrows from October 18-20, 1994, November 13-17, 1994 and April 18-20, 1995, to Cumberland House from December 11-14,1994, to Hollow Water on February 6 and 22, 1995, to Waywayseecappo from March 1-2, 1995 and to Pukatawagan from April 9-12, 1995. A further trip to Cumberland House was commenced June 21, 1995. Unfortunately the trip ended at my overnight stop in Melfort, Saskatchewan where I was contacted by Cyril Roy of the Sentencing Circle Committee who indicated the next day's meeting had been cancelled. Financial assistance in support of this research was provided by the Legal Research Institute of the University of Manitoba and the Government of Canada's Northern Scientific Training Program.

[36] See discussion of ethics in Taylor & Bogdan, *supra* note 9 at 70-74 and 86-88.

[37] Consent applied both to consultation and method of transcription. Interviews were only tape recorded with such consent.

[38] In person and by telephone as recorded by tape recorder or field notes.

court and diversion proceedings. Photographs were taken of court proceedings and locale in specific communities. Assorted secondary materials respecting these communities were obtained through local community members, the Department of Indian and Northern Affairs (DIANA) and the libraries at the University of Manitoba.

Data respecting specific communities was analyzed within the following categories: [1] community overview, [2] introduction and development of community sentencing initiative(s) and [3] perspectives on sentencing initiative(s).[39] These community case studies are documented in Chapter Six.[40]

As an aid to interpretation of data collected from the six communities, case law, commission reports, books and domestic and international journal articles were considered. Given the nature of qualitative research, a broad consideration of secondary materials was necessary to establish a framework for analysis of data collected.[41] These secondary sources also facilitated an understanding of community sentencing initiatives across Canada allowing for comparison with the initiatives studied and for consideration of the applicability and transferability of such approaches to other communities.

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[39] Perspectives were obtained from judges, police, Crown and defence lawyer, probations officers and community members involved with the initiatives.

[40] See generally R. Yin, *Case Study Research: Design and Methods*, 2d ed. (California: Sage Publications, 1994) in Ch. 6 "Composing the Case Study Report."

[41] See Denzin & Lincoln, *supra* note 18 at 14-15 for an overview of interpreting applied qualitative research which involves the intersection of "theory, method, praxis, or action, and policy ...."

1.3 Theoretical Frameworks of Analysis: Post-colonialism and Legal Pluralism

Data from the six communities disclosed perspectives among Aboriginal residents of estrangement from and disenchantment with the prevailing justice system. Such perspectives were reflected in, and were relevant to, problems associated with conventional sentencing practices.[42] This data also evidenced local systems of social control existing outside the formal court system yet impacting the sentencing of offenders within it. All communities studied shared a history of European colonization.[43] Post-colonialism scholarship[44] facilitated analysis of resistance within these communities to the justice system and conventional sentencing practices and an understanding of perspectives held by Aboriginal persons respecting justice and sentencing issues.

Criminal law has been described as pivotal to the colonization and domination of indigenous peoples. Peter Fitzpatrick, Professor of Law and Social Theory at the University of Kent, stated:

> Operatively, the essence of colonization was concentrated in the criminal law. As a universalistic project imperial colonization made all that stood outside it provisional and strange. "Native society" in its whole range was rendered deviant, and the colonized rendered "presumptive criminals" [citations omitted]. Anything that resisted re-creation in imperialism's own terms was denied or

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[42] See Chapter Three of this thesis for a discussion of the problems associated with sentencing practices in Aboriginal communities.

[43] Chapter Two considers traditional Aboriginal dispute resolution practices and the subsequent effects of European colonization.

[44] Which considers the experiences of countries or communities in the period following initial colonization.

suppressed.[45]

Colonialism has been defined in two ways within socio-legal literature: narrowly as a consideration of "European political, economic, and cultural expansion into Latin America, Africa, Asia and the Pacific during the last four hundred years" and more broadly as "a relation between two or more groups of unequal power in which one not only controls and rules the other but also endeavours to impose its cultural order onto the subordinate group(s)."[46] The broader definition is descriptive of the experience of Canadian Aboriginal people who were recipients of a criminal justice system imposed through colonization.

Although earlier studies respecting law and colonization stressed "the role of law in imperial domination", subsequent scholarship focussed on the means by which indigenous populations "resisted and accommodated" colonization.[47] As an example of the latter focus, Robert Kidder questioned earlier scholarship which suggested colonial law had simply been imposed by colonizers on less powerful indigenous populations. He argued that the degree to which colonial law was successfully imposed upon such people depended largely on the degree of their resistance.[48]

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[45] P. Fitzpatrick, "Crime as Resistance: The Colonial Situation" (1989) 28:4 Howard J. 272 at 276.

[46] S. Merry, "Law and Colonialism" (1991) 25:4 Law & Soc. Rev. 889 at 894.

[47] R. Smandych & G. Lee, "Women, Colonization and Resistance: Elements of an Amerindian Autohistorical Approach to the Study of Law and Colonialism." *Native Studies Rev.* 10:1 (1995): 21 at 24-26.

[48] R. Kidder, "Toward an Integrated Theory of Imposed Law" in S. Burman & B. Harrell-Bond, eds., *The Imposition of Law* (New York: Academic Press, 1979) at 293. The author stated:

> The sheer inventiveness of supposedly imposed-upon populations not only warms the heart of those who cheer for underdogs; it suggests that the fact of imposition is itself questionable. At what point in the process of legal challenge and indigenous response do we conclude that law has been

Peter Fitzpatrick described the inter-relation between indigenous resistance and development of colonial criminal law systems in such places as India, Papua New Guinea and Sri Lanka, and theorized that crime was utilized to label and control those who resisted colonization.[49] In a North American context, Mike Brogden described various forms of resistance by the French Metis of western Canada to colonial authority during the nineteenth century and the resulting labels of criminality applied to the Metis in an effort to disable such opposition.[50] A further example of colonial imposition and subsequent resistance and modification of law is found in a study by Robert Gordon and Mervyn Meggitt.[51] This considered the colonization of New Guineau and demonstrated how the colonial legal system was initially subverted and eventually overtaken by the indigenous Engas who integrated aspects of colonial law with their customary practices.[52]

Post-colonial writing has been based largely in the experience and practice of

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'imposed'?

[49] Fitzpatrick, *supra* note 45 at 276-279.

[50] M. Brogden, "Law and Criminal Labels: The Case of the French Metis in Western Canada" (1990) 1:2 J. Human Just. 13.

[51] R. Gordon & M. Meggitt, *Law and Order in New Guinea Highlands: Encounters with Enga* (Hanover, New Hampshire: University of New England, 1985).

[52] The above description was summarised from a book review of Gordon and Meggitt's work by Sally Merry in *Law & Colonialism, supra* note 46 at 907-909. Colonial recognition of "customary law" was considered by Francis Snyder in "Colonization and Legal Form: The Creation of 'Customary Law' in Senegal" (1981) 19 *Journal of Legal Pluralism* 49. He argued, in the context of French colonization of Senegal, that law respecting land usage, referred to as "customary law" in the twentieth century, was not based on local tradition but rather was created at the time of colonial imposition of the capitalist state. Also see Robert Gordon, "The White Man's Burden: Ersatz Customary Law and Internal Pacification in South Africa" (1989) 2:1 Journal of Historical Sociology 41 which traced the recreation of "customary law" within the Apartheid system and argued this adoption can be best seen as instrument of "internal pacification" of the indigenous population.

European colonization of India, Africa and Latin America. Much of the writing on law and colonization has been authored by anthropologists, historians and social scientists who are themselves members of colonizing societies.[53] In response to a perceived Eurocentric bias on the part of such writers, a body of post-colonial literature authored by indigenous writers who analyze colonial history and dynamics from perspectives of the "colonized", has emerged.[54] Such writing, usually characterized by acerbic and pointed critiques of European colonization, provides a link to the experiences and perspectives of many Aboriginal Canadians who express disenchantment with and estrangement from the Anglo-Canadian justice system.

Sally Merry described a form of ongoing struggle and resistance currently existing within some post-colonial countries which is highly relevant to analysis of community sentencing initiatives:

> Some post-colonial countries are now experimenting with new forms of local justice that are now more rooted in customary law, more conciliatory, and more locally controlled as the more established local courts become more formalized and bureaucratic over time and replicate the forms of the colonial courts .... Efforts to expand supervision, to develop formal procedures, and to reduce customary law to writing contradict efforts to reproduce local power relations and replicate a more informal, situationally informed vision of justice. *Courts*

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[53] Merry, *supra* note 46 at 919.

[54] See G. Prakash, "Postcolonial Criticism and Indian Historiography" (1992) 31-32 Social Text 8 in which the author described and attacked the Eurocentric nature of many accounts of Indian history. Also see G. Spivak, "Three Women's Texts and a Critique of Imperialism" (1985) 12 Critical Inquiry 243 in which the author critiqued the imperialistic nature of nineteenth century British literature from the eyes of a Third World person and H. Bhabha, "Signs Taken for Wonders: Questions of Ambivalence and Authority under a Tree Outside Delhi" (1985) 12 Critical Inquiry 144 in which the author described the role of English literature in colonization and the resulting forms of resistance to this. Other examples of post-colonial scholarship author by indigenous writers are A. Allahr, "When Black First Became Worth Less" (1993) 34:1-2 Int'l J. Comp. Soc. 39 and F. Mellon, "The Promise and Dilemma of Subaltern Studies: Perspectives from Latin America History" (1994) 99:5 Am. Hist. Rev. 1491.

> *designed in a capital city are very different when they are implemented in remote villages and towns, places not easily supervised by the centre and already dominated by a local elite. Local courts are, to use Sally Falk Moore's term (1973), semi-autonomous social fields: semi-independent social systems that develop local practices within a larger structure which constrains the way they function.* [emphasis added][55]

The dynamics of colonization are tied to the inter-relation of local and state systems of social control and law. The concept of legal pluralism focuses less on historical aspects of colonization than on this inter-relationship and is thus useful in analyzing specific sentencing initiatives and their relationship to local and state systems.

Sally Merry defined legal pluralism as "a situation in which two or more legal systems coexist in the same social field [citations omitted]."[56] Stuart Henry stated, "[l]egal pluralism ... holds that every society contains a plurality of legal orders and legal subsystems (or fragments of these)."[57] This view of legal pluralism recognized interaction between formal state-imposed and local indigenous systems of law and social control. As the sentencing initiatives under consideration facilitated involvement of local community members in a process previously dominated by outside justice professionals, interaction between these systems was inevitable.

Social control theorist Donald Black postulated an inverse relationship between the strength of local social control and dependence upon a formal legal code.[58] He

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[55] Merry, *supra* note 46 at 906.

[56] S. Merry, "Legal Pluralism" (1988) 22 Law & Soc. Rev. 869 at 870.

[57] S. Henry, "The Construction and Deconstruction of Social Control: Thoughts on the Discursive Production of State Law and Private Justice" in J. Lowman, R. Menzies & T. Palys, eds., *Transcarceration: Essays in the Sociology of Social Control* (England: Gower Publishing, 1987) 89 at 90.

[58] D. Black, *The Behaviour of Law* (New York: Academic Press, 1976) at 6-7 & 107-111.

traced modern day reduction in social influence by the family within industrialized nations:

> In modern societies such as America, however, family control is weaker than in more traditional societies. With modernization it has weakened everywhere, and everywhere law has correspondingly increased. In Taiwan, for instance, the *tsu*, or clan, has steadily lost its former authority. Its sanctions have been undermined by changes in land tenure, and the growth of economic relationships outside the village has made its jurisdiction less relevant anyway. Other social control in the village has also declined. As all of this has happened, Taiwanese peasants have more and more turned to the police and courts [citation omitted]. The same pattern has appeared in every part of the world, gradually in some societies, quickly, even suddenly in others. In Europe, it happened over centuries. For many Indians of North America. it happened almost overnight, as quickly as they were moved to reservations [citations omitted]. In most of Africa, Asia, Latin America, and Oceania, it has come only recently, if at all. In Africa, for instance, family control is still so strong that juvenile law hardly exists.[59]

This tension and inter-relation between local and state systems of social control was also considered by Robert Ellickson in his study of relations between cattle ranchers in Shasta County, California.[60] He found, despite considerable statutory regulation of the cattle industry, that such problems as "cattle trespass and boundary-fence disputes" were not dealt with by formal law processes but rather through local social control mechanisms. These included such self-help measures as "negative gossip and mild physical reprisals."[61] He theorized that people often choose custom over formal law, in large part because "the substantive content of customary rules is more

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[59] *Ibid* at 108-109.

[60] R. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Massachusetts: Harvard University Press, 1991).

[61] *Ibid* at 282.

likely to be welfare maximizing" for members of the local community.[62]

All sentencing initiatives studied were characterized by an increase in local community participation in the sentencing process. Rupert Ross commented on a similar move towards local community justice among the Cree and Ojibway of northwestern Ontario:

> The cries for local control over community justice are growing. It is tempting to conclude that they spring only from political claims of sovereignty, incidental only to the larger issue of political autonomy. While that may indeed form part of the background, it appears that much more is at stake in their eyes; the contribution which local control over justice would make, directly and indirectly, to the very goal of peaceful co-existence to which our system aspires.[63]

Sally Merry described establishment of local community-based justice forums as a move to "popular justice". In her study of the San Francisco Community Boards program, a community-based justice approach begun in 1977, she observed popular justice initiatives were characterized by processes which were "informal in ritual and decorum, nonprofessional in language and personnel, local in scope, and limited in jurisdiction."[64] She described the role of popular justice initiatives in countries having

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[62] *Ibid* at 283. Also see S. Henry, *Private Justice: Towards Integrated Theorising in the Sociology of Law* (London: Routledge & Kegan Paul, 1983) who described the development of "private law" systems of social control within workplaces.

[63] Rupert Ross "Cultural Blindness and the Justice System in Remote Native Communities" Paper presented to the Sharing Common Ground Conference on Aboriginal Policing Services, Edmonton, May 1990 at 11-12 cited in Michael Jackson, "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities" (1992) U.B.C. L. Rev. 147 at 208-209.

[64] S. Merry, "Sorting Out Popular Justice", in S. Merry & N. Milner, eds., *The Possibility of Popular Justice: A Case Study of Community Justice in the United States* (Michigan: University of Michigan Press, 1993) 31 at 32. Related to literature on popular justice, social control theorist Stanley Cohen described a trend, beginning in the 1960s within the prevailing justice system, away from institutionalized control and towards community control characterized by "a lack of faith in traditional closed institutions and a call for their replacement by non-segregative, 'open' measures, termed variously 'community control', 'community treatment', 'community corrections' or 'community care'. See S. Cohen, *Visions of Social Control: Crime,*

an Anglo-American legal system:[65]

> In countries with Anglo-American legal systems, popular justice is described as the opposite to an adversarial, rights-based, act-oriented legal system. ... Many Third world countries equipped with colonial Anglo-American legal systems are developing customary-law forms of popular justice to reclaim a law suppressed during the colonial era. Procedures are conciliatory rather than adversarial, the characteristics of the Anglo-American legal system.[66]

A key element in the analysis of popular/community justice initiatives is their relationship to formal state law and local or indigenous social control systems. Sally Merry theorized that "popular justice is best conceived as a legal institution located on the boundary between state law and indigenous or local law. It can be thought of as intermediate, distinct from each side but linked to each."[67] She distinguished several

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Punishment and Classification (Cambridge: Policy Press, 1985) at 31. In considering the movement towards community-based justice, Cohen at, 122-123, displays cynicism about the notion of "community" and concludes that most community-based initiatives are creatures of the state. Indeed, one of the findings of this study was that the initiatives studied were closely tied to the state-controlled system (see Chapters Six and Seven).

[65] Given the similarities in the evolution and development of the American and Canadian criminal justice systems, her analysis is equally applicable to the Anglo-Canadian system.

[66] Merry, *Popular Justice, supra* note 64 at 37. Donald Black, in *Behavior of Law, supra* note 58 at 5, identified four styles of social control: penal, compensatory, therapeutic and conciliatory. At 78, he observed that the cultural similarity of members of a community helps explain the prevalent style of law:

> All else constant, penal law varies directly with cultural distance, whereas conciliatory law varies inversely with cultural distance. ... For instance, case by case, tribal tribunals are less likely than modern tribunals to punish people, and, overall, tribal societies have less penal law than modern societies ... But where conditions for penal law are the poorest, they are best for conciliatory law.

A criminal justice framework stressing victim/offender reconciliation and compensation, as opposed to offender punishment is presented by criminologist Herman Bianchi in *Justice as Sanctuary: Toward of New System of Crime Control* (Indianapolis: Indiana University Press, 1994).

[67] Merry, *Popular Justice, supra* note 64 at 35. Peter Fitzpatrick also analyzed popular justice initiatives and argued popular justice is best described as an adjunct of formal state control: popular justice programs complement formal state law by fulfilling roles not addressed by the later. See P. Fitzpatrick, "The Impossibility of Popular Justice" in S. Merry & N. Milner, eds., *The Possibility of Popular Justice: A Case Study of Community Justice in the United States* (Michigan: University of Michigan, 1993) at 453. Despite the difference in emphasis, both Fitzpatrick and Merry recognized an important link between popular justice

popular justice traditions that have developed in the twentieth century. Two of these, the "reformist" and "communitarian" traditions, are directly applicable to the current analysis of community sentencing initiatives. "Reformist" approaches are described as endeavouring to "increase the efficiency of the formal legal system by streamlining it and increasing its accessibility."[68] This approach seeks to increase "participation in modern legal institutions" and revise procedures.[69] Control over the reformist approach resides solely with the central state.[70] In contrast, "communitarian" approaches are described as being more closely related to "indigenous ordering than to state law."[71] This approach:

> ... seeks to operate entirely outside the state and its institutions. Communitarian popular justice is sometimes part of a withdrawal from secular society, an attempt to create a new religious or utopia social order. Communitarian popular justice tribunals typically develop in small communities that are explicitly dedicated to maintaining a separate legal order and moral code.[72]

In a Canadian context, Associate Chief Judge Murray Sinclair of the Provincial Court of Manitoba suggested sentencing initiatives may be categorized as driven by

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and formal state control. They differed on the degree to which popular justice initiatives intersected with and represented indigenous or local law and social control. Also see Laura Nader, "When is Popular Justice Popular" in Merry & Milner, eds., *Popular Justice, ibid* 435 at 435 where the author argued that "popular justice movements are not usually popular, in the sense of being locally controlled or bottom up in origin, but rather movements that originate in centres of control and then try to connect with local populations for purposes of control ... [citations omitted]." She distinguished popular-justice organization originated through a top-down state-controlled process from those of community origin (such as the San Francisco Community Boards).

[68] *Ibid* at 40.

[69] *Ibid.*

[70] *Ibid* at 42.

[71] *Ibid* at 45.

[72] *Ibid.*

judges, offenders or local communities.[73] Rupert Ross distinguished community justice initiatives on the basis of proximity and adherence to competing paradigms which he defined as "Aboriginal healing" and "western criminal justice".[74] In contrasting the sentencing initiatives at Sandy Lake and Attawapiskat, Ontario with that at Hollow Water, Manitoba, he characterized the Hollow Water approach as more closely aligned with the Aboriginal healing paradigm and viewed the other initiatives as more closely tied to the state-controlled Western justice paradigm. The origin(s) of sentencing initiatives may predict whether sentencing reforms evolve towards a distinctive local justice system or are simply assimilated into the established Anglo-Canadian court system.[75]

Part One of this thesis considers problems associated with established sentencing practices in Aboriginal Communities. Discussion of these problems will facilitate analysis, in Part Two, of changes to conventional sentencing processes in

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[73] Interview with Associate Chief Judge Murray Sinclair (17 January 1995) Winnipeg, Manitoba. As an example of an "offender driven' process, Judge Sinclair referred to a circle held in his court in December of 1993 at Winnipeg. He commented that he believed the process was ineffective as the offender requested the circle and was responsible for bringing most of the people to the circle. As such, the process was offender and not community driven. *R. v. Dusomme* (1993) Winnipeg (Man. Prov. Ct.).

[74] R. Ross, "Duelling Paradigms?" *supra* note 28 at 241-243.

[75] See Proposal to the B.C. Minister of the Attorney General entitled "Unlocking Aboriginal Justice: Alternate Dispute Resolution for the Gitksan and Wet'suwet'en People" at 15-19 as reproduced in Michael Jackson, "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities" (1992) U.B.C. L. Rev. 147. at 210 for an example of the positioning of a community-based justice initiative between the formal state legal system and traditional indigenous law:

> The justice system brought to Canada by the Europeans has been very disruptive of both the individual and community life of its Aboriginal people. We propose to implement an alternative in Northwestern B.C. that will allow the dispute resolution laws and methods of the Gitksan and Wet'suwet'en people to interact with the provincial justice system in a way that does not undermine the integrity of either.

Aboriginal communities and, in Part Three, of sentencing initiatives operating within six Aboriginal communities of central and northern Manitoba and Saskatchewan. Part Four will analyze findings and observations from this study and will consider the future of such community-based sentencing initiatives.

Chapter Two: Aboriginal Dispute Resolution Traditions and Perspectives

2.1 Traditional Methods of Social Control and Dispute Resolution

This study analyzed various sentencing initiatives which encouraged community, victim and offender participation in Aboriginal communities. The communities chosen for consideration in Manitoba and Saskatchewan were of Cree[76] and Ojibway[77] descent. Cree and Ojibway people residing in Manitoba and Saskatchewan are descendants of woodland Indians who, prior to the arrival of Europeans in North America,[78] resided in dense boreal forest regions across an enormous area now comprising much of Quebec, Ontario and the prairie provinces.[79] Cree ancestors are believed to have migrated from the east; although disagreement

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[76] These communities were Sandy Bay, Pelican Narrows and Cumberland House, Saskatchewan and Pukatawagan, Manitoba. Cumberland House also has a Metis settlement. However, a substantial majority of the residents are treaty status Cree Indians who are either members of the Cumberland House band or obtained their treaty status through *Bill C-31*.

[77] These communities were Hollow Water and Waywayseecappo, Manitoba.

[78] Subsequently referred to as "the pre-contact era."

[79] The area inhabited by the Cree and Ojibway is described in INAC, *The Canadian Indian* (Ottawa: Supply and Services Canada, 1986) at 10:

> The Ojibway (sometimes called the Chippewa) occupied a large territory occupying encompassing all the northern shores of Lake Huron and Lake Superior from Georgian Bay to the edge of the far north where the rivers begin to flow towards Hudson Bay. ... Flanking the Ojibway on the north and west, the Cree also occupied an immense area. They lived on the southern perimeter of Hudson Bay, living as far north as Churchill. Their territory was bounded on the east by Lake Mistassini and extended all the way west to the prairie frontier.

exists on their date of migration.[80] Substantial migration of both Cree and Ojibway people took place after contact with Europeans through the fur trade.[81]

These woodland tribes were hunters and gatherers and provided food and clothing through the hunting of moose, deer, bear, beaver and caribou.[82] They "lived a nomadic existence, travelling for most of the year in small groups, seeking fish and game and gathering food. During the summer months, when food was relatively plentiful, they would gather in larger communities for feasts, religious ceremonies, and other social activities."[83] Little, if any, autohistorical documentation exists respecting Cree and Ojibway culture prior to European contact.[84] Given this shortage of evidence, written material on traditional dispute resolution practices of Aboriginal people represents interpretations by non-Aboriginals based on personal observations or

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[80] See J. Vanstone, *The Simms Collection of Plains Cree Material Culture from Southeastern Saskatchewan* (U.S.A.: Field Museum of Natural History, 1983) at 1 who commented that, despite the existing view that "the western Cree in general represented a late 18th and 19th century migration resulting from the depletion of game and fur-bearing in the region east of Lake Winnipeg" recent studies indicated there "were Cree in northern Manitoba by A.D. 900 and in northern Saskatchewan and southern Manitoba by A.D. 1500..." Also see A. Stonechild, *Survival of a People* (Saskatchewan Indian Federated College, 1986) at 26.

[81] See Coyle M., "Traditional Indian Justice in Ontario: A Role for the Present?" (1986) 24 Osgoode Hall L. J. 605 at 612 where the author stated: "Both peoples migrated considerably during the fur trade era which followed. The Cree pushed west into the Prairies, while many Ojibway seem to have migrated north toward James Bay."

[82] INAC, *supra* note 79 at 9-10. This contrasted with the agricultural-based tradition of the Iroquois to the south.

[83] Coyle, *supra* note 81 at 612. For an anthropological history of the Western Woods Cree see W. Sturtevant, *Handbook of North American Indians*, Vol. 6 (Washington: Smithonian Institute, 1981) at 217-230. Historical accounts of Ojibway culture are found in W. Warren, *History of the Ojibway People* (St. Paul: Minnesota Historical Society Press, 1984) and E. Danzinger, *The Chippewas of Lake Superior* (Norman, Oklahoma: University of Oklahoma Press, 1979). An account of the "ceremonies, rituals, songs, dances, prayers and legends" of the Ojibway is found in B. Johnson, *Ojibway Heritage* (Toronto: McLelland & Stewart, 1987).

[84] Coyle, *supra* note 81 at 612-613. Such contact first occurred in the early seventeenth century.

discussions with Elders.

The dynamic nature of culture must be recognized in analyzing "traditional" dispute resolution practices. Practices recognized and adopted within a culture depend significantly on current reality.[85] Indeed, traditions may be adapted or invented in response to such reality.[86] Ultimately, it is beliefs about tradition and the understanding and application of traditional practices within a culture which are significant. The effects of colonization have eroded retention of traditional knowledge among First Nations in Canada.[87] The extent of such erosion and the context within which traditions are applied will influence the similarity between current and historical practices. Aboriginal dispute resolution traditions were considered within three eras; pre-contact, the fur trade and post-confederation.

2.1.1 The Pre-contact Era:

The Aboriginal Justice Inquiry of Manitoba (AJI) summarized existence of law in Aboriginal communities prior to arrival of Europeans as follows:

> Law in an Aboriginal community was found in unwritten conventions before the arrival of Europeans. Although these rules were never codified, we observe

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[85] R. McDonnell, "Contextualizing the Investigation of Customary Law in Contemporary Native Communities" (1992) 34 Can. J. Crim. 299 at 301.

[86] See E.J. Dickson-Gilmore, "Finding the Ways of the Ancestors: Cultural Change and the Invention of Tradition in the Development of Separate Legal Systems" (1992) 34 Can. J. Crim. 479 at 489-90 where the author discussed adaptation of traditional justice practices by the Mohawk nation based on current realities. She also discussed whether such adaption can be considered "invention of tradition". Similarly, during a telephone interview September 19, 1995, Judge Claude Fafard of the Provincial Court of Saskatchewan, when questioned whether circle sentencing represented an appeal to tradition, commented that this approach might be more accurately described as "inventing" tradition.

[87] Dickson-Gilmore, *ibid* at 481.

> that there were consistent patterns in the treatment of such matters as relations with other nations, family problems, and disputes about behaviour and property. These patterns became part of Aboriginal oral tradition and were passed from generation to generation. One can easily speak about these patterns in terms of "law" and "justice".[88]

Diamond Jenness described pre-contact law and order among tribes, including the woodlands Cree and Ojibway, as depending "solely on the strength of public opinion" and based on "rules and injunctions handed down by word of mouth from an immemorial antiquity".[89] He further observed that:

> [P]ersuasion and physical force were the only methods of arbitrating disputes, social outlawry or physical violence the only means of punishing infractions of the moral code or offenses against the welfare of the band or tribe.[90]

Although the accuracy of this account has been challenged,[91] it confirms that pre-contact Aboriginal societies clearly exercised an identifiable system of dispute resolution and social control. The AJI concluded:

> Aboriginal enforcement mechanisms, although not codified in today's sense, served the same purpose in Manitoba's pre-contact Aboriginal societies as did the justice system of the European societies of that time. Crime and punishment became part of each Aboriginal group's oral record, preserved by elders in story

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[88] Public Inquiry into the Administration of Justice and Aboriginal People, Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People, Vol. 1, Winnipeg: 1991 at 50.

[89] D. Jenness, *The Indians of Canada*, Bul. 65- Anthr. Ser. No. 15 (Ottawa: Department of Mines, 1934) at 125.

[90] *Ibid.*

[91] His account was criticized by the AJI commissioners, *supra* note 88 at 22-23, who stated this reflected "cultural biases and stereotypes" about Aboriginal people prevalent during the 1930's. The interpretation of F. Jennings, *The Invasion of America* (New York: Norton & Co., 1975) at 111 was favoured by the Inquiry as Jennings had sought to avoid stereotyping and cultural bias in presenting a more realistic, accurate and fair version of history. Jenning's account, however, is based on the history of more southerly American Indian tribes.

and legend.[92]

Both Cree and Ojibway societies were characterized by "community decision making ... [as] a horizontal process which involved the participation and consent of the community at large"[93] and by generally informal social structures.[94] The AJI described Cree and Ojibway justice practices:

> Ojibway and Cree cultural decision making involved the participation and consent of the community at large. Behaviour was regulated by ostracism, shame and compensation for the victim's loss, even if only symbolic

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[92] AJI, *supra* note 88 at 53. Also see L. Hennepin, *A New Discovery of a Vast Country in America*, Vol. 1 (Toronto: Coles Publishing, 1974) at 513. The author, a Catholic missionary in contact with the late 17th century Iroquois, observed a process of community dispute resolution and law enforcement which included victim restitution and capital punishment for "enormous" crimes. Also see M. Nielson, "Native People and the Criminal Justice System: The Role of the Native Courtworker" (1982) 5:1 Can. Legal Aid R. 55 at 56 where the author, a Research Officer with Native Counselling Services of Alberta, described the basic principles of traditional Aboriginal justice:

> i) Traditional Native justice was based on informal social control mechanisms.
> ii) Traditional Native justice was based mainly on preserving the welfare of the group, meaning that the interests of the individual often were of secondary importance. Theft, adultery and assault were, therefore, relatively minor "offenses". The tribe intervened in a dispute between individuals only when the dispute was unresolvable or unreasonable demands were made.
> iii) Conformity was more important than punishment.
> iv) Traditional Native justice was flexible , situational and adaptable, meaning that an action may not be an "offence" at one point but may be at another, depending on the circumstances.
> v) Traditional native justice was not a separate institution but rather an integral part of the socialization process and social, religious and economic functioning of the group.
> vi) Traditional Native justice relied on reimbursement, replacement and reconciliation of with the intension of achieving a balance in the group and harmony between the individuals or groups involved in the "offence". "Punishments" were immediate and designed to help the welfare of the group, eg., replacing stolen objects, or substitutive "payments" for violent offenses, (eg. someone committing an assault would take over the responsibility of feeding the victim's family until the victim recovered).
> vii) Positive reinforcement was emphasized as much as punishments, for example, gifts and songs of praise to well-doers were as prominent in the culture as negative reactions and could, theoretically, "balance out" or overcome any stigma associated with wrong-doing.
> viii)Enforcers, if they existed in the Native group, held their positions by receiving group support in carrying out their duties.

[93] Coyle, *supra* note 81 at 615.

[94] *Ibid* at 622. Also see I. Hallowell, *Culture and Experience* (Illinois: Waveland Press, 1955) who commented at 120 that the Ojibway, prior to signing treaties with the Canadian government in the late 19th century, had "no chiefs in the modern sense, nor any formal band or tribal organization."

> compensation were possible. Elders undertook the regular teaching of community values and warned offenders on behalf of the community. They publicly banished individuals who persisted in disturbing the peace. Elders might undertake to mediate dangerous disputes and to reconcile offenders with victims. In cases of grave threats or such serious offenses as murder, physical punishment and even execution of the offender might be undertaken either by the community or by those who had been wronged. In all instances the sanction of tribal elders was necessary.[95]

Such traditional methods of social control appear to have focused on deterring crime through internal community pressure and sanction. Although its achievement is often linked more directly to incarceration, deterrence also constitutes a central goal of Anglo-Canadian sentencing policy.[96] The role of traditional social control mechanisms in deterring anti-social behaviour among the Cree and Ojibway of north-western Ontario was described by Rupert Ross:[97]

> In traditional times, such deterrence was accomplished without much man-directed intervention. In the first place, the social group was the extended family, with the result that any harm done was harm to family members. Secondly, Mother Nature was the great enforcer, for anti-social conduct almost by definition diminished the capacity of the group to maintain bare survival in the woods. If man failed, Mother Nature punished. The overriding threat was banishment from the group, banishment into the wilds where, without the help of others, there was every likelihood of death. It was critical to each person that he maintain the welcome of the group, for without it he was lost.[98]

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[95] AJI, *supra* note 88 at 51. A less interventionist view of dispute resolution among 19th century Ojibway was described by Hallowell, *supra* note 94 at 120:

> Of institutionalized penal sanctions there were none, nor were there any juridical procedures provided in the aboriginal culture. No, in short, was responsible for punishing crime or settling disputes. The major social sanction was the fear of misfortune and disease, an inescapable penalty for wrongdoing and one that functioned through the internal psychological mechanisms of guilt and fear, rather than shame or any kind of direct punishment that could be instituted by one's fellows ...

[96] AJI, *supra* note 88 at 52.

[97] A Crown prosecutor and author from Kenora, Ontario.

[98] R. Ross, "Leaving Our White Eyes Behind: The Sentencing of Native Accused" [1983] 3 C.N.L.R. 1 at 7.

Ross also stressed the role of gossip in traditional social control:

> A number of Elders have told me that before the courts came they kept order through gossip. I am coming to understand that being talked about negatively hurts them, in their context, far more that it does me in mine.[99]

Similarly, John Milloy described the practice of mocking and teasing as a means of encouraging conformation to social customs among the Plains Cree.[100]

Among pre-contact Cree, less serious offenses such as theft and damage to property were treated as a matters between offender and victim (or between their respective families) with an emphasis on compensating the victim.[101] David Mandelbaum described the traditional treatment of theft within Plains Cree society:

> Theft was rare and was usually the consequence of a thoughtless act by a young man. When a boy's father discovered that a boy had taken something belonging to another, the parent would immediately return it to the owner.[102]

Agnes Morin, a Cree woman from Sandy Bay, Saskatchewan, described a childhood experience which occurred while residing with her family on a trapline (reflecting a traditional emphasis on victim compensation):

> I'll tell you a little story about myself when we were staying with my grandparents. I was mischievous. And when we were staying with my uncles, my uncle, my dad they had everything, guns, snowshoes, and one day I decided to take my uncle's snowshoes and go in the bush. I didn't know how to walk

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[99] *Ibid* at 8.

[100] J. Milloy, *The Plains Cree: Trade Diplomacy and War: 1790 to 1870* (Winnipeg: University of Manitoba Press, 1988) at 79. The Plains Cree apparently share the traditional heritage of the Woodlands Cree, having moved onto the plains from the woodlands. See D. Mandelbaum, "The Plains Cree Remembered" (Proceedings of the Plains Cree Conference, 24 October 1979) Canadian Plains Research Centre, University of Regina at 4-5.

[101] Interview with Agnes Morin (16 November 1994) Sandy Bay, Saskatchewan.

[102] D. Mandelbaum, *The Plains Cree: An Ethnographic, Historical and Comparative Study* (Regina: Canadian Plains Research Centre, 1979) at 123.

> around in snowshoes but I took them anyway. And I went in the bush and I said "I got snowshoes!". I got stuck in the snow and ... I had this axe. I was going to chop a little stick to play with a stick. I chopped the snowshoe right in half and that was a very big thing and I knew I was in big trouble. I came home and I hide that snowshoe, my uncle's snowshoe. A few day after, my uncle said "Well, it's a nice day, I'm going hunting." He looks for his snowshoes and I didn't say anything. I know I would get into trouble. Finally, he found the snowshoes and one was cut in half with the axe. I was the only one there to be blamed, so my dad asked me "Well, what did you do?" So, I told him I accidentally chopped it. And they were really mad. Really mad. ... So my dad told my uncle "Here's my snowshoes and I'll fix your snowshoe while you're gone." My dad worked about two days to repair that snowshoe I broke. Never did that again. See things like that, the parents had to repair or get [a new one].[103]

Murder within Cree and Ojibway society often resulted in revenge killings by the victim's family.[104] Such "blood vengeance" was sometimes avoided through negotiation and compensation by the offender to the family of the deceased.[105]

The traditional role of community circles in dispute resolution among the pre-contact Cree and Ojibway is difficult to assess. Given the limited size of nomadic hunting communities and the non-interventionist traditions of pre-contact woodlands tribes, it appears doubtful that community circles, similar in format and size to the

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[103] Morin interview *supra* note 101.

[104] This practice among mid-19th century Ojibway is described in F. Baraga, *Chippewa Indians* (New York: League of Slovenian Americans, 1976) at 24 and Warren, *supra* note 83 at 139. A similar practice among the Cree was described by Mandelbaum, *Ethnographic History, supra* note 102 at 122.

[105] Mandelbaum, *Ethnographic History*, *supra* note 102 at 122 comments that "[a] payment of horses sometimes commuted blood vengeance." Also see A. Skinner, "Notes on the Plains Cree" (1914) 16 Am. Anthr. 68 at 72: "[i]f a man murdered his wife through jealousy, as sometimes happened, he had to pay eight horses to his wife's relatives ...". Also see Fine Day, *My Cree People* (Invermere, B.C.: Good Medicine Books, 1973) at 42 for an example of negotiation between the family of the victim and the offender after murder.

sentencing circles currently being conducted, were used to facilitate dispute resolution.[106] However, evidence does exist of community consultation following a transgression within traditional Cree and Ojibway society.[107] Usage of circles appears to be accepted as having traditional significance by present day Cree and Ojibway people. Berma Bushie, an Ojibway women and Co-ordinator of Community Holistic Circle Healing (CHCH) at Hollow Water First Nation in Manitoba, commented on Ojibway tradition:

> [T]he circle has a very significant role in our traditional way of life. Our whole culture is based on the circle. You look at the cycle of life, it's all in a circle, seasons are all in a circle. Everything! Everything operates on a circle in our culture. And this is what we have to return to. And definitely, in our work, the circle gives us the strength to be able to deal with these horrific cases.[108]

Verna Merasty, a Cree women involved in healing and sentencing circles at Sandy Bay, Saskatchewan, confirmed the traditional role of circles within Cree culture.[109]

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[106] See J. Trudeau, *Culture Change Among the Swampy Cree Indians of Winsk, Ontario* (Ph.D. Thesis, Catholic University of America, 1966) at 23 where the family domination over social control and dispute resolution among the Cree of northwestern Ontario is described:

> The family was the only really functioning economic and political unit. Hunting and trapping were done by single families living in relative isolation ... Not only were there no hunting groups besides the family, but it seems that other types of larger groupings were also lacking. There were no social classes and no societies, secret or otherwise ... Leadership, authority and imposition of sanctions took place within the family, so much so that the family and the "state" were said to be pretty much one and the same thing ....

[107] See comments of AJI, *supra* note 88. Also see Baraga, *supra* note 104 at 22 where the author wrote in the mid-nineteenth century of a form of community counsel among the Ojibway through which community members "deliberate[d] on some difficulties among themselves or some concerns with their traders etc.".

[108] Interview with Berma Bushie (6 February 1995) Hollow Water, Manitoba.

[109] Interview with Verna Merasty (20 October 1994) Sandy Bay, Saskatchewan.

2.1.2 The Fur Trade Era:

The lives of Cree and Ojibway people were significantly affected during the fur trade era of 1660-1870.[110] They interacted with both French and English traders during expansion of the fur industry, often in a co-operative fashion as described by Arthur Ray:

> The fur trade was the most pervasive force influencing the economic and political development of Western Canada between 1660 and 1870. During this period it operated as an integrating force between Indians and Europeans. To be successfully prosecuted, the fur trade required the cooperation of both parties. In the broadest sense, it was a partnership for the exploitation of resources. Although it was not an equal partnership, nor one in which the same group always held the upper hand, at no time before 1870 would it have served the interests of one party to destroy the other as by doing so the aggressors would have been deprived of their supplies of goods, or furs and provisions .... [111]

As a result of this interaction, Aboriginal people experienced significant cultural change.[112] Dispute resolution, previously controlled within each band, increasingly came to be controlled by colonizers, most significantly, in the area of Rupert's Land,[113] by the Hudson's Bay Company (HBC). Russell Smandych and Rick Linden described the "rough justice" meted out within the private justice system used by HBC

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[110] These are the dates used to circumscribe this era by historian Arthur Ray in *Indians in the Fur Trade: Their Role as Trappers, Hunters and Middlemen in the Lands Southwest of Hudson Bay: 1660-1870* (Toronto: University of Toronto Press, 1974).

[111] *Ibid* at xi. This often co-dependant relationship was described by Peter Cumming and Neil Mickenburg in *Native Rights in Canada*, 2d ed.(Toronto: Indian Eskimo Association of Canada, 1972) at 120. Dependence by Hudson's Bay employees on the knowledge and skills of the Western Woods Cree in establishing the trading post at Cumberland House was described by Paul Thistle in *Indian-European Trade Relations in the Lower Saskatchewan River Region to 1840* (Winnipeg: University of Manitoba Press, 1986) at 54.

[112] Ray, *supra* note 110 at xi. For a description of changes to traditional religious practice by the Cree after European contact, see J. Dion, *My Tribe the Cree* (Calgary: Glenbow Museum, 1979). The author is a Cree from northwestern Alberta.

[113] Currently comprising most of Manitoba and Saskatchewan.

employees who established and operated trading posts in Rupert's Land:

> The legal system that was most effective for the Hudson's Bay Company was its private justice system. While the validity of the Company's Charter and other enabling "criminal legislation" was being debated in the courts of Upper and Lower Canada and in England, servants of the Company in western Canada were creating and applying their own law. More research is required to learn about the many different contexts within which this private justice system operated. To this point, the evidence suggests that the system of private justice operated by the Company's had a considerable impact on aboriginal peoples.[114]

Aboriginal people developed "many different creative strategies for dealing with European colonizers".[115] However:

> [B]y the middle of the nineteenth century, the indigenous peoples of western Canada were clearly beginning to have their culture and traditional social institutions, including institutions of dispute resolution and social control, replaced by those brought about by the Hudson's Bay Company.[116]

Dispute resolution was controlled by colonial fur traders in and around their trading posts.[117] No single law enforcement system existed during this era. The AJI observed:

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[114] R. Smandych & R. Linden, "Co-existing Forms of Aboriginal and Private Justice: An Historical Study of the Canadian West" in K. Hazelhurst, ed., *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia and New Zealand* (Aldershot, England: Avebury, 1995) 1 at 15.

[115] *Ibid* at 25. The authors at 15 stated:

> It is important to make it clear that the aboriginal people of the Canadian west were not the passive recipients and victims of an English brand of "white man's" retributive justice. Violent confrontation and taking revenge on enemies were also common among pre-contact North American aboriginal peoples [citations omitted]. They later applied this approach to Europeans who failed to fulfil the social obligations that were expected of military trading partners.

An example of a violent response by the Home Guard Cree of James Bay was described by Thistle, *supra* note 111 at 50-51. The author described the destruction of Fort Henley by the Cree as a result of a perceived breach of reciprocal social obligations HBC employees. The Cree had been denied free entrance to the trading post despite their understanding that this was the exchange for allowing Cree women to marry HBC employees.

[116] Linden & Smandych, *supra* note 114 at 25.

[117] See AJI, *supra* note 88 at 58 for a description of the "rough justice" used against Aboriginal people by employees of the HBC and the North West Company.

> None of these incidents [examples of "rough justice"] should be seen as evidence of a consistent pattern of law enforcement. Instead, as one might conclude from Paul Thistle's detailed study of the Cumberland House district, the Indians lived according to their rules, and the fur traders by theirs within the context of company discipline. Moments of disagreement in Indian-European relations sometimes were resolved by force, sometimes not.[118]

The AJI described confusion among nineteenth century Europeans over which colonial body[119] had jurisdiction over criminal offenses. Despite such confusion, the AJI commissioners argued that Aboriginal people retained self-control over criminal law:

> [T]he Hudson's Bay Company introduced laws and courts that applied to the European inhabitants of this territory, and especially to the growing settlement at the Red River ... , while the rest of the western interior was left in a kind of legal limbo until 1870. Within this "vacuum," it need hardly be added, Aboriginal law prevailed as it had done for centuries. Only Europeans perceived an absence or ambiguity in the law.[120]

Sale of Rupert's Land by the HBC to the dominion of Canada in 1870 resulted in further colonization of Aboriginal people within this territory. Changes included negotiation of treaties, establishment of reserves[121] and expansion of colonial criminal law enforcement into Aboriginal communities through the North-west Mounted Police (NWMP), later the RCMP.

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[118] AJI, *supra* note 88 at 58.

[119] The courts of eastern Canada or the HBC (by virtue of its power to enact laws for the good government of its territory).

[120] AJI, *supra* note 88 at 59.

[121] See H. Hickerson, *The Chippewa and Their Neighbours: A Study in Ethnohistory* (Illinois: Waveland Press, 1987) at 13: "In Canada ... the government came to take an active role in the lives of the Indians, starting in the 1870s when treaties were made and reservations established."

2.1.3 The Post-confederation Era:

The transition of control over Rupert's Land from the HBC to the central Canadian government and the subsequent difficulties faced by Aboriginal people was described by Paul Cumming and Neil Mickenberg:

> In the period immediately preceding the admission of Manitoba[122] into Confederation, a number of important changes occurred in the Northwest. With the advent of increased European settlement and the transfer of the Company territories to government authorities, the Hudson Bay Company's monopoly over trade in the Northwest ended. The resulting lack of a central authority with sufficient means of law enforcement led to an increase in the previously repressed liquor trade, and to a general weakening of law and order. In addition, the wholesale slaughter of the buffalo resulted in the near extinction of the once vast herds which had inhabited the plains. The totality of these events, combined with the spread of European deceases, such as smallpox, placed the plains Indians in a precarious position.[123]

Aboriginal land in the Prairie region was ceded to the federal government through treaties made between 1871 and 1879. The resulting impact on Aboriginal people was described by Allan McMillan:

> The treaties allocated reserves and provided small payments of money and farm equipment. In only a few decades these people had gone from proud and self-sufficient nomads, roaming freely across the Plains, to destitute and dependent groups, confined to small areas of land without any adequate means of support.[124]

During the time of treaty negotiations the NWMP were created as a central police

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[122] In 1870.

[123] Cumming & Mickenberg, *supra* note 111 at 120.

[124] A. McMillan, *Native People and Cultures of Canada* (Vancouver: Douglas & McIntyre, 1988) at 145. For a more detailed history of the signing of treaties by the Indians of the prairie provinces see J. Frideres, *Native People in Canada: Contemporary Conflicts*, 2d ed. (Scarborough: Prentice-Hall, 1983) at 60-71.

force governing criminal law enforcement in the Western territory.[125] The new police force was intended to protect this area from annexation by the United States and to "make the land safe for settlement".[126] By the end of the nineteenth century, the NWMP had expanded their operations from "Fort Cumberland two hundred miles down the Saskatchewan River from Prince Albert in the east, to the Peace River district in the west, and to the Yukon in the north."[127] The NWMP, renamed the Royal North-west Mounted Police in 1904[128] and re-created as a national police force, the RCMP, in 1920,[129] came to dominate formal criminal law enforcement during the twentieth century across Canada and prominently in Manitoba and Saskatchewan.

In addition to the police presence, colonization of the Aboriginal population was enhanced through passage of federal legislation which came to regulate virtually all facets of life in Aboriginal communities. The AJI stated:

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[125] See G. Marquis, *Policing Canada'a Century: A History of the Canadian Association of Chiefs of Police* (Toronto: University of Toronto, 1993) at 41 where the author described the development of this police force:

> Following the dramatic entry of Manitoba into confederation, the federal government began planning an orderly settlement of the West, then still dominated by Native peoples and the Metis. Prime Minister John A. Macdonald was considering a mobile government force, modelled on the Royal Irish Constabulary, capable not only of enforcing the law but also of upholding Canadian sovereignty in the West.

[126] R. Robertson, *The Law Moves West: The Northwest Mounted Police: 1873-1878* (Canada: Burns & MacEachern, 1970) at 9. The author also described the report of an investigation into the policing needs of the western territory which concluded "a military force should be stationed there to 'provide safety, prevent bloodshed and preserve order'." (*Ibid*).

[127] N. & W. Kelly, *The Royal Canadian Mounted Police: A Century of History: 1873-1973* (Edmonton: Hurtig, 1973) at 89. Also see J. Turner, *The North-west Mounted Police: 1873-1893* (Ottawa: Kings Printer, 1950) for an analysis of the development and expansion of this police force.

[128] *Ibid* at 121-131.

[129] *Ibid* at 153-160.

> The new justice system, as represented by the *Indian Act* and supplementary legislation, soon was being employed to prevent Aboriginal people from expressing their traditional beliefs, from pursuing their traditional economy and from asserting their political rights as individuals or as members of Canadian society. In every aspect of life, from criminal law to education and religious expression, from hunting to agriculture, from voting to the use of lawyers, Aboriginal people ran into regulations that restricted their freedom.[130]

Post-confederation changes in community structure and social control among the Cree and Ojibway of northwestern Ontario, and their impact on the exercise of traditional dispute resolution tactics, were described by Rupert Ross:

> Traditional ethics, then, were formulated with three different contexts in mind: central ethics governing life within one's own extended family, then ethics governing occasional, controlled interaction with other families perceived to be essentially cooperative and, finally, ethics governing the very rare occasions of contact with outsiders. At no time prior to European contact, or even during the trapping era after contact, was there any need to develop ethics and rules appropriate to ongoing, daily relations with people other than those within one's own extended family. That, however, is precisely the context within which most Indian people in the North no find themselves. Their reserve communities regularly have populations as high as twelve hundred in my region, with the majority in the five hundred range.[131]

While the evidence point to the continued existence of distinct Aboriginal dispute resolution traditions, the Anglo-Canadian justice system has full jurisdiction over criminal law enforcement in Aboriginal communities. How Aboriginal peoples perceive this imposed system and its dispute resolution powers are discussed in the remainder of this chapter. Problems associated with established sentencing practices in Aboriginal communities are discussed in Chapter Three.

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[130] AJI, *supra* note 88 at 64.

[131] R. Ross, *Dancing With a Ghost: Exploring Indian Reality* (Toronto: Octopus Publishing, 1992) at 103.

2.2 Aboriginal Perspectives on Justice

"At the most basic level of understanding, justice is understood differently by Aboriginal people" wrote the AJI:

> The dominant society tries to control actions it considers potentially or actually harmful to society as a whole, to individuals or to the wrongdoers themselves by interdiction, enforcement or apprehension, in order to punish harmful or deviant behaviour. The emphasis is on the punishment of the deviant as a means of making the person conform, or as a means of protecting other members of society.
>
> The purpose of a justice system in an Aboriginal society is to restore the peace and equilibrium within the community, and to reconcile the accused with his or her own conscience and with the individual or family that has been wronged. This is a primary difference. It is a difference that significantly challenges the appropriateness of the present legal and justice system for Aboriginal people in the resolution of conflict, the reconciliation and the maintenance of community harmony and good order.[132]

Perspectives supporting this interpretation of Aboriginal justice were discovered by this investigator within the communities studied.

Closely related to this perspective is a sense of estrangement between the community and the Anglo-Canadian justice system shared by many Aboriginal people. The report of a 1988 Cree Justice Symposium in northern Quebec described this

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[132] AJI, *supra* note 88 at 22. See also Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ministers Reference, Report 34) (Ottawa, 1991) at 5 where Aboriginal perspectives on criminal justice are described:

> From the Aboriginal perspective, the criminal justice system is an alien one, imposed by the dominant white society. Wherever they turn or are shuttled throughout the system, Aboriginal offenders, victims or witnesses encounter a sea of white faces. Not surprisingly, they regard the system as deeply insensitive to the to their traditions and values: many view it as unremittingly racist.
>
> Abuse of power and the distorted exercise of discretion are identified time and time again as principal defects of the system. The police are often seem by Aboriginal people as a foreign military presence descending on communities to wreak havoc and take people away. Far from being a source of stability and security, the force is feared by them even when its services are necessary to restore a modicum of social peace to the community.

estrangement:

> Whether because of being historically obliged to do so or whether in a certain way they accept it, owing to fate or the fact of its usefulness, the Cree communities have relied for almost a half century on a Western system of justice. In court a Cree has to answer only very indirectly to his own society; he is more answerable to a little known world, to a society foreign to his habits and traditions. And what is more, the society that bears the social costs of the transgression by that individual has neither control over that individual nor any say in the judicial process.[133]

Despite estrangement and resistance, the goals of Aboriginal and Anglo-Canadian justice are similar. Members of the Indigenous Bar Association suggest that "functional Aboriginal objectives for justice are similar to those of the Canadian criminal justice system: deterrence of members from misconduct, public condemnation of offenders, means of restoring the offenders to society, and punishment, if necessary".[134]

A recurrent Aboriginal justice theme is replacement of the punitive focus of Anglo-Canadian law with an emphasis on restoration of peaceful relations between offender, victim and community. This view was reflected in the comments of Harry Morin, a Cree man from Sandy Bay, Saskatchewan who was active in the development of circle sentencing within his community:

> Like a lot of times, to me personally, the system is right now just a punishing system, it's punishing. They're not looking at what's causing these problems, they're looking at hey, we have to punish this guy for what he's done, basically, that's all it's at. And a lot of these guys go to jail, and they sit around this ten by twelve cell or whatever size they may be, and they sit there and think. And they get very bitter. They're bitter at the people that put him in there, the victim that reported him. He's mad at the justice system, he's mad at the

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[133] Department of Justice of Quebec, *Cree and Justice Symposium: Problematics on Justice in the Cree Milieu* (Montreal, 1988) at 14.

[134] L. Mandamim et al., "The Criminal Code and Aboriginal People" (1992) U.B.C.L.Rev. Special Edition 5 at 9.

> RCMP. Here in a sentencing circle, we make sure somebody tells the offender that we're here to help, for support, and not only that, if recommendations are made that he takes some kind of programming to better himself back in society, he's not only promising to the magistrate or the probation officer, he's promising it to his own community. And then he knows he's got all that support.[135]

This perspective is reflected in the comments of Rupert Ross on the Elders' Sentencing Panel at the Sandy Lake reserve in northwestern Ontario:

> In the year and a half that the project has been going, I have begun to see some very clear differences between the approaches of the Elders and those which characterize our southern courts. As I expected, the Elders seldom speak about the past. They focus instead upon the future, upon restoration of peaceful relations. They do not speak of punishment, but they do focus on compensation and restitution to the victim, upon "making things right again".[136]

Although a plurality of views on justice is evident among Aboriginal people,[137] there is significant emphasis on holistic approaches to justice which integrate the social, religious and economic functioning of the offender vis-a-vis the community.[138]

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[135] Interview with Harry Morin (19 October 1994) Sandy Bay, Saskatchewan. See also the comments of Lilles C.J., Yukon Territorial Court, in *Tribal Justice: A New Beginning* (Whitehorse, 1991) [unpublished] at 7:

> From my experience, concepts of "punishment" or "vengeance" are either foreign to Native people or play a much more limited role in their understanding of the meaning of "justice". In native culture and tradition, rehabilitation is of the greatest importance, provided the wrongdoer is prepared to accept responsibility and undertake rehabilitation. It is of course presumed that this individual will return to or continue to be part of the community, and for that reason every member of the community has a vested interest in a wrongdoer's rehabilitation. A small, self-reliant community clearly cannot afford to permit the cycle of violence or wrongdoing to continue.

[136] Ross, *Dancing*, *supra* note 131 at 167.

[137] See AJI, *supra* note 88 at 20 where the commissioners stated that "Aboriginal peoples do not adhere to a single life philosophy, religious belief or moral code. Indeed there are, and have been considerable differences among tribes.

[138] Nielson, *supra* note 92 at 56. Also see Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta in *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta*, Vol. 1 Main Report (Edmonton, 1991) at 9-6: "Justice and dispute resolution in traditional Aboriginal societies can be illustrated by a restorative model of justice which includes ... [t]he holistic context of an offence is taken into consideration including moral, social[,] economic, political and religious considerations."

The Law Reform Commission of Canada stated:

> Undoubtably, there are many contrasting visions as to what constitutes an Aboriginal justice system, but fundamental is the belief that the system must be faithful to Aboriginal traditions and cultural values, while adapting them to modern society. Hence, a formal Aboriginal justice system would evidence appropriate respect for community Elders and leaders, give heed to the requirements of Aboriginal spirituality and pay homage to the relation of humankind to the land and to nature. The Aboriginal vision of justice gives pre-eminence to the interests of the collectivity, its overall orientation being holistic and integrative.[139]

Many of the Aboriginal dispute resolution traditions and perspectives discussed in this chapter appear at odds with those accepted within the Anglo-Canadian justice system. Despite a common aim of controlling and deterring deviant behaviour and thereby protecting the community, Aboriginal justice approaches are characterized more by private inter- and intra-familial solutions, collective decision-making and an emphasis on reconciliation between offender, victim and community and less by an emphasis on punishment, the conventional Anglo-Canadian approach. The following chapter considers how such differences, together with other factors, affect the impact of Anglo-Canadian sentencing practices on Aboriginal communities.

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[139] Law Reform Commission, *Equality, Respect, supra* note 132 at 6.

Chapter Three: Problems Associated With Established Sentencing Practices in Aboriginal Communities

3.1 The Circuit Court: An Absentee Justice System?

Most non-urban Aboriginal communities in Manitoba and Saskatchewan are serviced by circuit courts. Based in central urban locations, court parties travel to these communities by road in the south and (usually) by air in the north.[140] The northern "fly-in" court party usually comprises a judge, court clerk, crown prosecutor and legal aid counsel. The circuit court experience in northern Manitoba was described by the AJI:

> Three to four days a week, a Provincial Court judge, crown attorney, Legal Aid lawyer, a court clerk, an Aboriginal court worker and a court reporter meet at the Thompson airport and board a small chartered aircraft .... During the course of the year this party travels to approximately 20 communities; some are visited only once a year, but, in general, the court is scheduled to travel to each community 10 to 12 times a year .... The residents of a remote community get their first sight of the circuit court when all of its members, who are usually non-Aboriginal, with the exception of the Aboriginal court worker, descend from the plane at the local airport. The court party is then often driven from the airport in an RCMP vehicle to the building or hall where court is to be conducted.[141]

The often tenuous relationship between circuit court party and community was

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[140] The court flies in on a regular monthly basis to Pelican Narrows, Sandy Bay and Cumberland House, Saskatchewan and Pukatawagan, Manitoba. At Waywayseecappo, Manitoba the court party accessed the community by road. Although Hollow Water, Manitoba does not have a regular court sitting, the Court agreed to conduct sentencing circles at Hollow Water which is accessed by road.

[141] AJI *supra* note 88 at 227. The northern Saskatchewan experience has been similar. While travelling to court in Pelican Narrows, Saskatchewan in April, 1992, I was part of the court party escorted from the airstrip to court in an RCMP vehicle. As we approached the town hall, where court was held, people slowly began emerging from their homes: apparently in response to our arrival.

described by Don Avison,[142] former Crown counsel in the Yukon:

> I have strong memories of how difficult it was to get people to come to court there, even those who were actual parties to the disputes. I remember days in Carmacks, and other Yukon communities, when I was there in court trying to sort out what the appropriate response or sentence should be, knowing that I was part of a group of three - the judge, the prosecutor and the defence lawyer - who probably knew less about what had happened than anyone else in the community, and we were the ones there to decide what the consequence should be. I also remember many times when I heard a dull rumble of voices behind me and I would know that, somehow, I had just fouled up the facts and there was no way to fix it.[143]

Estrangement between court and people was reflected in comments by Harry Morin of Sandy Bay, Saskatchewan:

> With the probation officer or the magistrate [the judge] ... you only see him once a month, you don't care, you know, "I'll get away with this, I'll get away with that. They're not going to know." Well, of course nobody knows because they're gone, nobody sees them until the next court date. Here, he [the offender] knows the people that are involved, and he knows the people that care and they keep an eye, and they tell him that right in the circle, "If you ever need any help, if you need someone to talk to, if somethings troubling you, we're available." And if you don't have a phone, you know, and a lot of times the probation officers won't accept a collect call, what do you do? When the pressure gets so tough. Do you just say 'To hell with it?.' Well, basically, that's what the system is doing. Here, [in Sandy Bay] you have your community of people. You know who is there; you know who you can talk to.[144]

Curt Griffiths and Simon Verdun-Jones described the problems associated with administration of justice by non-resident circuit courts as including large court dockets,

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[142] Previously the Director General of the Aboriginal Justice Initiative, Justice Canada and now the Deputy Minister of Justice in the Northwest Territories.Don previously practised as a defence lawyer and crown counsel in the Yukon.

[143] D. Avison, *Clearing Space: Diversion Projects Sentencing Circles and Restorative Justice* in D. Gosse, J. Youngblood Henderson & R. Carter, eds. *Continuing Poundmaker's & Riel's Quest* (Saskatoon: Purich, 1994) 235 at 238.

[144] H. Morin interview, *supra* note 135.

time constraints, lack of interpreters for Aboriginal offenders and the clash of cultural differences between Anglo-Canadian court parties and Aboriginal offenders and communities.[145]

In northern Saskatchewan and Manitoba, circuit courts regularly face heavy case loads. For example, despite an extremely high case count, Sandy Bay is only allocated one court date per month.[146] As a result, sentencing hearings in these communities are often conducted quickly with little, if any, participation by offenders, victims or local community members. This "case processing" approach was described by Judge Fafard:

> I'm really not interested in making more sausage or better sausage or adding spice to the sausage. Personally, I want to see a change away from that. I want to see us do good work. I sometimes feel it doesn't really matter if I do the forty or fifty cases before me on the docket in the morning, because if I do get them all done, I will not have done them very well. If I could do just a few of them and do them well, I would probably be further ahead than having case-processed them all and having done a bad job. So what we have at the moment, I believe, is an offender-processing system. Its not a criminal justice system because we're not achieving justice. We're not resolving the conflicts and the problems that are brought to us, and I think that our present system, as we operate it, just doesn't have the wherewithal to do that.[147]

Many Aboriginal offenders facing sentence are intimidated by the court process. Derek Custer and Cecile Merasty, two members of the sentencing circle committee at Pelican Narrows, Saskatchewan, explained that local offenders do not understand court

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[145] C. Griffiths & S. Verdun-Jones, *Canadian Criminal Justice* (Toronto: Butterworths, 1989) at 751.

[146] Constable Brian Brennan indicated Sandy Bay had the second highest case load per member in Saskatchewan, next to LaLoshe. When interviewed November 15, 1995, he reported Sandy Bay had a total yearly case load of 900 shared by three officers who functioned without secretarial staff.

[147] C. Fafard, *On Being a Northern Judge* in D. Gosse, J. Youngblood Henderson & R. Carter, eds. *Continuing Poundmaker's & Riel's Quest* (Saskatoon: Purich, 1994) 403 at 403-404.

procedure or the English language. As a result, they usually stand mute before the judge hoping their sentencing will be expedited.[148] This sense of confusion and intimidation was also described by defence counsel Nick Sebeston of the Northwest Territories in referring to local circuit court operation:

> The general impression Dene people have of the court circuit is that a bunch of strangers, most of whom are non-native people, have come to town. They see the court proceedings as very strict and formal, and for most of them, scary.[149]

An alternate explanation of the seeming detachment displayed by Aboriginal offenders at sentencing is that facing a judge is viewed as simpler than facing one's own community. This view was echoed in comments by Constable Brian Brennan of Sandy Bay, Saskatchewan who explained differences between conventional sentencings and circle sentencing:

> And it really actually confronts the accused a lot more ... standing ... before his community, and admitting that he was wrong and explaining why he did it, than to stand before a stranger. It's easier to stand before a stranger for four to five minutes while the judge sentences you and be done with it, than to sit for an hour or two, maybe even three, and have a number of people criticize your character and your actions , and you have to try to defend yourself.[150]

This is what happens in the sentencing circle. These comments show the differential impact of local systems of social control on offender response.

As most northern Aboriginal communities are geographically isolated from larger centres of the south, their population is generally less transient. Constable

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[148] Interview with Derek Custer and Cecile Merasty (20 October 1994) Pelican Narrows, Saskatchewan.

[149] N. Sebeston, "Intercultural Communication and the Administration of Justice" (presentation at the founding convention of The Northern Conference in March, 1994 at Yellowknife) in *Circuit Court and Rural Court Justice in the North: A Resource Publication* (Vancouver: Simon Fraser University, 1985) at 1-6.

[150] Interview with Constable Brian Brennan (15 November 1994) Sandy Bay, Saskatchewan.

Brennan[151] associated community isolation and population stability with the availability of local support systems he viewed as prerequisite to effective circle sentencing:

> The main difference is that Sandy Bay is an isolated community .... I think sentencing circles can work in any community anywhere if there's the proper support structure. I don't think that in a place like Red Earth and Shoal Lake unless that support structure's there ... that its going to work. They're [the residents of Red Earth and Shoal Lake] on the move. They move back and forth between Nipiwan and the reserves and Prince Albert ... so much that you don't have the solid core community support that you need to have a sentencing circle work."[152]

Although time constraints and separation from local communities and local culture are problems faced by circuit courts sitting in Aboriginal communities, one advantage appears to be the broader discretion over sentencing process exercised by circuit court judges in comparison to urban judges. Of the estimated 100 sentencing circles that had been held in Saskatchewan as of the fall of 1994,[153] a significant majority had been conducted by northern judges operating out of La Ronge and Meadow Lake.[154] Judge Bria Huculak, previously of La Ronge, stated unequivocally that circle sentencing development in northern Saskatchewan had been essentially

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[151] Who had previously been stationed 250 kilometres south of Sandy Bay at Carrot River and had policed the adjacent Red Earth and Shoal Lake reserves.

[152] Brennan interview, *supra* note 150. The analysis of specific sentencing initiatives in this thesis will consider the impact of local systems of social control on development of community-based sentencing approaches.

[153] B. Donlevy, *Innovation in the Justice System- Sentencing Circles*, C.B.A. Bar Notes, Volume 1X, October, 1994.

[154] During a sentencing circle April 19, 1995 at Sandy Bay (hereafter called "the Sandy Bay circle"), Judge Fafard estimated that he had conducted between sixty and seventy sentencing circles. In addition, Judge Bria Huculak and Judge Ross Moxley, both previously of La Ronge, and Judge Geremy Knightingale of Meadow had been active in conducting sentencing circles in northern Saskatchewan.

"judge driven".[155] The breadth of judicial discretion allowed innovation by individual judges to significantly affect the relationship between court and community. Greg Bragstad, a participant in several sentencing circles at Sandy Bay, commented on the local impact of Judge Fafard:

> Judge Fafard I find, anyway, has made a tremendous impact here and has, I think, in himself ... made a lot of changes and allowed those things to happen and allowed people in the community to be responsible and so there's a whole lot less anger in the community towards him, than there [was] in the past. Because he's allowed the community to take responsibility.[156]

In addition to the systemic problems and advantages of circuit court operation described above, misinterpretation of information about and of behaviour by Aboriginal offenders has been a concern.

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[155] Huculak interview *supra* note 17. Also see J. Batten, *Lawyers* (Toronto: McMillan, 1980) at 117-118 where the greater extent to which northern circuit judges depart from conventional practice is reflected in the following description of a court hearing conducted by Judge Jim Slaven of the Territorial Court of the Northwest Territories:

> The court party arrived in Rankin by plane from Yellowknife at noon on the trial date. It was an autumn day in 1978 and Judge Slaven was ready to proceed. But a group of Rankin people- Inuit- asked him to delay proceedings. They were calling a community meeting to talk about the young man [the accused] and his fate. 'It was the first time that such a thing had happened in Rankin,' the judge said, 'the first time the local people had ever sat down together. You see, coming from all various backgrounds the way they had, different strains of Eskimo, they's never merged as a real community. There was a professor up there, fellow named Williamson from the University of Saskatchewan, who'd been going to Rankin for eighteen years, and he said this was the old traditional Inuit way of doing things, meeting together and looking after their own. Well, hell, under those circumstances the court was pleased to stand aside for a few hours. That might sound ridiculous to judge in the south but northern justice is different ....

The colourful career of this judge was also portrayed in J. Scissons, *Judge of the Far North: Memoirs of Jack Scissons* (Toronto: McLelland & Stuart, 1968).

[156] Interview with Greg Bragstad (19 October 1994) Sandy Bay, Saskatchewan.

3.2 Misinterpretation of Aboriginal Offender Information and Behaviour at Sentencing

A problem encountered during sentencing in Aboriginal communities is obtaining accurate and relevant offender information. This concern was recognized by Rupert Ross:

> Sentencing is nothing more than an institutional response to an act or word. Sentencing native people- or people from another culture- poses a very substantial challenge. Sentencing is not, after all, an end but a means to other ends. It is a tool employed in an effort to accomplish rehabilitation of the individual, deterrence to him and to others in the community, and protection of that community. It requires that we learn as much as possible about the individual and the context in which he lives. The greater our misinterpretation, the less likely it is that our sentence will produce the results we intend.[157]

In obtaining and assessing such information, caution must be exercised not to misinterpret interpersonal behaviours of Aboriginal offenders. Rupert Ross described the tendency of people of European descent to interpret lack of direct eye contact as indicating evasiveness and noted that direct eye contact among the Cree and Ojibway of north-western Ontario was a sign of disrespect as "[you] only look inferiors straight in the eye."[158] Similarly, judicial expectations of appropriate court behaviour may impact conclusions reached about offender attitude. While appearing with Cree and Saultaux offenders in the courts of central Saskatchewan from 1988 to 1994, I noted that many Aboriginal offenders responded to the stress of court by smiling or laughing. This behaviour was sometimes misinterpreted by the court as indicating a lack of respect despite the seriousness with which offenders viewed proceedings when I

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[157] Ross, *White Eyes, supra* note 98 at 2.

[158] *Ibid* at 2.

interviewed them prior to court. A further example of potentially misunderstood behaviour is lack of verbal participation by Aboriginal offenders at sentencing. Such passivity may lead to an erroneous conclusion respecting offender attitude. Judge Murray Sinclair explained:

> A final example is the implicit expectation of lawyers, judges and juries that accused will display remorse and a desire for rehabilitation. Because their [Aboriginal offenders] understanding of courage and their position in the overall scheme of things includes the fortitude to accept, without protest, what comes to them, Aboriginal people may react contrary to the expectations of non-Aboriginal people involved in the justice system. Many years of cultural and social oppression, combined with the high value placed on controlled emotion in the presence of strangers or authority, can result in an accused conduct in court appearing to be inappropriate to his plea.
>
> In acknowledging their powerlessness before the Creator, Aboriginal children would be taught to affirm their dependence upon the Creator and upon all of creation; to wait patiently and quietly, in a respectful manner, to receive the mercy of the Creator. Many cultural traditions and ceremonies are imbued in this philosophy. This attitude can easily be carried into Aboriginal behaviour within the justice system. ... Judges and juries can easily misinterpret the words, demeanour and body language of Aboriginal individuals before them.[159]

Language also has created problems during sentencing in Aboriginal communities. As explained by Derek Custer and Cecile Merasty, of Pelican Narrows, Saskatchewan, lack of familiarity with English exacerbates fear and misunderstanding of court processes. By contrast, the Pelican Narrows sentencing circle committee,

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[159] M. Sinclair, *Aboriginal Peoples, Justice and the Law* in D. Gosse, J. Youngblood Henderson & R. Carter, eds. *Continuing Poundmaker's & Riel's Quest* (Saskatoon: Purich, 1994) 173 at 183-184. Also see Ross, *White Eyes, supra* note 98 at 6 who also cautioned against drawing an immediate link between lack of participation by Aboriginal offenders and lack of remorse:

> I therefore urge great caution whenever we are faced with descriptions of native accused filled with words starting with "un". We may well be faced with someone unwilling, unresponsive, uncommunicative, etc., because he truly does not care what happens to him or to anyone else; it is at least just as likely, however, that he is acting as he is out of long-established notions of propriety which forbid his acquiescence to our recommendations or requirements and that he truly does want to change his ways and avoid his past misconduct.

which met with offenders outside of court since spring, 1994, operated in Cree. This empowered offenders to explain their behaviour and their plan for compensating and reconciling with their victims.[160] In Saskatchewan, problems with language at sentencing are compounded by a shortage or absence of trained court interpreters.[161] The need for a trained interpreter was clearly displayed during a sentencing circle held November 14, 1994 at Pelican Narrows, Saskatchewan.[162] Of the thirty people within the circle, the only non-Cree speaking participants were the judge, a defence lawyer, two police officers and a operator of a group home in Creighton, Saskatchewan. Approximately half of the circle's discussion[163] was in Cree. Some comments were interpreted on an *ad hoc* basis by various circle participants while others were left un-interpreted. Towards the conclusion of the circle Judge Fafard apologised for his poor grasp of Cree and indicated his hope that the community would soon have benefit of a Cree speaking judge. In contrast, a court communicator/worker formed a regular part

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[160] Custer & Merasty interview, *supra* note 148.

[161] See *Report of the Saskatchewan Indian Justice Review Committee* (January, 1992) at 43 which contained the following quotation from Judge Claude Fafard respecting problems with interpretation:

> In the North, we have frequent, almost daily need of interpreters in Cree and Dene. There are no trained interpreters and no program to train them. We end up plucking a person out of the audience who speaks both English and the Native Language in question more or less and he or she becomes an instant interpreter. There is no training or preparation or understanding of legal terminology. This is patently wrong.
>
> The message in this to the native people is that their languages are not to be taken seriously and are unworthy of respect. It suggests that these languages do not have the capacity of precise speech and so a loose translation by anyone will be acceptable. I know this is not so. Cree is just as precise as English or French, and in a few respects it is more precise. To deny the people the right to accurate interpretation is an insult, and the sooner that problem is addressed the better.

[162] Hereafter called the "Pelican Narrows circle."

[163] The circle lasted approximately two hours.

of the circuit court party in Manitoba.[164]

A further difficulty with language at sentencing is incompatibility between languages. Professor Tim Quigley of the University of Saskatchewan, a former defence lawyer in northern Saskatchewan, commented on difficulties associated with translation:

> I recall from my legal aid days being told that the Dene language does not make the same precise legal distinction between "rape" and "intercourse", something that is obviously important in a sexual assault case. Likewise, in Cree, it is apparently difficult to distinguish between an accidental pushing from an intentional one--again, a vital difference in an assault trial. Yet both languages are very precise in their own cultural contexts. It is simply that our legal system is alien and difficult to describe in those languages.[165]

This chapter has considered problems with sentencing practice which relate to dynamics between circuit court operation and local Aboriginal communities and their culture. Although judicial discretion has allowed judges to address some of these problems through introduction of community sentencing, a factor limiting judicial creativity in addressing these problems is appellate court review.

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[164] This was evidenced at Pukatawagan court on April 11, 1995, were a court communicator was present to assist Aboriginal offenders appearing before the court.

[165] T. Quigley, *Some Issues in Sentencing Aboriginal Offenders*, in D. Gosse, J. Youngblood Henderson & R. Carter, eds. *Continuing Poundmaker's & Riel's Quest* (Saskatoon: Purich, 1994) 269 at 275. My own experience with Cree people in the courts of central Saskatchewan has repeatedly evidenced their difficulty in explaining sexual interaction. While one of the explanations of this may well be shyness and the trauma associated with recollection of an unpleasant memory, it also appeared that the Cree language simply does not contain a similar vocabulary to English respecting sexual acts.

3.3 Appellate Review: Limiting Sentencing Discretion While Promoting Provincial Uniformity

The *Criminal Code*[166] provides broad sentencing discretion.[167] For example, penalties for the offence of assault cause bodily harm[168] range from an absolute discharge to a ten years in prison. In theory, such discretion may be used in adapting sentences to individual offender circumstances. This approach was stressed by Mr. Justice Emmett Hall:

> Some judges have adopted the policy of treating all offenders convicted of similar or identical offenses alike. This is a practice which should not be condoned. It is the offender, not the offence which should dictate what penalty should be imposed in the circumstances. The court should stand firm in dealing humanely with wrongdoers- young or old; native or alien; white or coloured; all as individuals. Revenge or retribution are no part of a court's function. We can and are entitled to have law and order but not at the expense of justice to the individual.[169]

Yet, in reality, sentencing discretion is limited. Although many factors potentially enter into a sentencing decision,[170] appellate court guidelines establish acceptable ranges of sentence for specific offenses and significantly restrict discretion. The impact of

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[166] *R.S.C.* 1985, c. C-46 as amended.

[167] S. 717 establishes this discretion:

> 717(1) Where an enactment provides different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitation prescribed in the enactment, in the discretion of the court that convicts the person who commits the offence.
>
> (2) Where an enactment proscribes a punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence ....

[168] S. 267(1)(b).

[169] E. Hall, *Sentencing the Individual* in B. Grossman, ed. *New Directions in Sentencing* (Toronto: Butterworths, 1980) 302 at 305.

[170] C. Ruby, *Sentencing (4th ed.)* (Toronto: Butterworths, 1994) lists 34 factors effecting sentence in Chapter 5.

appellate guidelines, which focus on sentence uniformity between similar cases, was described by the AJI:

> Provincial appellate courts frequently deal with sentence appeals. These involve a review of the appropriateness of sentences imposed by trial judges. While we believe it is necessary for appellate courts to provide sentencing guidelines to ensure a certain degree of fairness and uniformity, we are concerned that the present system has gone to far in attempting to standardize what ought not to be, and cannot be, standardized. At the same time too much attention is paid to the total picture of each case. Courts of appeal have the details of the offence and the criminal history of the offender, but may not know the support services available in specific communities and thus do not examine the full range of sentencing options.
>
> One rather more disturbing aspect of appellate sentencing appears to occur frequently. That is the tendency of appellate courts simply to impose their own sentence in place of that of the lower court, instead of reviewing the lower court decision to ensure that it complies with principles of sound sentencing practices.
>
> The guidelines derived from appellate court judgements tend to limit the discretion of trial judges, particularly when it comes to the use of innovative sentences.[171]

In a Saskatchewan context, the effect of appellate review on sentencing practice was explained by Professor Tim Quigley:

> [I]n the law of sentencing, provincial courts of appeal act as both the final appellate body on the quantum of sentence and the policy-making body. Courts of appeal established starting point sentences for particular offenses as a guideline to trial judges. Because of the doctrine of *stare decisis*, those guidelines become mandatory guidelines in the sense that a trial judge can only deviate from the starting point according to the presence of aggravating or mitigating factors. Otherwise, the sentence is very likely to be overturned on appeal on the ground of unexplained disparity with the sentences normally imposed in that jurisdiction for that offence. This policy is deeply entrenched in the Saskatchewan Court of Appeal.
>
> This policy is a major constraint on innovation and creativity by trial judges.[172]

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[171] AJI, *supra* note 88 at 399.

[172] Quigley, *supra* note 165 at 277.

The effect of appellate review on judicial innovation and creativity in sentencing was evidenced by the majority decision of the Northwest Territories Court of Appeal in *R v. Naqitarvik*.[173] In the lower court, Judge Bourassa was persuaded by community representations made about traditional Inuit treatment of offenders and sentenced the offender to ninety days intermittent incarceration and probation on a sexual assault charge, a sentence unquestionably outside the appellate range for this offence. In increasing the offender's original sentence to eighteen months incarceration, Mr. Justice Laycraft stressed adherence to accepted appellate guidelines:

> I follow *Sandercock*[174] in using a sentence of imprisonment of three years as a starting point in cases of major sexual assault. No doubt some of the aggravating and mitigating factors mentioned in that case may be somewhat modified when applied to northern Canada .... Nevertheless, *Sandercock* offers a general guide-line of the starting point and of the various factors involved in upward or downward revision of that starting point in the light of aggravating or mitigating factors .... on a consideration of all of the factors of this case, I find the sentence to be wholly inadequate ....[175]

As community-based sentences have flexibility and can be adapted to local circumstances, appellate guidelines which require significant periods of incarceration for specific offenses, such as sexual assault, act as a deterrent to innovative types of sentences. In Saskatchewan, Judge Fafard acknowledged his hesitancy in dealing with cases of sexual assault by way of sentencing circle:

> If you get a community [that] develops a kind of a Hollow Water model, to do for instance, sexual assault cases, then we'll be able to venture out into that field, because people would like to do those. [However], we just feel we don't

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[173] (1986), 26 C.C.C. (3d) 193 (N.W.T.C.A.).

[174] *R. v. Sandercock*(1985), 22 C.C.C.(3d)79 (Alta.C.A.).

[175] *Supra* note 173 at 198.

> have the resources at the local level [to so such cases] ... but right now I don't think we're really ... equipped to do those kind of cases in a sentencing circle.[176]

Despite the limiting effects of appellate guidelines, many sentences rendered in northern Saskatchewan still appeared to be outside accepted appellate range for given offenses.[177] This may be explained by support for such sentences by Crown representatives which reduces the chance of appeal.[178]

The over-incarceration of Aboriginal people in Canada, in general, and in Manitoba and Saskatchewan, in particular, has been widely researched and reported.[179] In addressing this inequity, Professor Quigley advocated a legislative or judicial affirmative action program providing lower sentences for Aboriginal persons, to ameliorate the current situation:

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[176] Fafard December interview, *supra* note 8. Of the specific initiatives studied in this thesis, only Community Holistic Circle Healing project at Hollow Water, Manitoba considered sexual offenses.

[177] As an example, the Pelican Narrows circle produced sentences which very likely would fall outside the range of sentences accepted by the Saskatchewan Court of Appeal. All 10 offenders were charged with aggravated assault (carrying a maximum penalty of 14 years imprisonment for an adult or two years closed custody for a Young Offender). This incident was serious as the victim had been dragged from his home by the offenders who had proceeded to beat and kick him repeatedly leaving him unconscious and bloodied. The police could not awake the victim initially and sought medical attention for him which indicated possible seizures and a swelling of the brain. The sentencing circle reached a consensus that nine of the offenders (all with no previous record) should be either receive suspended sentences including probation or simply probation (depending on whether the offender was a young offender or adult). One offender with a previous record was given four months open custody followed by probation. This consensus was supported by the Crown, represented by the RCMP.

[178] Crown support at two sentencing circles held at Hollow Water in Manitoba was crucial. Both cases involved serious sexual assaults on children which would normally draw significant jail terms. However, in both cases, the Crown attorney joined the circle consensus for a suspended sentence. Neither case was appealed.

[179] See Jackson, M., *Locking Up Natives in Canada* (1988-89), 23:2 U.B.C.Law Review 215 at 215-216 where the author describes the levels of incarceration of natives in Canada and comments at 216 regarding the situation in Saskatchewan and Manitoba: "In Manitoba and Saskatchewan native people, representing 6-7% of the population, constitute 46% and 60% of prison admissions."

> Undoubtably, the notion of affirmative action in sentencing will be controversial. I suspect the idea that all offenders committing the same offence should receive the same or nearly the same penalty is deeply ingrained. The law and order mentality that commands us to get tough with crime also leads us in the opposite direction from healing and reintegration. But if we are serious about dealing with our social ills, if we are serious about our commitment to justice for Aboriginal people, and if we are serious about true equality, we should accept the concept of special measures for aboriginal offenders. After all, the larger society must bear a large portion of the responsibility for the plight in which Aboriginal people find themselves ..... It would be desirable, of course, if the political will were there to have such a scheme implemented by legislation. But that may not occur. As alternative, it is open to the Canadian judiciary to develop such a plan .... *Given that provincial courts of appeal are in general the court of last resort on quantum of sentence and are also in a better position to appreciate the situation within their own provinces, it would be logical for that level of court to devise and supervise such a program*. [emphasis added][180]

Although judicial affirmative action could be achieved through the broad sentencing discretion given to judges by the *Criminal Code*,[181] consistent sentencing outside of provincial appellate ranges would, in all likelihood, be threatened by appellate authority upholding the principle of sentence uniformity.[182] Again, Crown support of the original sentence is highly significant.[183] In further considering the limits of judicial sentencing discretion, the following section will consider the extent to which some judges, sitting in Canadian Aboriginal communities, have adapted sentence design to

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[180] Quigley, *supra* note 165 at 292. Also see Archibald, B., *Sentencing and Visible Minorities: Equal and Affirmative Action in the Criminal Justice System*, (1989), 12 Dalhousie Law Journal 377.

[181] And arguably has been invoked by some judges as evidenced in *R. v. Fireman* (1971), 4 C.C.C. (2d) 82 (Ont. C.A.) which is discussed in the following section.

[182] Despite the apparent leniency of many sentences passed April 19, 1995 at Sandy Bay court, Judge Fafard noted to one offender that he could not accede to the offender's request for a community-based sentence respecting an offence of violence as he "had to pass these sentences through the Court of Appeal."

[183] During an interview May 31, 1995, Judge R. Kopstein of the Manitoba Provincial Court, who had been involved in an Elders' sentencing panel at the Rousseau River reserve in the late 1970's, acknowledged the futility of attempted new sentencing approaches without Crown support.

address local concerns and circumstances.

3.4 Adaptability of Offender Sentences Within Anglo-Canadian System to Aboriginal Traditions and Perspectives

Chapter Two considered Aboriginal dispute resolution traditions and perspectives. Although Canada's Aboriginal population is diverse and represents a spectrum of traditions and perspectives, some generalizations were possible. Aboriginal dispute resolution traditions evidenced a significant emphasis on community decision making and attempts at reconciling victim, offender and community. Aboriginal justice perspectives, reflecting such traditions, focused significantly on a desire for increased local involvement in justice matters while evidencing an estrangement between Aboriginal communities and the prevailing Anglo-Canadian justice system. These differences in tradition and perspective were described in a report on circle sentencing by Sam Stevens:[184]

> [A]nother very important reason why circle sentencing developed revolves around the central question of whether justice means the same thing for aboriginal people as it does for non-aboriginal people. Aboriginal people, for example, continue to criticize the present system because it focuses its efforts, for the most part, on determining whether the offender is guilty or innocent. When the offender is found guilty, the system deals with the offender primarily by punishing him or her. The justification for the use of punishment is based on the concept that this will deter this offender and others, from committing other offenses again. It is also meant to educate others in the community, that this type of behaviour in the community is unacceptable.
>
> For aboriginal people, this was something that they did not believe in. Punishment involved the use of force and this caused disharmony. For aboriginal people the focus was on restoring harmony rather than creating more

[184] An Aboriginal man and Administrator of the Justice of the Peace Program for the Northwest Territories.

> disharmony. The focus was on getting the offender to accept responsibility for what he/she had done and then to concentrate most of the effort in healing the offender, the victim and the community; something which was fundamental to their continued health and survival as aboriginal peoples.[185]

Given the broad judicial sentencing discretion provided by the *Criminal Code*, attempts at sentencing reform within Aboriginal communities can be considered with respect to both the sentencing process and the content of sentences imposed. Part Two, Three and Four of this thesis, although considering sentence design, will focus on changes to the sentencing process in Aboriginal communities. The remainder of this chapter is a consideration of sentence content and adaptation.

Some judges sitting in Aboriginal communities across Canada have reflected and incorporated Aboriginal traditions and perspectives into specific sentences.[186] In *R. v. Ayalik*,[187] Macdonald J.A. of the N.W.T. Court of Appeal recognized the propriety of considering customary Aboriginal practices in determining sentence:

> However it should be noted that in the present case the learned trial judge had a distinct advantage over the members of [this Court of Appeal] ... for with his wide experience in the far-flung areas of the extensive jurisdiction of the trial division of this court he has knowledge of local conditions, ways of life, habits, customs and characteristics of the race of people of which the accused is a member.[188]

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[185] S. Stevens, *Report on the Effectiveness of Circle Sentencing* (Yellowknife, 1994) [unpublished].

[186] The following discussion is not intended as a detailed analysis of Canadian sentencing decisions in Aboriginal communities but only as some indication of judicial recognition of Aboriginal culture in the sentences rendered. For an in depth discussion of the relationship between Aboriginal customary law and the Anglo-Canadian court system see M. Jackson, "Unequal Justice Before the Law: Traditional Versus Customary Law: An Issues Paper" (Address to Canadian Law and Society Annual Meeting, 2 June 1985) [unpublished] and S. Clark, *Aboriginal Customary Law Review* (1990) (prepared for the Public Inquiry into the Administration of Justice and Aboriginal People). Also see P. Grant, "Role of Traditional Law in Contemporary Cases" (1982) 5 Can. Legal Aid Bul. 107.

[187] (1960), 33 W.W.R. 377 (N.W.T.C.A.).

[188] *Ibid* at 378.

Similarly, in *R. v. Naqitarvik*[189], Belzil J.A., in dissent, approved the sentencing judge's consideration of opinion from the local community who he characterized as "a small isolated group striving to preserve its cultural heritage by maintaining its cultural unity".[190]

In designing sentences for Aboriginal offenders, some judges have incorporated the customary practice of banishment. In *Saila v. R.*[191], the Northwest Territories Supreme court upheld a lower court sentence which included a period of banishment for the offender. De Weerdt J. stated:

> The appellant and the sentencing Justices of the Peace share a cultural background in the Inuit tradition. Ostracism by the community is a well recognized means of dealing with offenders against that tradition. Banishment from the community once the community has been settled ... is a measure which is plainly intended to have a similar effect. The traditional methods of discipline are evidently seeking expression in the condition of the probation order that the appellant not return to Spence Bay for a year after his release from prison.[192]

Similarly, the Yukon Court of Appeal in *R. v. Nukon*[193] recognized the fact that an Aboriginal offender had suffered a period of banishment form his community as a factor in mitigation of sentence. In a 1995 case, *R. v. Taylor,*[194] Milliken J. of the Saskatchewan Court of Queen's Bench imposed a sentencing circle's request for a one

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[189] (1986), 26 C.C.C. (3d) 193.

[190] *Ibid* at 206.

[191] [1984] 1 C.N.L.R. 173 (N.W.T.S.C.).

[192] *Ibid* at 176.

[193] (1988) 5 W.C.B. (2d) 395.

[194] (29 May 1995), La Ronge, Saskatchewan (Sask. Q.B.) [unreported]. See P. Moon, "Cree Offender to be Banished: Judge Accepts Community Verdict" *The Globe and Mail* (30 May 1995) A1.

year period of banishment upon the offender.

In assessing the appropriate length of incarceration for Aboriginal offenders, some judges have considered the disproportionate effect of incarceration on such offenders given their cultural heritage and circumstances. In *R. v. Fireman*,[195] a case involving an offender from an isolated settlement on the shores of James Bay, the Ontario Court of Appeal significantly reduced his penitentiary term:

> In my opinion, one can only proceed to consider the fitness of the sentence meted out to this man upon a proper appreciation of his cultural background and of his character, as it is only then that the full effect of the sentence upon him will be clear. When one considers these things, it is my opinion that even a short period of incarceration in the penitentiary is substantial punishment to him.[196]

Similarly, Bourassa J. of the Northwest Territories Territorial Court in *R. v. Zoe*[197] recognized that "taking someone who has lived his life in the bush and pulling him out of that environment and putting him in a federal penitentiary in the south" was a factor to be considered in assessing sentence.[198] However, the Newfoundland Court of Appeal, in assessing the length of sentence for an Aboriginal offender, stated in *R. v. A.(G.)*:[199]

> [T]he fact that a person is a Native is not per se a reason to impose a sentence different than that which ordinarily would be imposed upon a non-Native offender. The court must be aware of the culture and traditions of and other

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[195] *Supra* note 181.

[196] *Ibid* at 85.

[197] [1987] N.W.T.J No. 157 (QL).

[198] *Ibid* at 8.

[199] [1994] 3 C.N.L.R. 77.

facets of being Native that are relevant to the sentencing process.[200]

Some judges have acknowledged Aboriginal community wishes in pronouncing sentence. In *R. v. Moosenose*[201], Davis Terr. J. of the Northwest Territories Territorial Court recognized the local community's opposition to incarceration for the offender and commented that "because of the willingness of this community to show its concern and to undertake special responsibilities in application of community justice involving the accused" he was able to impose a community-based sentence.[202] In *R. v. J.A.P.*[203] Lilles C.J. of the Yukon Territorial Court noted the support of community leaders for a community-based disposition as a factor in his sentencing decision.

The cases considered above show how some judges have recognized problems with conventional Anglo-Canadian sentencing in Aboriginal communities by approving sentencing which is sensitive to cultural traditions and perspectives. The remainder of this thesis will consider attempts at reforming the process used to design sentences and supervise offenders within such communities.

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[200] *Ibid* at 85.

[201] [1992] N.W.T.R. 394.

[202] *Ibid* at 398.

[203] (28 May 1991) Teslin, No. T.C. 90-04222 & 90-07328 (Yuk. Ter. Ct.).

PART TWO: CHANGES TO ESTABLISHED SENTENCING PRACTICES IN ABORIGINAL COMMUNITIES: COMMUNITY/LAY PARTICIPATION

Chapter Four: Community and Victim Participation in Sentencing within the Anglo-Canadian Justice System

4.1 The Conventional Criminal Law Sentencing Hearing

Canadian criminal law and procedure is governed primarily by the *Criminal Code*. Sentencing[204] follows either a finding of guilt or a guilty plea. The typical form of sentencing hearing in Anglo-Canadian law is described in the *Canadian Sentencing Handbook*[205] as follows:

> Upon conviction following trial the judge at sentencing is entitled to take recognition of facts proved at trial insofar as they are relevant to sentencing and to have the benefit of representations by both counsel for the Crown and the defence. Where conviction has followed a plea of guilty it is usual for Crown counsel to address the court first as to sentence, setting out the basic circumstances upon which the conviction is based, to read out the criminal record or those parts which are relevant and to give a bare sketch of the antecedents of the accused.[206]

The usual sentencing hearing participants are Crown and defence counsel and the judge.

Although the criminal justice process, from initial complaint onwards, impacts on a broad cross-section of individuals including victims and local community members, to what extent are these people allowed to participate? Judge Barry Stuart of

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[204] Part XXXIII of the Criminal Code, ss. 716 - 751, sets out the penalty framework for offenses defined in the *Code*. However, it provides little guidance respecting the procedure to be followed prior to imposition of sentence. Other statutes which influence Canadian sentencing law and practice, although to a lesser extent, include the *Canada Evidence Act* R.S.C. 1985, Chap. C-5 as amended, the *Young Offenders Act* R.S.C. 1985, c. Y-1 as amended, the *Food and Drug Act* R.S.C. 1985, Chap. F-27 as amended and the *Narcotic Control Act* R.S.C. 1985, Chap. N-1 as amended.

[205] Canadian Association of Provincial Court Judges, *Canadian Sentencing Handbook*, 1982.

[206] *Ibid* at 3.

the Yukon Territorial Court, in *R v. Moses*[207], characterized the typical sentencing hearing in Canada:

> The foreboding court-room setting discourages meaningful participation beyond lawyers and judges.
>
> The judge presiding on high, robed to emphasize his authoritative dominance, armed with the power to control the process, is rarely challenged. Lawyers by there deference, and by standing when addressing the judge, reinforce to the community the judge's pivotal importance. All of this combines to encourage the community to believe judges uniquely and exclusively possess the wisdom and resources to develop a just and viable result. They are so grievously wrong.
>
> Counsel, due to the rules, and their prominent place in the court, control the input of information. Their ease with the rules, their facility with the peculiar legal language, exudes a confidence and skill that lay people commonly perceive as a prerequisite to participate.
>
> The community relegated to the back of the room, is separated from counsel and the judge either by an actual bar or by placing their seats at a distinct distance behind counsel tables. The interplay between lawyers and the judge creates the perception of a ritualistic play. The set, as well as the performance, discourages anyone else from participating.[208]

In contrast to the conventional sentencing hearing described above is the practice of circle sentencing which has recently been employed by judges presiding in various Aboriginal communities across Canada.[209] Although these circles are formed within the

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[207] (1992), 71 C.C.C.(3d) 347. This decision discussed the process of circle sentencing which allowed local community members and victims to join active consideration of offender sentences.

[208] *Ibid* at 357. Also see Interview with Associate Chief Judge Murray Sinclair, (1995) 1:4 *Family Violence Research Centre Bulletin* at 5 where His Honour contrasted the conventional system with circle sentencing: "The current system is adversarial - we depend on a Crown to prosecute, a defence lawyer to defend, and a judge to decide between the two positions being put forward. In circle sentencing the onus is placed on those within the circle."

[209] See *R. v. Naappaluk*, [1994] 2 C.N.L.R. 143 (Ct. Que. Cr. & Pen. Div.) where Dutil J. conducted a sentencing circle in October of 1992 at a remote settlement in northern Quebec. This circle, formed to assist in consideration of an appropriate sentence, involved 13 participants together with the judge, prosecutor and defence counsel. This included the victim and a variety of local community members. Judge Dutil described the setting and process:

> All participants in the session sit in a circle, with neither table nor desk in the centre, so that they all appear on an equal footing: nobody dominates anybody else by seeming to preside at a table,

parameters of Anglo-Canadian law,[210] they allow significant opportunity for input from the victim and local community members. In addition to making representations on their own behalf (as opposed to being represented by Crown or defence submissions), victims and local community members are allowed input in shaping, and potentially supervising, offender sentences.

The *Criminal Code*, despite containing over 800 sections, contains no specific procedure to be followed during sentencing[211] other than the offender's right to address the court[212]. Sentencing sometimes occurs after trial; in which case the judge has the benefit of forming an opinion during the course of the trial as to the circumstances of the offence and the nature of the accused.[213] However, the vast majority of accused

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> and nobody is in the background. Everyone looks at everyone else and dialogue is easier. Participants remain sitting when they speak, they speak in their own language as long as they wish and they are not interrupted by translation, which takes place only at the end of each contribution to the discussion.

[210] Retaining for the judge discretion as to whether such a circle will be formed and the ultimate sentencing decision. Dutil J. commented in *Naappaluk, ibid:*

> In my mind, consultation will always remain a tool at the judges disposal to help him pass sentence. Of course, the judge is not bound by the recommendations of the participants in the consultation [or sentencing circle] .... It is understandable, however, that if the judge systematically sets aside the circle's recommendations, it may become totally useless to hold such sessions. In my opinion, the judge must listen to the participants, discuss with them if need be, listen to their recommendations and follow them in most instances unless he has serious reasons to set them aside, in which case he must explain clearly the reasons for his decision, so that the sessions are not looked upon as futile exercises.

[211] Canadian Association Provincial Court Judges, *supra* note 205 at 2. However, see amendments contained in Bill C-41, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, 1st Sess., 35th Parl., 1994, which proposes, in sections 720-729, a statutory framework for the sentencing hearing.

[212] S. 668 of the *Criminal Code* reads: "Where a jury finds an accused guilty, or when an accused pleads guilty, the judge presiding at the trial shall ask the accused whether he has anything to say before sentence is passed on him ...."

[213] Nadin-Davis, P., *Sentencing in Canada* (Toronto: Carswell, 1982) at 513-514.

persons appearing before Canadian courts plead guilty.[214] Clayton Ruby described the typical sentencing hearing after guilty plea:

> If the plea is "guilty" then a hearing is held. Counsel for the Crown either calls evidence to substantiate the plea and the charge, or, if the court permits, reads into the record a summary of the facts relied upon by the Crown to support the charge and to assist the trial judge in sentencing. If evidence is called there is a right to cross-examine; if a summary is given, the accused is asked whether or not the facts are substantially correct and if he demurs in any way he is given an opportunity to deny those assertions .... After considering the summary, the accused will be given an opportunity to offer any factual material he wishes either by way of calling evidence or by submissions of counsel. The accused himself may testify under oath.... After this has been concluded either through the accused or through his counsel, counsel for the Crown and the defence have the right to make submissions regarding penalty.[215]

The Supreme Court of Canada has provided guidance respecting the range of information which may be considered during the sentencing hearing. Ritchie J., in *R. v. McGrath*,[216] cited the following passage from *Crankshaw's Criminal Code of Canada*, 7th ed., with approval:

> After conviction, accurate information should be given as to the general character and other material circumstances of the prisoner *even though such information is not available in the form of evidence proper*, and such information when given can rightly be taken into consideration by the judge in determining the quantum of punishment, unless it is challenged or contradicted by or on behalf of the prisoner, in which case the judge should either direct

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[214] Dickson J., in *R v. Gardiner* (1982), 68 C.C.C. (2d) 477 (S.C.C.) at 514 stated:

> It is well to recall in any discussion of sentencing procedures that the vast majority of offenders plead guilty. Canadian figures are not readily available but American statistics suggest that about 85% if the criminal defendants plead guilty or *nolo contendere*. The sentencing judge therefore must get his facts after plea. Sentencing is, in respect of most offenders, the only significant decision the criminal justice system is called on to make.

Also see AJI, *supra* note 8 at 398 where the commissioners commented that "the vast majority of people appearing before the courts do not have their cases proceed to trial".

[215] Ruby, *supra* note 170 at 49-50.

[216] (1962), 133 C.C.C. 57.

proper proof to be given or should ignore the information.[217]

The procedure followed during sentencing is usually less formal than that followed at trial.[218] Although an offender may force formal proof of any disputed allegation of fact,[219] this is rare and often results in judicial substitution of a plea of "not guilty." The general practice is for Crown and defence counsel to make submissions to the court respecting circumstances of the offence and offender and on appropriate sentence. The subject matter of these submissions is potentially broader than can be presented at trial. For example, a major focus at sentencing is the general character and material circumstances of the offender[220] which would be largely inadmissible at trial.

In my experience as a defence lawyer practising in central Saskatchewan from 1986 to 1994, I had the opportunity of observing and participating in hundreds of sentencing hearings. In most cases, these hearings were brief and consisted solely of representations to the judge by Crown counsel (or police officers in rural court locations) and defence counsel. Sworn testimony was rarely presented and, other than indirectly through the remarks of counsel or through comments in written pre-sentence reports, victims and other local community members rarely participated. The historical development of sentencing in Canada helps explain this lack of participation.

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[217] *Ibid* at 62. Also see the comments of Dickson J. in *Gardiner, supra* note 214 who stated that, despite the relaxation of the rules of evidence during the sentencing hearing as compared to the trial, aggravating facts had to be proved by the Crown beyond a reasonable doubt.

[218] See Olah, J., "Sentencing: The Last Frontier of the Criminal Law," 16 C.R.(3d) 97 (1980) at 100-103.

[219] *Gardiner, supra* note 214 at 514.

[220] *McGrath, supra* note 216.

4.2 The History and Development of Sentencing Law and Practice

Criminal law in Canada was based on the statutory and common law of England existing upon settlement of each territory.[221] As a result, current sentencing law and practice in Canada may largely be explained by considering the history of sentencing in English courts. Consideration of two English cases from the late eighteenth century paints a picture of the sentencing hearing similar to that described by Judge Stuart above.[222] The following passage from a 1788 case, *R. v. Bunt,* clearly suggests participation during sentencing was limited to defence and Crown counsel and the judge:

> The defendants, who had been convicted of a conspiracy, were brought up for judgement on Friday, November the 14th; and it being disputed at the bar whether the counsel for the prosecutor or the prisoners should begin, the court thought it proper, in order to obviate the difficulty for the future which had perpetually occurred, to make a general rule for that purpose, without prejudicing the rights of the parties to this indictment .... [T]he court, after consideration, had resolved to adopt the following rule: when any defendant shall be brought up for sentence on any indictment, or information, after verdict, the affidavits produced on the part of the defendant ... shall be first read, and then any affidavits produced on the part of the prosecution shall be read; after which the counsel for the defendant shall be heard, and lastly the counsel for the prosecution.[223]

Following the Norman conquest of 1066, English criminal law had gradually shifted from a view of crime as a personal wrong (to be compensated by the offender,

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[221] A. Mewett & M. Manning, *Mewett and Manning on Criminal Law*, 3d ed. (Toronto: Butterworths, 1994) at 3-4. The authors list these dates as "September 17, 1792 for Ontario, October 1763 for Quebec, November 19, 1858 for British Columbia, July 15, 1870 for Manitoba, Alberta, Saskatchewan, Northwest Territories and the Yukon and 1758 for Nova Scotia, New Brunswick and Prince Edward Island." [citations omitted]

[222] *R. v. Wilson* (1791), 100 Eng. Rep. 1134 (K.B.) and *R. v. Bunt* (1788), 100 Eng. Rep. 368 (K.B.).

[223] *Ibid* at 368. The reference to evidence presented by affidavit suggests indirect sentencing participation may have been more prevalent then.

usually according to a fixed schedule of payments) to crime as a public wrong against all of society.[224] The emerging criminal system came to depend ultimately on the authority of the monarch and his or her agents.[225] As royal agents, judges came to exercise sole jurisdiction over sentencing. This power has continued to the present in both Canadian and English criminal law.[226]

Due to the severity which characterized criminal law sentencing in England prior to the nineteenth century,[227] the judicial practice of allowing convicted felons to make a "speech in mitigation" (in effect, a plea for their lives) was developed.[228] The

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[224] J.H. Baker, *Introduction to English Legal History*, 3d ed. (London: Butterworths, 1990) at 570-571. Baker described this transformation at 571:

> The notion of a crime as a species of wrongdoing which requires punishment at the instance of the community or the state was at first based more on procedure than on substance. It came to the fore when the responsibility for pursuing the punitive or retributive process shifted from the family grouping of the kin to the wider community and thence (in theory) to the king. The transfer of primitive police functions from the kin to the community is now imperceptible, for want of records ....

Also see S.F.C. Milsom, *Historical Foundations of the Common Law*, 2d ed. (Toronto: Butterworths, 1981) at 406-415.

[225] J.F. Stephen, *A General View of the Criminal Law of England* (1890; reprint, Colorado: Fred Rothman, 1985) at 9-18. Despite this central authority, pre-modern criminal trials in England were usually conducted locally and were often presided over by local lay justices of the peace as noted by Milsom, *ibid* at 414-415.

[226] C. Harding, & L. Koffman, *Sentencing and the Penal System: Text and Materials*, (London: Sweet and Maxwell, 1988) at 81. Also see J.K. Jaffary, *Sentencing of Adults in Canada* (Toronto: University of Toronto, 1963) at 3.

[227] See L. Radzinowicz, *A History of the English Criminal Law and its Administration From 1750: The Movement for Reform 1750-1833* (New York: MacMillan, 1948) at 3 where the author quoted Sir Samuel Romily, a nineteenth century advocate of criminal law reform, as saying that in 1810 "there is probably no other country in the world in which so many and so great a variety of human actions are punishable with loss of life as in England." Also see V.G. Hines, *Judicial Discretion in Sentencing By Judges and Magistrates* (Chichester, England: Barry Rose, 1982) at #1-18 where the author commented that the number of capital crimes punishable by death increased in England from 50 to over 200 between 1660 and 1820.

[228] J.H. Baker, *The Legal Profession and the Common Law: Historical Essays* (London: Hambeldon, 1986) at 292. This practice is reflected in the current right of a convicted offender to address the court prior to sentence under s.668 of the *Criminal Code*.

death penalty could also be avoided by a convicted offender through application of "benefit of clergy"[229] or through a "pardon" by the monarch.[230]

Given the absolute role and authority of judges to impose sentence,[231] the formal role of the local community in sentencing might appear to have been virtually non-existent. However, development of trial by jury,[232] which increased the community's role in fact finding, also allowed jury members to influence offender punishment by a practice called "jury mitigation".[233] Perhaps moved by the severity of the criminal law,[234] juries acted to mitigate punishment either by ignoring evidence and finding the accused not guilty[235] or by finding the accused guilty of a lesser non-capital charge thereby avoiding capital punishment.[236] While this form of mitigation by

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[229] The privilege exempting clergymen, or those claiming this status, from capital punishment as explained in Baker, *Intro Eng. Hist.*, *supra* note 224 at 586-589.

[230] *Ibid* at 589-90. S. 749 of the *Criminal Code* still recognizes the power of Her Majesty or the Governor in Council to pardon a convicted offender.

[231] Hines, *supra* note 227 at #1-18.

[232] As enshrined in English law by the Chapter 29 of *Magna Carta* (1225) enacted by 25 Edward 1 (1297) which states, in part, that "no freeman shall be taken or imprisoned... but by lawful judgment of his peers...." The partial text of this chapter was set out in A. Dickey, "The Jury and Trial by One's Peers" (1973-74), 11 West. Aust. L. Rev. 205 at 206.

[233] Baker, *Intro. Eng. Hist.*, *supra* note 224 at 590-591.

[234] Law Reform Commission of Victoria, *Appendices; The Role of the Jury in Criminal Trials (background paper #1)* (November,1985) at 58.

[235] Baker, *Intro. Eng. Hist.*, *supra* note 224 at 591.

[236] Radzinowicz, *supra* note 227 at 95 where the author set out examples of the practice by juries of finding a reduced value for items stolen so as to bring the offence within a classification not providing for punishment by death.

the jury did not go unnoticed by judges,[237] it is an example of community response to perceived tyranny and misuse of power within the criminal courts of the day.[238] "Jury mitigation" continues to exist in current Canadian jurisprudence.[239]

The legal right of a convicted person to be represented by counsel prior to the passing of sentence did not occur until 1836 although prisoners facing felony charges were frequently allowed the assistance of counsel after 1730.[240] With the evolution of criminal law as a public wrong against society, the Crown prosecutor came to represent both the victim and community in the sentencing process.

While capital punishment was the central feature of criminal sentencing emerging from the eighteenth century both in England and what was to become Canada,[241] the nineteenth century saw significant reform of sentencing law and

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[237] See W. Jones, "Our Changing Jury System" (1931) 6:4 Notre Dame Lawyer 395 at 408. The author described the punishment (fines and imprisonment) that were imposed by judges upon juries who "found against the evidence and the direction of the court". The power of English courts to imprison or fine jurors for perverse verdicts was terminated in 1670 by *Bushels Case* (1670), 6 State Trials 999, as cited in New South Wales Law Reform Commission, *The Jury in a Criminal Trial (discussion paper)* (Sydney, 1985) at 16.

[238] M. Gleisser, *Juries and Justice* (New York: A.S. Barnes, 1968) at 39-41. Similarly, in Law Reform Commission of Canada, *The Jury in Criminal Trials* (working paper 27) (Ottawa: Minister of Supply and Services, 1980) at 8 and 11, current day juries are described as the "conscience of the community" and the protector "against oppressive laws and the oppressive enforcement of the law".

[239] See *Morgentaler v. R.* (1975), 20 C.C.C.(2d) 449 (S.C.C.) where the majority, in substituting a verdict of conviction for the jury's acquittal, criticized the lack of essential evidence to support such a verdict. Also see *R. v. Latimer* (1994), Battlefords (Sask.Q.B.) [unreported]. The jury, by returning a verdict of guilty to second rather than first degree murder, appeared to have employed a type of mitigation of penalty in the face of strong evidence at the trial to support planning and, hence, a conviction for first degree murder.

[240] Baker, *Intro. Eng. Hist.*, *supra* note 224 at 583.

[241] *Report of the Canadian Sentencing Commission: Sentencing Reform; A Canadian Approach* (Ottawa: Supply and Services Canada, February 1987) at 22.

practice.[242] The death penalty was initially superseded by "transportation"[243]and then by imprisonment as the major form of punishment. Consequently, judges gained a significant increase in sentencing discretion by the mid- nineteenth century.[244] This discretion initially focused on the length of an offender's jail sentence.[245] The English *Consolidation Acts* of 1861[246], largely copied in the Canadian *Consolidation Acts* of 1869,[247] established a statutory foundation for sentencing that remains intact today both in England[248] and in Canada,[249] with high maximum penalties, broad judicial discretion and few minimum penalties.[250] The sentencing options open to judges in England and Canada were increased with the advent of probation early in the 20th century.[251]

Nineteenth century sentencing reforms were accompanied by concerns about

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[242] Jaffary, *supra* note 226 at 10.

[243] The practice of sending an offender to a British colony either "as a condition for commuting a death sentence or as a penalty in its own right by the sentencing judge" was described by the Canadian Sentencing Commission, *supra* note ? at 24.

[244] D. Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division*, 2d ed. (London: Heinemann, 1979) at 6.

[245] D. Thomas, *Constraints on Judgement: The Search for Structured Discretion in Sentencing,1860-1910* (Institute of Criminology Occasional Series No. 4) (Cambridge, 1979) at 1.

[246] 24&25 Vict.1861, c.c. 94-100.

[247] S.C. 1869, cc. 18-36 as cited and discussed by the Canadian Sentencing Commission, supra note ? at 30.

[248] Thomas, *Principles of Sentencing*, *supra* note 244 at 6.

[249] Canadian Sentencing Commission, *supra* note 241 at 30.

[250] *Ibid.*

[251] Thomas, *Principles of Sentencing*, *supra* note 244 at 7. Also see Canadian Sentencing Commission, *supra* note 241 at 35.

sentencing disparities between judges[252] and by debates over appropriate principles of sentencing and purposes of punishment.[253] The predominant sentencing rational emerging from the nineteenth century was "deterrence": a belief that punishment would deter offenders from future crimes given the presumed "logical nature of man" to avoid painful consequences.[254] "Deterrence" remains a central theme of current sentencing law in Canada.[255] Nineteenth century English reforms also led to codification of the criminal law which had previously existed as a patchwork of disjointed statutory law together with the non-statutory common law. A draft English code prepared in 1879 by Sir James Fitzjames Stephen provided the basis of the Canadian *Criminal Code* passed in 1892 by Parliament.[256]

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[252] L. Radzinowicz & R. Hood, History of English Criminal Law:The Emergence of Penal Policy, Vol.5 (London: Stevens & Sons, 1986) at 741-747. Also see Thomas, *Constraints of Judgement, supra* note 245 at 1-6.

[253] Thomas, *ibid* at 47-74.

[254] Jaffary, *supra* note 226 at 10-13. Also see discussion of the principle of deterrence in Razinowicz & Hood, *supra* note ? at 753 and in Thomas, *Constraints on Punishment, supra* note 245 at 49-52.

[255] Jaffary, *supra* note 226 at 10. Deterrence is a recognized principle within Canadian sentencing law and has been further divided into specific and general deterrence (the deterrence of repeated behaviour by specific offenders as opposed to the deterrence of such behaviour among the community at large) as recognized in *R. v. Morrissette* (1970), 1 C.C.C. (2d) 307 (Sask. C.A.) at 310-311. Punishment, rehabilitation and protection of the public are other principles of sentencing recognized in this authoritative decision. Denunciation has also been recognized as an aspect of sentencing. See the comments of Lane J.A. in *R. v. Jackson*, [1993] S.J. No. 642 (Sask. C.A.) at 18-20. Bill C-41, in s. 718, sets out the fundamental purpose of sentencing as a respect for law and public safety. Other objectives specified are: denunciation of unlawful conduct, specific and general deterrence, incarceration of offenders were necessary, offender rehabilitation, victim and community compensation and promotion of responsibility for and acknowledgement of harm done by offenders. The efficacy of imprisonment as a means of achieving deterrence has been judicially questioned. See the comments of Vancise J.A., in *R. v. McLeod* (1993), 81 C.C.C.(3d) 83 (Sask. C.A.) at 94-95: "There is no empirical evidence that general deterrence as it relates to length of sentences is effective in reducing the crime rate. There is no evidence that higher sentences are effective in reducing the crime rate."

[256] Canadian Sentencing Commission, *supra* note 241 at 31-32. Also see D. Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: Osgoode Society, 1989) at 23-26.

The *Criminal Code* currently provides the following sentencing options for most offenses:[257] incarceration,[258] fine,[259] probation[260] or absolute or conditional discharge.[261] This range places significant importance upon the sentencing hearing as an opportunity for gathering information about both offender and offence.[262] The information deemed relevant may depend upon the offence committed and the sentencing principle deemed appropriate for this offence and offender. A "community-based sentence"[263] will be supported by information describing support, treatment and

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[257] For a limited number of offenses, including impaired driving (ss. 253(a) & 255(1)), use of a firearm while committing an indictable offence (s. 85(1)) and murder (ss. 229 & 235) the existence of minimum penalties restricts the range of sentencing options. The *Code* defines offenses as summary (punishable by maximum imprisonment of six months and/or a $2,000 fine), as indictable (punishable by maximum imprisonment as prescribed for each offence and/or an unlimited fine) or as dual (punishable either as a summary or indictable offence based on the Crown's election).

[258] The *Criminal Code* defines the maximum period of incarceration for each indictable offence. Summary offenses have a maximum penalty of six months as defined in s. 787(1). See generally Part XXXIII of the *Code* and, in particular, ss. 717, 721, 730, 731, 737(1)(c), 741.2, 743 and 746.

[259] An offender convicted of an indictable offence punishable by less than five year imprisonment may be fined instead of or in addition to any other punishment authorized by the *Code* (s. 718(1)). An offender convicted of an offence punishable by more than five years imprisonment may be fined in addition to any other authorized punishment (s. 718(2)). See generally Part XXXIII and, in particular ss. 717, 718-720, 722 and 727.9.

[260] An offender may be placed on probation for up to three years, assuming the offence does not require a minimum penalty, in addition to a suspended sentence (s. 737(1)), to imprisonment not exceeding two years or to a fine (s. 737(2)). Probation orders include mandatory conditions requiring offenders to keep the peace and be of good behaviour and to report to the court if and when required and may include a variety of other conditions (s. 737(2)). See generally Part XXXIII and, in particular, ss. 737-740.

[261] An offender awaiting sentencing for an offence without a minimum penalty and with a maximum punishment of less than 14 years imprisonment may be discharged absolutely or conditionally if the court finds such a disposition to be in the best interests of the accused and not contrary to the public interest. Such a discharge deems the accused not to have been convicted of the offence. See s. 736.

[262] Dickson J., in *Gardiner, supra* note 214 at 513-14 characterized the sentencing hearing as an exercise in which the sentencing judge seeks to obtain relevant and reliable information to shape the ultimate decision on disposition.

[263] Which refers to placement of the offender within his or her community usually through the conditions specified in a probation order. Although such an order may follow imprisonment of a term not exceeding two years, most community-based sentences are characterized by a suspended sentence with probation.

supervision resources available within the offender's community.

4.3 Jury Sentencing in Non-capital Cases: The U.S. Experience

The United States shares with Canada a criminal law system originating in England. Despite this common heritage, the sentencing process currently existing in several American states differs markedly from prevailing practice in both England and Canada. Most American states sanctioning capital punishment leave death penalty decisions to the jury.[264] Eight states allow juries hearing non-capital cases to sentence offenders.[265] The U.S. experience stands in sharp contrast to the limited sentencing role of juries in Canada.[266] Reasons suggested for U.S. community involvement in sentencing include mistrust of Crown-appointed judges in colonial courts[267] and the historical prevalence of lay judges which lead to the conclusion that there was little difference between judge and jury in terms of experience, training and competence.[268]

As "jury sentencing" represents the ultimate extension of community sentencing

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[264] Weninger, R., "Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas." (1994) 45 Wash. Univ. J. Urban Cont. L. 3.

[265] See C. Reese, "Jury Sentencing in Texas: Time for a Change?" (1990) 31 South Texas L. Rev. 323 at 328 where these states are listed as Arkansas, Kentucky, Mississippi, Missouri, Oklahoma, Tennessee, Texas and Virginia.

[266] The only provisions allowing limited jury participation in sentencing are ss. 743 and 743.1 of the *Criminal Code* which allow a jury recommendation to the presiding judge respecting the number of years to parole for a convicted second-degree murderer. In addition, s. 745 empowers a jury to decide whether the time before an inmate serving life (with a minimum of 15 years until parole eligibility) can apply for parole should be reduced.

[267] American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to *Sentencing Alternatives and Procedures* (New York: American Bar Assoc., 1968) at 44.

[268] See "Note: Jury Sentencing in Virginia" (1967) 53 Va. L. Rev. 968 at 970.

participation, what has been its impact? The National Advisory Committee on Criminal Justice Standards criticized jury sentencing in noncapital cases:

> [T]he practice has been condemned by every serious study and analysis in the last half century. Jury sentencing is non-professional and is more likely than judge sentencing of being arbitrary and based on emotions rather than the needs of the offender or society. Sentencing by juries leads to disparate sentences and leaves little opportunity for development of sentencing policies.[269]

Objections to jury sentencing in non-capital cases have included the greater disparity in sentences between like cases,[270] lack of information respecting offenders possessed by juries in comparison to judges who could adjourn sentencing for a pre-sentence report,[271] tendency of jury sentences to represent a compromise or average of the various opinions of jurors (many of which may be totally unreasonable and/or irrational),[272] lack of juror sentencing experience[273] and tendency of jurors swayed by emotion and prejudice.[274] Arguments in favour of jury sentencing were summarised by Judge Charles Betts of the 98th District Court in Texas:

> 1. The anonymity of jurors makes them less subject to the pressures of public feelings and opinion than the elected judge, who must seek popular favour at the next election.

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[269] National Advisory Commission on Criminal Justice Standards and Goals, "The Courts: Task Force Report" (1973) in N. Kittrie & E. Zenoff, eds. *Sanctions, Sentencing and Corrections* (New York: Foundation Press, 1981) at 65.

[270] American Bar Association, *supra* note 267 at 45.

[271] *Ibid* at 46. See also Note, "Virginia," *supra* note 268 at 978 and Note, "Statutory Structures for Sentencing Felons to Prison" (1960) 60 Colum. L. Rev. 1134 at 1156.

[272] H. LaFont, "Assessment of Punishment - A Judge or Jury Function?" (1960) 38 Texas L. Rev. 835 at 843. Also see C. Kerr, "A Needed Reform in Criminal Procedure" (1918) 6 Kentucky L. J. 107 at 109.

[273] American Bar Association, *supra* note 267 at 46.

[274] Lafont, *supra* note 272 at 842.

> 2. The brief tenure of the jury makes corruption or improper influence especially difficult.
>
> 3. Jury-fixed punishment diminishes popular mistrust of official justice.
>
> 4. The judgement of the jury may be more sensitive than that of the judge because its members, unlike the judge, are not often confronted with the recurrent problems of court cases and therefore do not become calloused.
>
> 5. A jury lacking sentencing power tends to acquit a defendant it believes guilty when it fears that the sentence the judge will impose is probably too severe.
>
> 6. Because it is a composite, a jury levels individual opinions and provides a reconciliation of varied temperaments, and therefore is more apt to assess a fair punishment.[275]

Although the *Criminal Code* does not give Canadian jurors such sentencing powers, circle sentencing may be considered to be a form of jury sentencing producing a consensus on sentence.[276] The U.S. experience with jury sentencing provides an interesting contrast to community sentencing models in Aboriginal communities. One difference between approaches is evident. Participants in a sentencing circle are often present because of their closeness to the offender or victim. Jury members, although representing the community at large, are excluded from participation if acquainted with offender or victim. Both, however, depend upon the participation of local non-professional community members.

The following section discusses opportunities for victims and community

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[275] C. Betts, "Jury Sentencing" (1956) 2 N.P.P.A.J. 369 at 371.

[276] Stuart, J., in *Moses, supra* note 1 at 360-361 commented:

> The circle, by engaging everyone in the discussion, engaged everyone in the responsibility of finding an answer. The final sentence evolved from the input of everyone in the circle. The consensus-based approach fostered not just shared responsibility, but instilled a shared concern to ensure the sentence was successfully implemented.

members to present information to the court while participating directly or indirectly within the conventional sentencing hearing.

4.4 Opportunities for Community and Victim Participation Within the Conventional Sentencing Hearing

Given the general informality of practice and range of information available at sentencing, information from victims and local community members can be presented to the court through representations of counsel,[277] court ordered reports[278] or sworn testimony presented by defence or Crown counsel. Crown and defence counsel and the judge act as "gatekeepers" controlling introduction of such information:[279] although community members and the victim have a right to attend the sentencing hearing,[280] they do not have standing in the proceeding to compel presentation of their views to the judge. *Bill C-41*, although codifying the range of evidence and submissions possible at sentencing,[281] still does not require a sentencing court to hear victim and

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[277] Including submission of documentation received through these individuals such as letters of support and character reference.

[278] Including a pre-sentence report pursuant and victim impact statements pursuant to ss. 735 and 735(1.1) of the *Criminal Code* and a pre-disposition report pursuant to s. 14 of the *Young Offenders Act*.

[279] See Canadian Association of Provincial Court Judges, *supra* note 205, which, in discussing the role and ethics of the sentencing hearing participants, identified only the participation of judges and Crown and defence counsel.

[280] Unless excluded by the judge pursuant to s. 486(1) of the *Criminal Code*.

[281] The proposed section reads, in part:

> 723. (1) Before determining the sentence, a court shall give the prosecutor and the offender an opportunity to make submissions with respect to any facts relevant to the sentence to be imposed.
> (2) The court shall hear any relevant evidence presented by the prosecutor or the offender.
> (3) The court may, on its own motion, after hearing argument from the prosecutor and the offender, require the production of evidence that would assist it in determining the appropriate sentence.

community representations.[282]

The *Young Offenders Act*[283] requires the judge to consider "any predisposition report required by the court, any representations made by the parties to the proceedings or their counsel or agents and by the parents of the young person and any other relevant information" prior to sentencing. In addition, this Act[284] provides for establishment of "youth justice committees" to assist in "any aspect of" the Act's administration. This provision allows a committee to become involved directly in the sentencing of young offenders. This was done in Sandy Bay, Saskatchewan in the late 1980's. Former committee member Ina Ray explained:

> I, along with ... other members of the community, were approached and asked if we would be willing to try out this new way of dealing with young offenders. I believe we were approached by the magistrate [provincial court judge] at that time, who was feeling frustrated ... that the system wasn't working the way it was set up, in that someone from out of town, like the magistrate, would come in and, not knowing the community or the people, would deal with justice the way he believes it should be done. But he felt that it would be more effective if people from the community took responsibility and showed that they were affected and cared about the people that got into trouble. That might be a better way.[285]

The *Young Offenders Act* provides more latitude for community participation in sentencing than does the *Criminal Code*. Parents,[286] agents of the young person[287] and

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[282] S. 745.6(2)(e) would require a court to consider representations of the victim when considering an application for parole eligibility after a prisoner has served 15 years of a life sentence.

[283] S. 20.

[284] S. 69.

[285] Interview with Ina Ray (15 November, 1994) Sandy Bay, Saskatchewan.

[286] Pursuant to s. 20(1).

members of a youth justice committee may have direct input into the sentencing of young offenders.

Given the adversarial roles usually assumed by defence and Crown counsel, the pre-sentence report serves as the court's major objective source of sentencing information.[288] Unfortunately, the enabling section[289] contains little guidance respecting the structure and content of such a report.[290] The term "probation officer" is not defined, creating uncertainty respecting who can author such a report.[291] Another problem is the variance in quality of such reports.[292] Although pre-sentence reports are discretionary under the *Criminal Code*, the *Young Offenders Act* requires judges to

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[287] S. 11(7) of the *Act* allows a young person, who is not represented by a lawyer, to ask the youth court judge to allow him or her to be represented by a an adult who is deemed suitable by the judge.

[288] C. Dombek, & W. Chitra, "The Pre-Sentence Report: An Update" (1980-81), 23 C.L.Q. 216 at 217-20. However, see A. MacAskill & H. Andrews, *The Role of the Youth Court Judge at the Disposition Hearing* (1985) 47 C.R.(3d) 60 at 72-73 which cites appellate court disagreement on whether predisposition reports should extend beyond simple information gathering to recommendation on sentence.

[289] S. 735 provides this report is to be prepared in writing by a probation officer. In *R. v. Webb* (1975), 28 C.C.C.(2D)456 (P.E.I.S.C.), discussions between the judge and probation officer outside of court were held to be outside the scope of considerations permitted by this section.

[290] Bill C-41 sets limited requirements for the pre-sentence report in s. 721(3) including the offender's age, maturity, character, attitude, willingness to make amends, criminal record and any previous history of having been dealt with through alternate measures (also called mediation/diversion).

[291] See Dombek & Chitra, *supra* note 288 at 223 who argued that proper interpretation of this term would allow a volunteer to prepare the report as long as he or she was properly supervised by a probation officer. Indeed, as discussed in Chapter Six, presentence reports at Hollow Water First Nation in Manitoba have been prepared by assessment team members of Community Holistic Circle Healing who are not probation officers.

[292] See G. Parker, "Commentary on Criminal Law and Use of Pre-Sentence Report" (1964), 42 Can. Bar Review 621 at 627 where the author stated: "... the quality of the pre-sentence report can vary enormously, depending on the time available to the probation officer, his skill, the community services assisting him, and, of course, the mode of presentation. At present, the law has no direct control over the quality of the pre-sentence report."

consider pre-disposition reports before sentencing young offenders to custody[293] and also details the information required in these reports.[294] This *Act* allows oral submission of predisposition reports by youth court workers if such information cannot reasonably be committed to writing.[295]

Information about crime victims can be considered at sentencing through presentation of victim impact statements.[296] These include a description of "the harm done to, or loss suffered by, the victim arising from the commission of the offence" and are to be in writing, prepared in accordance with the procedures specifically established under a designated provincial program.[297]

In the United States, lack of victim participation at sentencing was described by the Chairman of a 1982 Presidential Task Force on Victims of Crime: "Somewhere along the way, the (criminal justice) system began to serve lawyers and judges and defendants, treating the victims with institutional disinterest."[298] These comments were

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[293] In s. 24(2).

[294] S. 14(2) requires information respecting: an interview of the young person and, if possible, of their parents; an interview, where possible, with the victim; the age, maturity, behaviour and attitude of the young person; any plans of the young person; the young person's criminal record; any experience of the young person with mediation/diversion; the available community resources and the school and the employment record of the young person.

[295] In s. 14(3).

[296] Pursuant to ss. 735(1.1) - (1.2) of the *Criminal Code*.

[297] See T. Roberts, *Assessment of the Victim Impact Statement in British Columbia, (working document)* (Ottawa:Department of Justice, 1992) at 9-16 , which noted that, as of October, 1991, only four provinces and one territory (Newfoundland, Prince Edward Island, New Brunswick, Alberta and the Northwest Territory) had formalized victim impact statement procedures through designated programs.

[298] "President's Task Force on Victims of Crime, Final Report VI" , 1982, as reproduced in A. Klein, *Alternative Sentencing: A Practitioner's Guide* (Cincinatti: Anderson Publishing, 1988) at 137.

echoed by the Canadian Federal-Provincial Task Force on Justice for Victims of Crime: "Ours is an adversarial system where the victim is not one of the adversaries".[299] Victim impact statements have been described as providing a voice for victims during sentencing and ensuring the court has complete information about the crime's impact upon the victim.[300] Victim's rights groups have criticized the lack of uniform usage and the discretionary nature of such statements in Canadian law.[301]

Although not all victims may wish to attend the sentencing hearing in the presence of the offender, victims may still benefit from some direct or indirect participation in the sentencing process. Andrew Klein, considering a 1981 Pennsylvania study on the views of victims, commented:

> Just as dramatically the survey found that the victim's feelings were generally positive when they were involved in and informed about the [sentencing] process or received restitution. The moral of the Pennsylvania study, and others

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[299] D. Sinclair et al, "Report of the Canadian Federal-Provincial Task Force on Justice for Victims of Crime", 1983 as quoted in Barfknecht, D., "Concerns of Canada's Victim's Rights Movement", (1985) 8 Cdn. Com. L.J. 83 at 83-84. The discretionary nature of victim impact statements under the Criminal Code stands in contrast to the evolving American procedure as the above task force reported that more than 34 states and the U.S. federal legislative process required courts to consider victim impact statements.

[300] Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections, *Taking Responsibility* (Ottawa: Queens Printer, 1988) at 18 who cited the opinion of Canadian victimologist Dr. Micheline Baril.

[301] See *Final Report: Safety Net; A National Conference on Crime Prevention, Public Safety and Justice Reform* (Burlington: CAVEAT, 1994) at 48 where the conference's Victim's Rights Panel recommended "[s]tandardization and uniform use of Victim Impact Statements at all stages of the criminal justice system including sentencing ...". Frustration by some victims over their treatment by the justice system, including the sentencing process, has lead to the formation of victim's rights groups. See S. Rosenfeldt & S. Sullivan, "Victims Rights: Discussion Paper" in *DNA Testing and the Law [and] Victims Rights* (Ottawa: Victims of Violence, 1994) at 5 in which one such group, Victims of Violence, published a Victim's Bill of Rights including the following provisions:

> (4.) At a victim's request, victims will be notified of and have the right to be present at all criminal proceedings ... [including] sentencing hearings ....
> (6.) Victims have the right to present Victim Impact Statements , orally or written, at sentencing ... proceedings.

> like it, is simple. Courts need not resort to Draconian sentences to increase victim satisfaction. The simple expedient of victim recognition, involvement, and the ordering of restitution, ... can substantially increase victim satisfaction with the system, the sentence and the judge.[302]

Similarly, Stuart J., in *R. v. Moses,*[303] described the potential impact upon offenders of victim participation within a sentencing circle:

> Many offenders perceive only the state as the aggrieved party. They fail to appreciate the very human pain and suffering they cause. Absent an appreciation of the victims suffering, offenders fail to understand their sentence except as the intrusion of an insensitive, oppressive state bent on punishment. An offender's remorse is more likely to be prompted by a desire to seek mercy from the state or by a recognition that they have been "bad". Only when an offender's pain caused by the oppression of the criminal justice system is confronted by the pain that victims experience from crime, can most offenders gain a proper perspective of their behaviour. Without this perspective, the motivation to successfully pursue rehabilitation lacks an important and often essential ingredient.

In addition to direct or indirect sentencing participation in court, victims and community members also participate in mediation of cases diverted from the court system (also referred to as "mediation/diversion").

4.5 Community and Victim Participation in Disposition of Criminal Acts Through Mediation/Diversion

Mediation/diversion programs allow offenders the opportunity to compensate and reconcile with their victims and community.[304] The prevalence of these programs

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[302] Klein, *supra* note 298 at 138.

[303] *Supra* note 1 at 262.

[304] Although the terms mediation and diversion are often used conjunctively, they represent two processes which only sometimes occur together. "Diversion" refers to the resolution of a criminal acts outside of the formal court system. "Mediation" refers to a process, which may occur following diversion, involving offenders and victims in attempts at negotiating crime compensation for the victim and achieving

for youthful offenders in the United States was shown in a study which found "more than 50% of all delinquency cases referred to juvenile court in the U.S. ... [were] disposed of nonjudicially (including formal and informal diversion)".[305] Similarly, in Canada, one study noted "[s]ince the proclamation of the Young Offenders Act (1982), there has been a growing interest across Canada in developing opportunities for mediation and reconciliation to occur between young offenders and their victims."[306]

The philosophy of mediation/diversion can be seen in the evolution of a crime mediation program in Columbus, Ohio, described by Daniel McGillis, Director of the Dispute Resolution Project at Harvard Law School:

> Some of the earliest mediation centres were developed by prosecutors frustrated by the seeming inability of the courts to effectively handle minor disputes. In 1970, the city prosecutor of Columbus, Ohio, established the Night Prosecutor Program, one of the first mediation projects in the nation. The prosecutor noticed that complainants very often withdrew their complaints as trial time drew near because their opponents were neighbours, relatives, or acquaintances. The complainants rarely sought jail terms or fines for their adversaries, but rather were looking for an apology, changed behaviour, or money paid to them as restitution .... Now more than 10,000 matters a year are mediated in Columbus.[307]

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reconciliation with each other. See Saskatchewan Justice, *Mediation/Diversion Program Policy Draft* (March, 1994) [unpublished]. Such programs are called "alternative measures" in s.4 of the *Young Offenders Act*. The *Criminal Code* has no corresponding provision allowing or disallowing such programs for adults although s. 717 of Bill C-41 contains formal recognition of "alternate measures."

[305] A. Maron, "The juvenile diversion system in action: Some recommendations for change" (1976) 22 Crime & Delinquency 461-469 cited in D. Fischer & R. Jeune, "Juvenile Diversion: A Process Analysis" (1987) 28:1 Cdn. Psych. 60 at 61.

[306] K. Pate & D. Peachey, "Face to Face Mediation Under the Young Offenders Act" in J. Hudson, J. Hornick & B. Burrows, eds., *Justice and the Young Offender in Canada* (Toronto: Wall & Thompson, 1988) at 105.

[307] D. McGillis, "The American Resolution Dispute Movement" in *Mediation in the Justice System: Dispute Resolution Papers Series #2* (American Bar Association, 1983) at 18-19.

A focus of mediation/diversion is facilitating victim participation.[308] This process has been described as "restorative justice": maintaining a focus on the "harmful effects of offenders' actions" while "actively involv[ing] victims and offenders in the process of reparation and rehabilitation."[309]

Two urban mediation/diversion programs in Toronto represent approaches also applicable to rural Aboriginal communities. The Operation Springboard "Community Sentencing Model"[310] is based on the circle sentencing experience of Canadian Aboriginal communities and administers mediation/diversion programs for both young offenders and young adults. The Aboriginal Legal Services of Toronto "Community Council Project"[311] applies the young offender mediation/diversion concept to adult Aboriginal offenders. The Project uses a community/Elders' council model[312] drawn from Toronto's Aboriginal community[313] to fashion appropriate dispositions for

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[308] Pate & Peachey, *supra* note 306 at 108.

[309] D. Van Ness, "Restorative Justice" in B. Galaway & J. Hudson, eds. *Criminal Justice, Restitution and Reconciliation* (New York: Criminal Justice Press, 1990) at 10. Also see Fischer & Jeune, *supra* note 305 at 63 where attempts at reconciliation between offenders and victims were evidenced in the following description of a young offender mediation/diversion program in Saskatoon, Saskatchewan:

> The meetings provide a forum where the youth, parents/guardian, two community volunteers, the victim, and a representative of the John Howard Society discuss the nature of the youth's transgression, its historical antecedents, the youth's remorsefulness(or lack thereof) and the means by which compensation to and reconciliation with the victim can be reached.

[310] See *Community Tribunals: A Community Sentencing Model: Final Draft Proposa*l (Toronto: Operation Springboard, undated). The program description was taken from this proposal.

[311] See *Aboriginal Legal Services of Toronto's Community Council Project* (Toronto, 1992) [unpublished].

[312] See discussion of the Elders' sentencing panel in Chapter Five and also in the Waywayseecappo case study in Chapter Six.

[313] Together with any victims wishing to participate.

offenders while promoting reconciliation and healing.

Community mediation committees in Aboriginal communities of Manitoba and Saskatchewan will be considered in Chapters Five and Six. This thesis has explored problems with Anglo-Canadian sentencing practices in Aboriginal communities and opportunities within the Anglo-Canadian justice system for victim and community participation. The following chapters discuss recent changes to sentencing practices, including the development of mediation, in Aboriginal communities.

Chapter Five: The Sentencing Circle and Other Aboriginal Community Participation Models

5.1 Identifying the Models

In the conventional Anglo-Canadian system, crown prosecutors represent the interests of both victims[314] and community members at sentencing. Although evidence of their views may be tendered by defence or Crown counsel, community members and victims have not been considered parties to the sentencing hearing.[315] Several Canadian inquiries into the treatment of Aboriginal people within the Anglo-Canadian justice system have questioned the lack of direct community input at sentencing. The AJI commented:

> If non-Aboriginal judges and courts are going to be able to formulate sentences which are appropriate to the needs of Aboriginal offenders, victims and communities, they will need direct input from those communities .... In particular, communities need to be involved in the sentencing process, since sentences should, in part, reflect the needs and desires of the community.[316]

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[314] Not all offenses have a victim which is clearly identifiable. For example, offenses such as Possession of a Narcotic or Impaired Driving (without any bodily harm occurring) have no identifiable victim other than, perhaps, the public at large. For practical purposes, no victim would be available for court purposes.

[315] Comments by de Weerdt J. in *R v. Cabot-Blanc*, [1987] N.W.T.R. 1 (N.W.T.S.C.) at 11 reflected the control of defence and Crown over information in the conventional sentencing hearing:

> As to the task force recommendations [the Task Force on Spousal Assault in the Northwest Territories, 1985] ... to the effect that the courts should spend more time on the spousal assault cases and find ways to have the evidence of community action groups and leaders placed before the courts (at the same time urging community initiatives such as informing the judiciary of "community attitudes and expectations regarding the crime of spousal assault and its punishment"), I think that it should be said here that it is the function of counsel to ensure that pertinent evidence is adduced before the courts, and that it is not appropriate for courts to turn themselves into inquisitors, investigators or commissions of inquiry in that connection.

[316] AJI, *supra* note 88 at 409.

Similarly, the Saskatchewan Indian Justice Review Committee stated:

> In order to empower aboriginal communities and reduce feeling of alienation, communities must be given an opportunity to become involved in, and take greater responsibility in community interaction with, the criminal justice system .... Changes in sentencing or remand practices to recognize community-based approaches cannot succeed without the full participation and support of the judiciary at all levels and of Crown counsel.[317]

Support for direct consultation with the community has come from the judiciary. Lilles C.J. of the Yukon Territorial Court stated in *R v. J.A.P.*:[318]

> There are many benefits to be gained from citizen and community participation in sentencing and dispositions. Such participation reinforces the socializing effect of the criminal law upon many persons in the community. It strengthens the community focus tending to reduce crime and enhance[s] community interest in the administration of justice. The educative impact of community dispositions cannot be overstated.

Stuart J., of the same court, echoed these sentiments in commenting that: "the formal, professional justice system must acquire greater confidence and trust in community knowledge, judgement and instincts."[319]

My field work in Saskatchewan and Manitoba disclosed significant local interest in community sentencing participation on the basis of intimate knowledge of the victim and offender. Donald McKay Jr., a Cree man from Cumberland House, explained:

> Well, one of the biggest things I believe in with the sentencing circle is the community knows the person that has committed whatever kind of crime or

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[317] *Saskatchewan Indian Justice Review Committee, supra* note 161 at 41. The Committee recommended: "subject to community support, community justice committees be established for adult aboriginal offenders to parallel the activities of youth justice committees. Committee responsibilities might include advising on pre-sentence reports and sentencing, ... and administering alternate measures."

[318] [1991] Y.J. No.180 (QL) (Yuk. Ter. Ct.) at 12.

[319] *R v. D.N.* [1993] Y.J. No. 193(QL) at 26.

> whatever it was. We ... know the accused and we know the victim. We know him I think far more than the court system, the judge or the lawyers ... probation officers or social services [employees] that come in. We know him more than anybody else. I think we can better deal with these people.[320]

Feelings of estrangement from non-resident judges and probation officers were voiced together with cries for local participation. Harry Morin, a Cree man from Sandy Bay, stated:

> Well with promising to the probation officer or the magistrate or anything, you only see him once a month, you don't care, you know, "Oh I'll get away with this, I'll get away with that, they're not going to know." Well of course nobody knows because they're gone, you don't see them until the next court date. Here, he knows the people that are involved, and he knows the people that care and they keep an eye, and they tell him that right in the circle. If you ever need any help, if you need somebody to talk to, if something is troubling you, we're available. And if you don't have a phone, you know, and a lot of times the probation officers won't accept a collect call, what do you do? When the pressure gets so tough. Do you just say, to hell with it? Well basically that's what the system is doing. Here, you have your community of people, you know who is there, you know who you can talk to. If something is bothering you, you go.[321]

Local sentencing and mediation participation was seen as a means of community empowerment. When asked if the Sentencing Circle Committee was going to have an impact on and make a difference to Cumberland House, Chairperson Cyril Roy commented:

> Well that's what I'm hoping for and I'm sure I'm not the only person hoping for that. At least that might help our community and looking at these people coming to the sentencing circle [committee], they respond to the people that are

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[320] Interview with Donald McKay Jr. (13 December, 1994) Cumberland House, Saskatchewan.

[321] H. Morin October interview, *supra* note 135. This sense of estrangement between the court personnel and community members was also evidenced in Greg Bragstad's comments: " ... because here especially the judge flies in from La Ronge. He's here at 8:00 [a.m.] and he's gone [later that day]. The community members are saying we don't want this kind of [offender] action in our community, so it puts more onus on the person than the judge saying it."

> in that circle, and I'm sure that ... in the future there's more people ... being involved in the circle. Because that's the only way we can keep our community a little stronger and keep it going.[322]

By what means may such community participation be facilitated?

There are currently a number of alternate sentencing approaches employed in Aboriginal communities across Canada. At a "Workshop on the Role of Crown Counsel in an Aboriginal Context" conducted September 16-18, 1994 in Vancouver, prosecutors from across Canada[323] reported on community sentencing initiatives within their jurisdictions.[324] Circle sentencing was being used extensively in the Yukon and to a lesser extent in Quebec, Manitoba and Saskatchewan. Involving local Elders or other community representatives in advising judges on sentence was common in the Yukon and the Northwest Territories. A community-based model of mediation/diversion was said to be developing in Saskatchewan and Alberta. Although the draft report represented only a summary of the personal experiences of prosecutors from some of Canada's provincial and territorial jurisdictions,[325] these comments served as a guide to the range of sentencing approaches being used within Aboriginal communities. In the six communities studied, several community sentencing projects were discovered:[326]

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[322] Interview with Cyril Roy (12 December 1994) Cumberland House, Saskatchewan.

[323] Including Rodney Garson of the Yukon, Pierre Rousseau of the Northwest Territories, Pierre Desrosiers of Quebec, Robin Ritter of Saskatchewan, George de Moissac of Manitoba and Jim Langston of Alberta.

[324] J. Bowers & P. Rousseau, "Workshop on the Role of Crown Counsel in an Aboriginal Context Draft Report", [unpublished] at 3-7.

[325] The conference does not appear to have included representatives from the maritime provinces.

[326] See Chapter Six for in-depth analysis of these community initiatives.

Sandy Bay, Saskatchewan was the first community in Saskatchewan to use formal sentencing circles (commencing in the summer of 1992) and had continued to develop this approach. A committee had been formed which made sentencing recommendations on cases referred by the court.

At Pelican Narrows, Saskatchewan, the first sentencing circle was held in spring, 1994. Apparently resulting from the initiative of the local band,[327] a sentencing circle committee was formed. Several cases had been referred to the committee who then conducted a sentencing circle in Cree and without the judge. This process resulted in sentence recommendations to the court.

Cumberland House, Saskatchewan had experienced introduction of circle sentencing at the Provincial Court and had formed a sentencing circle committee which functioned both as a sentence advisory committee, providing the court with community recommendations on sentence for cases referred by the court, and a mediation committee, dealing with adult and young offender cases referred to it by the RCMP or the court.

At Hollow Water, Manitoba, Community Holistic Circle Healing (CHCH), established in the mid-1980's, provided holistic treatment for sexual assault victims and victimizers. This process had intersected with the Provincial Court system initially through CHCH assessment team members providing sentencing reports to the court sitting in Pine Falls[328] and then, aided by a protocol with the provincial Department of

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[327] Interview with Judge Fafard (19 September 1994) Pelican Narrows, Saskatchewan.

[328] Located 100 kilometres south of Hollow Water.

Justice, through introduction of circle sentencing at Hollow Water in 1993.

Waywayseecappo, Manitoba had experienced introduction of the Elders Advisory Panel had been established in 1994. Local Elders sat beside the presiding judge and advised on sentence.

At Pukatawagan, Manitoba, the local Justice Committee conducted mediation of cases referred from the RCMP, the court and local community members. They also sat with the presiding judge in court and advised on sentence.

In addition to conducting a sentencing circle with the judge in attendance, O'Regan J. of the Newfoundland Supreme Court (Trial Division), in *R v. Rich (S.) et al. (No. 1)*,[329] said he could get the same information from the community by:

> 1. hearing the results of the consensus of the community from their own sentencing circle with the accused and without the complainant and the judge. The weight of such evidence to be determined by all the circumstances.
> 2. by "viva voce" evidence from community leaders and elders, some of which I have already heard; and
> 3. evidence of proposed programs and services available which would convince the court to impose a sentence to enable probation to enter the picture and thus give the community the powers of the court's control to enforce its own power over the accused.[330]

Many local variations exist through which courts serving Aboriginal communities encourage community participation in criminal sentencing and mediation. These may

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[329] (1994), 116 Nfld. & P.E.I.R. 293 at 298. In this case, the court rejected the request for a sentencing circle on the basis that the victim did not feel she could participate as she had not yet healed.

[330] *Ibid* at 298. See also *R. v. Moosenose* [1992] N.W.T.R. 394 (N.W.T. Ter.Ct.) where the community represented to the court through representatives of the band council and through other statements their wishes regarding a non-custodial sentence for the offender and *R. v. Waskahat* (1987), 1 W.C.B. (2d) 210 (Alta. C.A.) where the trial judge appears to have followed a resolution of the local band council opposing jail for the offender.

be grouped into the following models:

> 1. Circle sentencing: the judge takes an active facilitator or a passive observer role;
>
> 2. The Elders or community sentencing panel: the judge consults directly, in court, with Elders or other community representatives on appropriate sentence;
>
> 3. The sentence advisory committee: cases are referred by the court to a local committee which produces a sentencing recommendation after meeting with the offender and sometimes the victim; and
>
> 4. The community mediation committee: cases diverted by the Crown, police or court are considered, in the presence of the offender and often the victim, by a local committee who produce an offender disposition.

These are developed in the following sections. The first, circle sentencing, has received most judicial and media attention.

5.2 Circle Sentencing

5.2.1 Physical Setting:

Stuart J., in *R v. Moses*[331], described the physical setting of that sentencing circle:

> For court, a circle to seat 30 people was arranged as tightly as numbers allowed. When all seats were occupied, additional seating was provided in an outer circle for persons arriving after the "hearing' had commenced.
>
> Defence sat beside the accused and his family. The Crown sat immediately across the circle from defence counsel to the right of the judge. Officials and members from the First Nation, the R.C.M.P. officers, the probation officer and others were left to find their own comfortable place in the

[331] *Supra* note 1.

circle.[332]

The Kinistin circle, which I participated as counsel,[333] involved both an inner and outer circle. The inner circle contained 20 chairs occupied by elders of the Kinistin band, both defence counsel, the Crown prosecutor, both offenders and the judge. The probation officer, although present, sat in the outer circle and did not participate in the circle. The outer circle contained approximately the same number of chairs. The sentencing circle participants had been selected by the probation officer in consultation with an Elder at the reserve. An equal number of male and female elders sat in the circle, as requested by the judge. Although physical setting of circles will vary between judges, communities and jurisdictions, there is commonality between the circles. All involve the offender, judge, a Crown representative and a number of influential and respected local community members. Other participants are usually the victim, defence counsel and family members of the offender and victim. Of the circles observed during this study, most had between 20 and 30 participants.

Judge Stuart described the egalitarian effect of the circle setting on participants:

> The circle significantly breaks down the dominance that traditional court-rooms accord the lawyers and judges. In a circle, the ability to contribute, the importance and credibility of any input is not defined by seating arrangements. The audience is changed. All persons within the circle must be addressed. Equally, anyone in the circle may ask a direct question to anyone else.[334]

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[332] *Ibid* at 356.

[333] *Thomas, supra* note 4. The case of *R. v. Lumberjack* was also considered within the same sentencing circle. This circle was formed to consider a sentence for two offenders charged with stealing a substantial sum of money from the reserve.

[334] *Moses, supra* note ? at 356-357.

The circle setting promotes a sense of informality and equality of all participants.[335] I experienced this at the Kinistin circle while observing participants drinking coffee, smoking and keeping their hats on during the sentencing circle, all practices forbidden in conventional court. This informality facilitated an interchange of opinions and information within the circle.

5.2.2 Procedure Followed:

Robin Ritter of La Ronge, Saskatchewan,[336] one of the first defence counsel in Saskatchewan to be involved in circle sentencing, described the evolving process of circle sentencing:

> The people take their places in the circle and the judge, or the person organizing the circle, will usually ask one of the elders to say a prayer or to perform the sacred Sweet Grass Ceremony. All religious beliefs are tolerated and welcomed. Everyone in the circle has the chance to talk or to remain silent. The members of the circle discuss the offender and his crime until they all agree on what his sentence should be. The judge then imposes that sentence according to law.[337]

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[335] This sense of equality may be hindered by changing the physical setting. The circle I attended in Winnipeg January 9, 1995, *R. v. C.S.* (9 January, 1995), Winnipeg (Man.Q.B.) [unreported], hereafter called the "Winnipeg circle", provided an interesting insight. The chairs had initially been set up in a circle with no other furniture in place. Shortly prior to the commencement of the circle, apparently at the request of the judge, a table was moved in front of the chair designated for the judge. Some in attendance commented on the effect of special arrangements for the judge. Indeed the added table gave the impression of setting the judge apart from the rest of the circle. Although one of the reasons for the presence of the table may have been to the allow the judge to make notes, this difference in treatment was noticed by those in attendance.

[336] Employed by the Saskatchewan Legal Aid Commission in La Ronge until February, 1994 and now employed by the Saskatchewan Department of Justice as Regional Crown Prosecutor for north-east Saskatchewan.

[337] R. Ritter, *Sentencing Circles* (La Ronge, Saskatchewan, 1993)[unpublished] at 2. Also see S. Davies, *Experiences with Circle Court* (Paper presented to the Northern Justice Society Conference in Kenora, Ontario, 1993) where the author, a probation officer with extensive involvement in circle sentencing, summarised the process used in the Yukon:

The Pelican Narrows circle proceeded as follows:

1. All participants introduced themselves;

2. An Aboriginal Elder said a prayer in Cree;

3. Judge Fafard outlined the range of sentences possible for the offenders under the *Criminal Code* and the *Young Offenders Act*;

4. The Crown (represented by an RCMP officer) outlined the circumstances of the offence;

5. Community members in the circle took turns talking about the offenses committed and their view of appropriate sentences;

6. The offenders were all given a chance to speak and comment on any recommendations or other matters raised in the circle;[338]

7. A consensus emerged suggesting nine of the ten offenders be placed on probation or receive a suspended sentence[339] with specific conditions in their probation order suggested by members of the circle[340]. The tenth offender,[341] again by consensus, was to be given a period of incarceration with probation to follow containing terms similar to the other nine offenders.

8. These sentences were then imposed by Judge Fafard.

> The basic process for a "circle court" is the same from community to community .... The judge acts more as a chairperson or mediator in some cases, and sits in the circle with everyone else.... Initially, the Judge or a member of the support group will welcome people to the circle court and introductions are made around the circle to assist the court recorder and familiarize people with those present. The Crown will present the circumstances of the offence, the community perception of the seriousness of the crime and make submissions as to sentence.... The members of the circle are asked by the judge to consider the problem and possible solutions. This allows the community to become specific when talking about the needs, strengths and resources available for the individual [offender] before them. The accused will be asked to address the circle and often speaks with much emotion and insight into their situation. If the victim is present, they are asked to speak to the circle.

[338] Only one offender spoke. He opposed the forming circle consensus of a short period of custody for him. Subsequently, he was silent when Judge Fafard asked if anyone was opposed to the final consensus which included custody for this offender.

[339] Depending on whether the offenders were young offenders or adults.

[340] And apparently previously discussed by their Sentencing Circle Committee.

[341] The only one with a previous criminal record and apparently the instigator of assault.

The "consensus-building" approach evidenced in the Pelican Narrows circle may be contrasted with the approach used by presiding judges at Pukatawagan, Manitoba. According to lawyer Joyce Dalmyn,[342] the practice of Manitoba judges has been to listen to sentence recommendations from circle participants and then to indicate their decision. The judge takes a less active role in facilitating the circle and seeking a consensus. These differences suggest that the influence of local circumstances on circle sentencing development lead to unique practices in each community.[343]

5.2.3 Status of Circle Recommendations Within Prevailing Criminal Code System:

Judicial analysis of the role of circle sentencing has been varied. In *Rich (#1)*,[344] O'Regan J. of Newfoundland's Supreme Court (Trial Division) viewed its role within the existing system as "a form of diversion in the sentencing process" which "strongly suggest[ed] alternatives to incarceration."[345] In R. v. *Morin*,[346] Milliken J. of

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[342] Interview with Joyce Dalmyn (28 January 1995) Winnipeg, Manitoba. Joyce was employed as Director of Manitoba Legal Aid in The Pas and had been active in development of sentencing initiatives in Pukatawagan.

[343] B. Stuart, *Circles into Square Systems: Can Community Processes be Partnered with the Formal Justice System?* (Whitehorse, 1995) [unpublished] at 2 where Judge Stuart explained:

> I am reluctant to set out the procedures, guidelines, the mechanics of Circle Sentencing. Reluctant to do so because there is no single model. Each community adapts Circle Sentencing to fit their particular circumstances. A principal value of Circle Sentencing lies in its flexibility to bend to the vision of each community.

[344] (1994), 116 Nfld, & P.E.I.R. 293 (Nfld.S.C.).

[345] *Ibid* at 297.

[346] [1994] 1 C.N.L.R. 150 (Sask. Q.B.).

Saskatchewan's Court of Queen's Bench likened a sentencing circle to a pre-sentence report:

> A pre-sentence report is usually done by a probation officer who interviews the persons necessary to give him or her the information covered in the report. It appears to me that same type of information is obtainable at a sentencing circle, where the persons who would give the information to the probation officer for a pre-sentence report are present in the circle. If a pre-sentence report can be used by a judge to gain information about the offender, then why can't a sentencing circle be used for the same reason? I am not aware of any restrictions imposed upon a judge when he or she decides to request a pre-sentence report, so why should there be restrictions on judges about ordering a sentencing circle?[347]

In *Moses,*[348] Stuart J. described the role of circle sentencing as enhancing sentencing options, affording greater concern for victims, shifting the focus from punishment to rehabilitation and meaningfully engaging communities in shared responsibility for sentencing decisions.

Despite these general comments on the role and advantages of circle sentencing, there has been little judicial consideration of the relationship of circle sentencing to the sentencing framework established by the *Criminal Code*. Dutil J. of the Court of Quebec (Criminal and Penal Division),[349] when interviewed in *Macleans Magazine*, viewed circle sentencing as an adapted sentencing hearing within the *Criminal Code* system:

> "This is an experiment," says Dutil. "It's a way to help me make sentences much like I use pre-sentencing reports prepared by probation officers." As such,

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[347] *Ibid* at 4.

[348] *Supra* note 1 at 356.

[349] The first judge to introduce sentencing circles into northern Quebec and the presiding judge in *R. v. Aluka* (1993), 112 D.L.R.(4d) 732 and *Naappaluk, supra* note 209.

> the use of sentencing circles did not require any legislative change. "A judge can use any normal and legal means to find acceptable sentences," he says.[350]

Available judicial comment suggests circle sentencing is based in the court's broad sentencing discretion which retains for the judge ultimate decision-making power.[351]

A goal of circle sentencing is to promote consensus among participants. This objective is subject, however, to the ultimate sentencing authority of the judge. The interplay between community decision-making and judicial sentencing discretion was described by Arnot P.C.J. of the Provincial Court of Saskatchewan[352] :

> The circle attempts to build a consensus on the appropriate disposition. If a consensus is reached, the judge will impose the sentence recommended subject to judicial discretion. The judge may not accept the recommendation of the community. That is rare.[353]

As a result of this inter-relationship, confusion may arise among circle participants who are asked to shape an offender's sentence without final authority to impose it. Mary Crnkovich reported such confusion at the sentencing circle in *R. v. Naappaluk*[354]:

> Judge Dutil attempted to clarify what his role and the roles of the other participants would be. He explained that everyone in the circle was "on the

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[350] Nemeth, *supra* note 8 at 52.

[351] In *R. v. Equash* (13 December 1994) Regina (Sask. Q.B.) [unpublished], Kyle J., in refusing a request to "allow a native tribunal to try a Regina man for sexual assault", commented that sentencing circles "have been used in recent months but their verdicts are recommendations only and not binding." These quotations are from "Request for Native Tribunal Turned Down" *Saskatoon Star Phoenix* (13 December 1994)). Also see M. Sinclair, *Family Bulletin interview*, *supra* note 208 at 5 where Judge Sinclair stated in describing the status of a sentencing circle: "This is not a legally recognized body of people. It is a community-made process. For now, then, the process demands that the ultimate decision still rests with a judge."

[352] Who has been involved in the introduction of sentencing circles to Aboriginal communities in northwestern Saskatchewan.

[353] D. Arnot, "Sentencing Circles Permit Community Healing" *National: The Canadian Bar Association Magazine* (October, 1994) 14.

[354] *Supra* note 209.

> same level" and "equal". There was no doubt some confusion caused when after stressing this equality, he explained that he was "not obliged to follow advice" given by the circle members.
>
> On one hand the judge was inviting the community to participate with him in constructing a sentence for the accused, but on the other hand, he retained the ultimate authority by stating that he was not obliged to follow the "advice" of the circle when deciding the sentence for Jusipi Naappaluk.
>
> The idea of the circle is to "break down the dominance that traditional court rooms accord lawyers and judges". By referring to the group's work as "advice" yet telling them they are equal to the judge, presented a mixed message and questioned how "equal" the members really were.
>
> This comment only served to reinforce any scepticism about the circle providing the community with an[y] real opportunity to share in the sentencing responsibility. The real power appeared to be reserved for the judge and everyone else in the circle appeared to be an advisor.[355]

Practically, however, the sentencing decision is not always "made" by the judge. Of the sixty to seventy sentencing circles conducted by Judge Fafard in northern Saskatchewan, he had never rejected the consensus emerging from a circle and believed he was giving the community a significant role on the decision-making process.[356]

An example of a judge rejecting a circle consensus occurred after an experimental circle held in Winnipeg.[357] Scollin J., after sitting passively through a circle involving the offender, the victims and various local community and justice system personnel, concluded that he could not impose a non-custodial sentence as

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[355] M. Crnkovich, *Report on the Sentencing Circle in Kangiqsujuaq* (Ottawa, 1993) [unpublished] at 6.

[356] Fafard interview, *supra* note 8. Also see the comments of Dutil J. in *Naappaluk supra* note 209: "When I set up the consultation circle, in Kangiqsujuaq ... I clearly explained to the participants that I would not be bound by their recommendations. It is understandable, however, that if the judge systematically sets aside the circle's recommendations, it may become entirely useless to hold such sessions."

[357] Previously referred to as the Winnipeg circle.

recommended by most members of the circle.[358] He reasoned that, despite positive efforts by community members within the sentencing process, he was bound by precedent from the Manitoba Court of Appeal which, for the offenses involved,[359] required a lengthy period of incarceration. As a result, he agreed with submissions of the Crown prosecutor and imposed a penitentiary term of three years.

Confusion exists over the extent of agreement required to constitute a circle "consensus". Robin Ritter, in summarising the practice of circle sentencing in northern Saskatchewan, equated consensus with unanimity.[360] "The Pelican Narrows circle" and "the Sandy Bay circle" both supported this interpretation as all participants appeared to agree with the consensus.[361] However, the circle in *Morin*[362] was showed a "consensus without unanimity" as the Crown prosecutor actively opposed the proposed sentence.[363] My Saskatchewan field work failed to identify any sentencing circle in which the Crown (represented by a prosecutor or the RCMP) opposed the consensus reached by

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[358] K. Rollason, "Court Rejects Healing Circle Proposal" *The Winnipeg Free Press* (11 January 1995) B2. The Crown prosecutor did not join the consensus.

[359] Which included incest, indecent assault, forcible confinement and possession of a weapon for a purpose dangerous to the public peace.

[360] Ritter, *supra* note 337 at 2.

[361] This assumes that all people who wished to speak to the circle actually did. At the Pelican Narrows circle, in attempting to draw together a consensus, Judge Fafard asked if everyone was in agreement with the dispositions suggested by circle participants. It appeared that the participants in the circle were in agreement although some members did not speak and their silence was taken a tacit approval of the suggested consensus.

[362] *Supra* note 346.

[363] *Ibid* at 10. In delivering sentence, Milliken J. stated: "Finally, a consensus was reached with everyone agreeing except the crown prosecutor who would not consider anything less than seven to nine years imprisonment."

other circle members.[364] This was partly the result of reluctance by judges in conducting circles against Crown opposition.[365]

A more subtle question respecting the legal status of circle sentencing, is the effect of comments made within the circle. Recording by tape or court reporter is the general practice in Saskatchewan and the Yukon circles. This leaves open the possibility of obtaining a transcript. Stuart J. in *Moses*[366] commented on whether the sentencing circle should be recorded or transcribed:

> In some cases, there are good reasons to question why a transcript is embracing all circle discussions is necessary. Some aspects of the discussion may be best excluded from the transcript, or where the circle is closed to the public, the transcript retained in a confidential manner, available only if required by a court of appeal .... The tradition of the circle - "what comes out in a circle, stays in a circle" - runs counter to the justice tradition requiring both an open court and transcripts.[367]

Lorne Hagel, an active participant and supporter of healing and sentencing circles at Hollow Water, advised that wisdom flowing from a circle is often regarded by

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[364] Constable Murray Bartley of Cumberland House did advise me that he was unhappy with the result of a sentencing circle held for a young offender. However, it was not clear whether he verbally opposed the circle consensus at the sentencing circle. Interview with Cst. Murray Bartley (14 December 1994) Cumberland House. A sentencing circle conducted April 19, 1995 at Sandy Bay, *R. v. Bear* (Sask. Prov. Ct.), hereafter described as the "Sandy Bay circle," was a circle at which all participants, including the RCMP, agreed with the consensus of a suspended sentence for an offender charged with spousal assault. However, this sentence was subsequently appealed by the Crown. The offender, who had a lengthy record of violence, breached his probation shortly after the circle. Telephone discussion with Sid Robinson (21 July 1995).

[365] Brennan interview, *supra* note 150. Although the Crown, represented by the RCMP, agreed with the circle consensus at the Sandy Bay circle, this suspended sentence was subsequently appealed by Crown prosecutors. In the Yukon, the agreement of the Crown also appears to be important as Hudson J. commented in *R. v. Lucas* [1994] Y.J. No. 107 (QL) at 3 that "this was not a sentencing circle in the cultural sense that has been adopted in other courts. but those are achieved some preparation and the agreement of the prosecuting authorities. which was not the case here."

[366] *Supra* note 1.

[367] *Ibid* at 368.

participants as privileged and not to be repeated outside of the circle.[368] As one of the goals of circle sentencing is to promote reconciliation and healing between the offender, victim and local community,[369] can statements made in a circle be considered by the court as evidence? In *R. v. Johnson*,[370] McEachern C.J.B.C. viewed these as providing information which can and should be available to judges at sentencing. If information gathering is an objective of circle sentencing,[371] how can a judge totally disregard circle comments? In *R v. Gardiner*,[372] Dickson S.C.J. (as he then was) commented on the informality of a sentencing hearing and the need for a wide range of information open to the court including "the fullest possible information concerning the background of the accused if he is to fit the sentence to the offender rather than to the crime."[373] Although circle informality facilitates discussion and, hence, information about offender and offence, some restriction on use of circle comments may be appropriate, especially with respect to those made by the victim. In *C.S.*,[374] Scollin J.

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[368] Interview with Lorne Hagel (23 January 1995) Winnipeg, Manitoba.

[369] Stuart J. in *Moses*, *supra* note 1 at 366-67 stated:

> Aboriginal people see value in avoiding confrontation and in refraining from speaking publicly against each other. In dealing with conflict, emphasis is placed on reconciliation, the restoration of harmony and the removal of underlying pressures generating conflict .... The circle has the potential to accord greater recognition to aboriginal values, and to created a less confrontational, less adversarial means of processing conflict.

[370] (1994), 24 W.C.B. (2d) 114 (Yuk.Ter. C.A.).

[371] As suggested by Milliken J. in *Morin*, *supra* note 346.

[372] (1982), 68 C.C.C. (2d) 477 (S.C.C.) at 514.

[373] *Ibid* at 514.

[374] *Supra* note 335.

criticized the Crown for referring to comments made by victims during the Winnipeg circle suggesting it was unfair, given the healing nature of the circle, to quote such statements in the context of aggravation of sentence.

5.2.4 Criteria for Circle Sentencing:

Circle sentencing requires considerable expenditure of court time and resources. In R. v. *Johnson,*[375] Finch J.A. of the Yukon Court of Appeal expressed concern over an absence of criteria guiding selection of circle sentencing cases:

> Sentencing circles [as] employed in this case took far longer than the sentencing process prescribed in the *Criminal Code* and it was apparent that this process could not be used in every case .... If judges proposed to use sentencing circles, they should establish and publish rules so that the Crown and the accused would know the kinds of cases to be tried in that way and what to expect .... It would be wrong if judges of the court should follow different procedures on such a common question as sentencing.[376]

Time limitations may be a significant restriction on use of circle sentencing. The Pelican Narrows circle lasted approximately two hours. The entire court party had flown from La Ronge solely for this sentencing. "The Winnipeg circle" lasted nine hours.[377] During the circles involved in this study, no sentencing circle took less than two hours. With heavy court schedules in many rural and northern court points,[378] time

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[375] *Supra* note 370.

[376] This passage taken from the Quick Law summary.

[377] Prior to the Winnipeg circle, the Director of Court Operations expressed to me his concern about the amount of time required for sentencing circles.

[378] Bartley interview, *supra* note 364. A recent court docket day included 22 accused persons appearing before the court on a total of 35 charges. This docket was only considered moderate in Cumberland House. On trial days, as many as 5 to 6 trials have been set.

requirements will necessitate selective use of circle sentencing.[379]

Fafard P.C.J. in *R. v. Joseyounen*[380] set out the following criteria governing selection of cases for circle sentencing:

> 1. The accused must agree to be referred to the sentencing circle.
>
> 2. The accused must have deep roots in the community in which the circle is held and from which the participants are drawn.
>
> 3. There are elders or respected non-political community leaders willing to participate.
>
> 4. The victim is willing to participate and has been subjected to no coercion or pressure in so agreeing.
>
> 5. The court should try to determine before hand, as best it can, if the victim is subject to battered woman's syndrome. If she is, then she should have counselling and be accompanied by a support team in the circle.
>
> 6. Disputed facts have been resolved in advance.
>
> 7. The case is one which a court would be willing to take a calculated risk and depart from the usual range of sentencing.[381]

In *R. v. Cheekinew*[382], Grotsky J. listed the following criteria:

> In my view, depending always on society's need for protection , and having regard for the need for punishment, general and specific deterrence, and the offender's own reformation and rehabilitation; where, as here, the offender seeks the intervention of a "sentencing circle" for the purpose of sentencing advice and assistance to the presiding judge, then *at the very least*, the offender should be:
>
> a. a fit and proper candidate therefor, including, in the particular

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[379] This assumes no substantial increase in court resources and available court time.

[380] (March 15, 1995) Wollaston Lake (Sask. Prov. Ct.) [unreported].

[381] *Ibid* at 5-10.

[382] (1993), 80 C.C.C. (3d) 143 (Sask. Q.B.).

> circumstances, eligible for either a suspended sentence; or an intermittent sentence; or a short term of imprisonment, coupled in either case with an appropriate term of probation on terms realistically adequate for the particular purpose;
>
> CLEARLY: *If the trial judge is, following conviction of the accused, of the view, on the whole of the evidence that the offender must receive a punitive term of imprisonment of two years or more, then, as such a sentence cannot, by virtue of the provisions of s. 737 of the Criminal Code, be coupled with a probation order, a submission should not, in these circumstances, be heard for the establishment of a sentencing ... circle.* [emphasis in original]
>
> b. genuinely contrite with respect to the offence of which he stands convicted and faces sentencing;
>
> c. supported in the request for the establishment of a sentencing circle by the offender's own community willing to participate in the sentencing circle process and to make meaningful sentencing recommendations. As well, to assume responsibility for the supervision and enforcement of the terms of the probation order including the reporting of any breach of the terms thereof. ...
>
> d. a person honestly interested in turning his or her life around with the assistance and supervision of his or her "community".
>
> The noted requirements are not intended to be an exhaustive list. Rather, merely demonstrative of some of the basic requirements, in my view for the court's consideration of the request for the establishment of a sentencing circle or other like tribunal.[383]

Although not limiting the application of circle sentencing to this extent, Milliken J. in

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[383] *Ibid* at 149-150. As suggested by Grotsky J., the ability of a court to impose a probation order may limit the usefulness of a sentencing circle. However, except in obvious cases such as homicide, the broad discretion open to a sentencing judge makes pre-determination of sentence length difficult. See Quigley, *supra* note 165 at 290 where the author argued:

> [T]hese restrictions [from *Cheekinew*] put the cart before the horse. It is only during the process itself that it can be learned whether the offenders remorseful and motivated to change, whether the community is willing to provide the necessaria and, perhaps most fundamentally, what is the appropriate sentence itself for this offender.

Morin[384] and Dutil J. in *R. v. Aluka,*[385] viewed as prerequisite a desire for rehabilitation by the offender and a community prepared to provide offender assistance and support during and after sentencing.

An alternative to court-directed selection criteria is protocol negotiation between communities and the provincial departments of justice. One example is the Protocol of the Katapamisuak Society at the Poundmaker Cree Nation in Saskatchewan,[386] which appeared to incorporate the northern judges' criteria (above) and which established a local Justice Committee to screen sentencing circle requests from any person or agency, including the accused, RCMP, Crown and defence counsel and judge. Another example is the Protocol for Manitoba Department of Justice Support for the Community Approach of the Hollow Water Community Holistic Circle Healing at the Hollow Water First Nation in Manitoba.[387] Although not specifically dealing with circle sentencing criteria, this protocol does establish guidelines for Crown consideration of community-based sentences for sex abusers. The protocol has facilitated the introduction of circle sentencing at Hollow Water.

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[384] *Supra* note 346 at 152.

[385] *Supra* note 349 at 735-738.

[386] North Battleford, 1993. See Appendix C.

[387] See Appendix D.

5.2.5 Appropriateness of Circle Sentencing for Offenses Involving Domestic Violence:

Sentencing circles have been used to consider a wide range of offenses including assault causing bodily harm,[388] robbery with violence,[389] sexual assault,[390] spousal assault,[391] impaired driving causing death,[392] theft over $1000[393] and arson[394]. This list, although not exhaustive, does indicate the serious nature of some offenses which have been considered. Although personal circumstances of an offender are an element considered in sentencing, appellate guidelines may restrict the decision to refer some offenses to a sentencing circle.[395] Specifically, recognition of starting point sentences for such offenses as sexual assault[396] may hinder usage of circle sentencing in specific jurisdictions. As Stuart J. in *Moses* recognized,[397] the "circle may not be

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[388] R. v. *Webb* (22 July 1992), Whitehorse T.C. 91-03332 (Yuk. Ter. Ct.) [unpublished] and *R. v. Charleboy*, [1993] B.C.D. Crim. Sent. 7100-06 (B.C. Prov. Ct.).

[389] *Morin, supra* note 346.

[390] *D.N., supra* note 319 and *C.S., supra* note 319 (although, in the latter case, the judge did not accept the recommendation from the Winnipeg circle).

[391] *Naappaluk, supra* note 209.

[392] *R. v. Rope* (11 January 1995), Regina Q.B.C.N.J. 10/94 (Sask. Q.B.).

[393] *Thomas*, supra note 4.

[394] *Aluka*, supra note 349.

[395] See *R. v. John* [1995] A.J. #98 (QL) (Alta. C.A.) at 6 where Cote J.A. stressed the effect of appellate sentencing guidelines both on a judge and on a sentencing circle: "What binds a sentencing judge binds him or her with or without such community involvement. We think that if one wants to regard the sentencing circle or some similar body as a being the sentencing body, it also is bound".

[396] An approach established by the Alberta Court of Appeal in *R. v. Sandercock* (1985), 22 C.C.C. (3d) 79 (Alta. C.A.).

[397] *Supra* note ?.

appropriate for all crimes ...."[398]

Power imbalances between offender and victim offenses involving domestic violence necessitate caution in selection of cases for circle sentencing. Feminist scholars in particular question the application of mediation to cases involving wife abuse and, given the ubiquity of domestic violence, mediation in criminal offenses is also problematic. Martha Shaffer argued historical power imbalances are not easily overcome in mediation:

> Since experts estimate that one in three women is battered by her spouse, the problem of mediating domestic violence cases is not insignificant. It is difficult to imagine a situation in which the power imbalance between the spouses is more pronounced and the potential consequences of mediation more disastrous. It is grossly unrealistic to assume that women who have been subjected to a pattern of repeated abuse will suddenly be able to face their abuser.[399]

Fafard P.C.J. indicated that he was hesitant to take on such cases before a sentencing circle.[400] Rupert Ross commented that, because of the power imbalance between

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[398] *Ibid* at 370. At the appeal hearing in Morin, *supra* note 346, Sherstibitoff J.A. questioned defence counsel on what possible role a sentencing circle could play if the case before the court was such that a penitentiary sentence was unavoidable, as the court could not impose a probation order. However, Fafard P.C.J. in *Joseyounen, supra* note 380 at 10, despite his position that a penitentiary term was unavoidable for the offender, directed formation of a sentencing circle as a way of healing the hurt done by the offender, of insuring that this would not happen again and of making parole condition suggestions for the Parole Board. Also see Stuart *Circle into Square System, supra* note 343 at 16 where the author described the recent experience within Yukon communities: "Communities do not reject cases on the basis of the crimes committed. Minor offenses such as drinking underage to serious, indictable offenses including attempt murder and sexual assaults have been heard Circle Sentencing."

[399] See M. Shaffer, "Divorce Mediation: A Feminist Perspective" (1988) 46:1 U.T Fac. L. Rev. 162 at 182.

[400] Fafard September interview, *supra* note 327. Indeed, the criteria established by the northern Saskatchewan judges, although not specifically excluding cases of domestic violence, does identify the "battered woman syndrome" and requires counselling and support for such a victim within the circle sentencing process. The Sandy Bay circle involved a charge of spousal assault with an apparent history of battering by the offender. Most people in the circle were friends or relatives of the offender. However, support was extended to the victim who had played a major role in organizing the circle. This case, which resulted in a suspended sentence, has been appealed by the Crown.

offender and victim in a situation of ongoing domestic physical or sexual abuse, it may be inappropriate to conduct a sentencing circle in the conventional fashion, in which offender, victim and community members are brought together on a single occasion without previously identifying and addressing power imbalances.[401] Mary Crnkovich expressed concerns about power imbalances at the circle in *Naappaluk*[402]:

> Aside from the fact that the sentence was based on a proposal presented by the accused, the victim could hardly, in her position, oppose such a proposal or complain that it was not working. Again to suggest that her attendance [for counselling] would keep the accused honest, demonstrates, in the author's view, the judge's misunderstanding of the life circumstances of this woman as a victim of violence. How could this woman speak out against her husband? How could she speak out against the mayor [and] ... others in her community [who attended the sentencing circle]? Did the judge really believe she would speak out based on the history of this case to date. The victim's actions or lack thereof during the circle, demonstrated the degree of fear and deference paid to her spouse.[403]

If domestic assault cases are dealt with in a sentencing circle, judges must ensure, to the extent possible, protection of the victim within the process. Unfortunately, such protection is short lived as the court party leaves each community after court making community-based support essential for victims.[404]

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[401] Interview by telephone with Rupert Ross (4 January 1995).

[402] *Supra* note 209. As a result of the circle, the offender, charged with spousal assault, was directed to take counselling with his wife.

[403] Crnkovich, *supra* note 355.

[404] Caution respecting offender/victim power imbalances, in the context of a request for a community-based sentencing hearing, was also expressed by Stach J. of the Ontario Court of Justice (General Division) in *R v. A.F.* [1994] O.J. #2865 (QL) at 3. The victim had become an outcast from this community and had moved to southern Ontario after her disclosure leading His Lordship to comment:

> The success of a community-based sentencing approach depends very much upon the active participation of and sincere commitment of each participant. ... So too, where the nature of the crime bespeaks an imbalance of power as between the victim and the offender, great care ought to

The community approach to victim support practised at Hollow Water demonstrates both recognition of and compensation for power imbalances between offenders and victims in sexual assault cases. The offender and victim each have separate support teams and are not brought together until such time as they can face each other on an equal footing.[405] If a sentencing circle is held[406] the victim is encouraged, but not required, to attend. Each victim has a specific worker with them for support.[407] Consideration of the Hollow Water approach, which addresses offender/victim power imbalances prior to sentencing, brings into question the appropriateness of circle sentencing for cases involving domestic violence without prior intervention.[408]

In contrast to domestic assault cases, a sentencing circle may be beneficial, without prior intervention, to a victim who is not well acquainted with the offender.[409]

> be taken .... The perspective of the accused, the convenience of witnesses and the perspective of the community are not the only considerations. The rights of the public, the perspective of the victim, and the Court's duty to ascertain the truth are all competing and sometime competing considerations. In cases of sexual assault, for example, an imbalance of power as between the offender and the victim is commonplace. Where the imbalance is not offset by some other visible community support for the victim, the logic of a community-based sentencing hearing is dissipated.

[405] Ross interview, *supra* note 401.

[406] As has happened twice at Hollow Water since negotiation of the protocol in 1991. A total of five offenders were sentenced in these sentencing circles.

[407] Sinclair interview, *supra* note 73.

[408] The approach at Hollow Water is predicated on lengthy adjournments of sentencing by the trial court. There is a protocol in effect between the Manitoba Department of Justice and Hollow Water that recognizes the propriety of such adjournments for completion of the healing program. However, it should be noted that the Alberta Court of Appeal in *R v. A.B.C.*(1991), 120 A.R. 106 (Alta. C.A.) rejected the practice of lengthy adjournments for treatment making the Hollow Water approach unlikely to be accepted in Alberta.

[409] Ross interview, *supra* note ?.

In *Morin*,[410] the victim had never met the offender prior to the offence. The sentencing circle appears to have allowed her to confront her assailant while "putting a human face" to him. At the circle, she directly challenged the offender Ivan Morin:

> Morin's victim, [a] university student ... , said she didn't hate Morin and didn't appear looking for revenge.
>
> "I did not come here out of vindictiveness and I have no anger towards you. I came here to challenge you in your actions."
>
> [The victim] said what she and the rest of the community wanted was a commitment from Morin to break his cycle of crime.
>
> "I need a commitment from you to better yourself. It can't come from anyone else here," [the victim] said.[411]

She also attained insight the offender's personal situation and problems.[412] Although reconciliation between parties to the offence may occur during a sentencing circle, offenses involving historical power imbalances between offenders and victims require caution in ensuring these are identified and addressed prior to circle commencement.

5.2.6 Deterrence in Circle Sentencing:

A goal of sentencing in Anglo-Canadian law is specific and general deterrence.[413] Although incarceration has been a predominant means of encouraging

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[410] *Supra* note 401.

[411] J. Campbell, "Morin Says Sentence Was Just" *New Breed Magazine* (May 1993) 3 at 4.

[412] See M. Miller, "Forgiveness Replaces Blame: Sentencing Circle Experiment in Saskatoon" (1993) 13:1 *St. Thomas More College Newsletter* 4 at 5:

> With regard to Ivan, [she] indicated that he was a very intelligent man, that he had worked as a reporter for a newspaper. She also indicates that he appeared remorseful. She also perceived that he resented authority and feared a white court. It was very apparent that he had a serious problem with alcohol; during the period of time in his life when he was attending AA and not drinking, he had been successful, productive and happy.

[413] *Morrissette, supra* note 255 at 310-311.

deterrence within the prevailing system, Stuart J. in *R v. Washpan*[414] commented that community-based options also deter crime: :

> A severe sentence is not the only punitive sanction that serves to achieve general deterrence. Other forms of punishment, either in lieu of jail or in addition to jail, depending upon the crime, offender and community, may be as effective in achieving general deterrence and at the same time be less disruptive of other sentencing objectives.[415]

Community members at Hollow Water argued that deterrence of sexual offenses could be accomplished without jail. Jail reinforces silence and promotes the cycle of violence:

> The legal system's use of incarceration under the guise of specific and general deterrence also seems, to us, to be ineffective in breaking the cycle of violence. Victimization has become so much a part of who we are, as a people and a community, that the threat of jail simply does not deter offending behaviour. What the threat of incarceration does so is keep people from coming forward and taking responsibility for the hurt they are causing. It reinforces the silence and therefore promotes, rather than breaks, the cycle of violence that exists. In reality, rather than making the community a safer place, the threat of jail places the community more at risk ....[416]

The impact of the mere presence of community members on offenders also promotes deterrence.[417] In *R. v. D.N.*,[418] Stuart J. commented that: "[A]s any offender who has been through a [Sentencing] Circle and community rehabilitation sentence

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[414] [1994] Y.J. No. 47 (QL) (Yuk. Ter. Ct.).

[415] *Ibid* at 3.

[416] Community Holistic Circle Healing Assessment Team, *C.H.C.H. Position on Incarceration* (Hollow Water, Manitoba, 1993) [unpublished] at 2-4.

[417] See *R. v. Genaille* (1982), 8 W.C.B. 197 (Sask. C.A.) where the court, although not considering a sentence arrived at through a sentencing circle, commented that the offender would be returning to his Indian community who would continue to remind him of the offence.

[418] *Supra* note 319.

will attest, jail is a shorter, less demanding and less traumatic sentence".[419] The deterrent effect of circle sentencing was described by Greg Bragstad, a Sandy Bay man who had participated in a number of circles:

> That was the decision of the sentencing circle, and that was the community that decided that. And so it has stopped two people from doing crime because of it. ... They [the two young offenders sentenced in the circle] haven't been in court since so that tells me they're not doing anything .... I think [the sentencing circle] gave them time to think about what they did and it gave them the message that the community is not going to tolerate it and, again, that gives the community some ownership - rather than just having a judge fly in and you go to jail, you do this, you do that.[420]

Shaming is a key element in the success of the circle as deterrent. John Braithwaite argued that the most effective way to deter crime in a community was through an organized form of shaming by the local community while at the same time reintegrating offenders into the community.[421] The police agree. Constable Brian Brennan, an RCMP officer stationed in Sandy Bay and involved in a number of sentencing circles, stated:

> [I]t really confronts the accused a lot more ...standing ... before his community and admit[ing] he was wrong and explain[ing] why he did it than to stand before a stranger. It's easier to stand before a stranger for four or five minutes while the judge sentences you and be done with it than to sit for an hour or two or maybe three and have a number of people criticize your character and your actions and you have to try and defend yourself.[422]

Although judicial disagreement exists on how specific and general deterrence can best

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[419] *Ibid* at 31.

[420] Bragstad interview, *supra* note 156.

[421] J. Braithwaite, *Crime, Shame and Reintegration* (Cambridge: University Press, 1989) at 54-68.

[422] Brennan interview, *supra* note 150.

be accomplished, judges such as Stuart in the Yukon and Fafard in Saskatchewan are recognising the power of local Aboriginal communities to deter criminal behaviour. Working within the prevailing legal system, such judges are using judicial discretion in sentencing to "tap into" local systems of social control through circle sentencing and the three other community participation models which are discussed in the remainder of this chapter.

5.3 The Elders' or Community Sentencing Panel

Direct consultation with community members at sentencing was advocated by the Law Reform Commission of Canada in 1974:

> [O]ne way of maintaining contact with the community and its sense of values is to have individual citizens from the community sit with the judge to assist in the disposition and sentence. Countries such as Denmark have used this devise for yeârs and while judges may not be enthusiastic about such a procedure, the community, at least, welcomes the opportunity to participate.[423]

In 1991, the Commission developed this theme in an Aboriginal context:

> [L]ay assessors (Elders or other respected members of the community) ought to be permitted by express statutory provision to sit with a judge to advise on appropriate sentences .... Their duties would include consulting those involved and recommending an appropriate disposition to the judge. Similar programs already exist or are being created in some communities. The advisors ' recommendations may differ from the range of sentences established by case law, or may be contrary to general court of appeal jurisprudence. We see no real difficulty in this; indeed, it is because such guidelines are on occasion inappropriate to Aboriginal communities that we make this recommendation.[424]

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[423] Law Reform Commission of Canada, *The Principles of Sentencing and Dispositions (Working Paper No. 3)* (1974) at 29 as cited in S. Zimmerman, "The Revolving Door of Despair: Aboriginal Involvement in the Criminal Justice System", (1992) U.B.C. Law Rev. Special Edition: Aboriginal Justice 367 at 386.

[424] Law Reform Commission of Canada, *Report on Aboriginal Peoples, supra* note 132 at 36-37.

The Commission saw no legal impediment to community consultation during sentencing.[425]

An Elders' sentencing panel was introduced at Christian Island in Northern Ontario in 1973. The court involved two Elders in the sentencing of young offenders.[426] This was the court's response to local community concerns about increased youth crime and to the apparent alienation, estrangement and distance between this community and both the court[427] and probation services.[428] Michael Jackson described this initiative:

> The key feature of the program involves holding juvenile court at Christian Island and having two native lay assessors sit on the bench with the judge. Their role is to advise the judge of an appropriate sentence. When the programme first began in 1973 the Band Council selected six men and six women from the community as a panel. Whenever Court is held on the Island, two of the twelve advisors who are not related to the accused are selected .... The lay assessors do not take part in the adjudication of the guilt of the accused juvenile but after a finding or plea of guilty, the sentence is given by two lay assessors who consult with the duty counsel, the police, the probation officer, the accused and the accused's parents. The judge is not involved in this decision-making process. Once a decision is reached, Judge Golden is informed so that he may formally announce the decision according to law. Although Golden retains the right to alter a disposition rendered by the advisors, there

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[425] Also see Zimmerman, *supra* note 423 at 386 where the author observed:

> While no policy or law allows lay assessors, none forbids them either, and certain judges have taken the initiative of instituting such practices themselves. The formal use of lay assessors is itself not without precedent. The use of Aboriginal Elders or other community members presents no legal obstacle, would greatly assist non-Aboriginal judges in determining appropriate sentences and would go at least some way toward alleviating the perception widely held in Aboriginal communities that judges are ignorant of and insensitive to the circumstances and needs of Aboriginal offenders.

[426] Jackson, "Locking Up Natives", *supra* note 179 at 273-276.

[427] Which travelled to Christian Island from Middleton, separated by a twenty minute boat ride and a 20 mile drive from the community.

[428] The probation officer was a non-native resident of Middleton.

> has been no occasion in which he has ever done this. It was Judge Golden's view that the penalties imposed upon juveniles are viewed by the native community as being decided entirely by their own people.[429]

This approach was recently introduced at court in Waywayseecappo, Manitoba. The Elders' Advisory Council sat with the judge in court and provided advice during sentencing. Court was conducted in a circle format with other participants including police, defence and Crown counsel and the local probation officer. The Elders provided the judge with information on each offender and advice on sentence. Further discussion of this initiative is contained in Chapter Six.

Recent sentencing practices at Pukatawagan, Manitoba are similar to the Elder's sentencing panel although involving members of the local Justice Committee rather than Elder.[430] Judges sitting in Pukatawagan court have consulted directly with these members. This consultation provides more information to the court about both offender and offence than is usually obtainable through counsel. Judges have also attempted to verify defence counsel claims about purported offender rehabilitation by consulting

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[429] Jackson, "Locking Up Natives," *supra* note 179 at 274. Also see Ross, *Dancing With a Ghost, supra* note 131 at 167 where Rupert Ross described the role of Elders in the sentencing process at the Sandy Lake reserve in northwestern Ontario:

> Those three Elders have been sitting with the court since June of 1991. As I mentioned earlier, we place a long trestle tables in such a way that they form a large square. The judge, his clerk and his reporter occupy one side of the square. To his right are the Elders and an interpreter. Directly across from the judge is where the defence lawyers, offenders and their families sit, together with probation officers and others who may wish to address the court. The fourth part of the square is occupied by the Crown Attorney and those police officers involved in the cases at hand. ... If a conviction is entered, the next question is the sentence thought to be most appropriate. It is at this point that the Elders have an opportunity to speak to the accused and family members, and to make recommendations about the sentence they believe will be most productive from a community perspective. The Elders bring to the court their knowledge of the accused and his or her family circumstances, and their appreciation of the specific events that might have contributed to the commission of the offence.

[430] Dalmyn interview, *supra* note 342. The Justice Committee involves a mixture of Elders and younger community members.

Justice Committee members. This approach, while allowing the court to access more information, may impede attempts at reconciliation among the offender, victim and community by stressing the role of Justice Committee members as witnesses of offender behaviour rather than resources for the healing and support of the offender.[431]

Although the practices of community sentencing consultation in court vary between jurisdictions, judges and courts, all approaches appear to bestow a distinct status upon Elders or other community representatives within the sentencing process. When acting in an advisory capacity to the court, the Elders assume a quasi judicial role similar to that of the lay assessor.[432]

5.4 The Sentence Advisory Committee

O'Regan J., in *Rich (#1)*[433], commented that information available through a sentencing circle involving a judge could also be obtained by "hearing the results of the consensus of the community from their own sentencing circle with the accused and without the complainant and the judge." This practice has been employed in

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[431] Also see S. Yaeger, "Circle Sentencing Programs Give Yukon Indian Bands an Alternative to Traditional Legal System", *The Lawyers Weekly* (1 October 1993) 12 which described a similar approach to the Elders Sentencing Panel being used in some Yukon communities. Lilles C.J. of the Territorial Court of Yukon, in *R. v. J.A.P. supra* note 318 at 2 stated that one of the submissions he considered in arriving at an appropriate sentence included "evidence and representations by Chief David Keenan, Chief of Teslin Tlingits, representing the five clan leaders, the Tlingit Council and the community recommending a community based disposition instead of incarceration." Also see *R. v. Jules* [1993] Y.J. No. 236 (QL) (Yuk. Ter.Ct.) where Lilles C.J. commented, in passing sentence on an offender at Teslin, "This is a sentence which has been developed by hearing from a number of community members and clan leaders sitting in a circle."

[432] These were used in British admiralty courts. See Zimmerman, *supra* note 423 at 386.

[433] *Supra* note 329 at 299.

Cumberland House, Sandy Bay and Pelican Narrows, Saskatchewan where presiding judges have refereed cases to a local committee seeking a recommendation on sentence. The committee[434] met with offenders (and sometimes victims) before reaching a recommendation. At Pelican Narrows, Judge Fafard began referring cases to the local sentence advisory committee in the spring of 1994. The Peter Balantyne band actively supported community participation by appointing members to the committee.[435] This advisory process was described by committee Co-ordinator Derek Custer:

> Yes, in most cases the judge prefers that we talk with the accused as well as the victim prior to the date of the court, the court date. So what I do is I gather up the committee people and we sit down with the accused as well as the victim, if he or she is willing to sit down with us, and then we make recommendations. Now once this happens, we write down the recommendations, type them up, and then I approach the judge. And during that date of the court, I give the recommendations to the judge. He looks at them and approves them. Once they're approved then the accused will have to follow what we recommended.[436]

He explained the specific procedure followed when meeting with offenders:

> The procedure we follow is, we start off, I start off with giving the date when we're supposed to meet and I talk to the committee and they agree, that's prior to the court date. And we meet at a certain date, maybe a couple days before the court date, or a week, depending on who's available in the committee. And then when we proceed with that, with the circle, we start out with a prayer and then everything is read aloud to the committee, what the offence is. And as well we ask the offender, if he really fully understands the reasoning for the sentencing circle. Some do and some don't. But during our, when we get together, we explain to the offender what happens in the circle. See this is their opportunity to turn their lives around instead of getting into trouble all the

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[434] Described by its participants as the "sentencing circle committee" in all three locations.

[435] Fafard December interview, *supra* note 8.

[436] Interview with Derek Custer (16 November 1995) Pelican Narrows, Saskatchewan.

> time, this is the time to you know, reflect back on what's happened to their lives and people are caring and they're trying to help. And we explain this to every offender that comes to the circle, and then we proceed to give proper recommendations for that offender, and to follow through, and as well make sure they agree with what we've recommended, if they're willing to do it. And once they agree, then everything is typed up, the recommendations, and then the judge will look at them.[437]

The sentence advisory process is in its infancy in these Saskatchewan communities. Despite his warning that "it may be too early" to draw any conclusions from the community sentencing initiatives,[438] Judge Fafard suggested that belief in the effectiveness of process itself was a deterrent:

> [Y]ou could say that in Pelican Narrows, ... because our case load there diminished fairly dramatically since we've started doing sentencing circles maybe you could conclude from that that its having an impact on actual crime. Because it may be, ... if people believe that the system of administration of justice that supervises them ... is functioning for them and by them in their own best interests, that they're less likely to go against it.[439]

According to Judge Fafard, the committee at Pelican Narrows tends to be more demanding, and stricter in their recommendations respecting probation orders, than he would himself be.[440]

The "sentencing circle committee" at Cumberland House served two functions: sentence advisory and mediation/diversion. During my visit to Cumberland House December 12, 1994, I was given permission by the committee to attend their meeting. Two cases were considered in the committee's sentencing advisory capacity. In each

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[437] *Ibid.*

[438] Fafard November discussion, *supra* note 24.

[439] Fafard December interview, *supra* note 8.

[440] Fafard September interview, *supra* note 327.

case, the committee met with the offenders and attempted to reach a consensus on a sentence recommendation.[441]

As of spring, 1995, the sentence advisory process in northern Saskatchewan was in the initial stages of development. Although conclusions on overall impact would have been premature, it initially appears to have alleviated time pressures on the court, in contrast to lengthy sentencing circles, while at the same time facilitating community sentencing input. A further consideration of this approach is contained in case studies of Sandy Bay, Cumberland House and Pelican Narrows (Chapter Six) and in my findings from this study (Chapter Seven).

5.5 The Community Mediation Committee

Although not concerned with the imposition of a criminal sentence, mediation does provide for the disposition and resolution of criminal actions by adults and youths diverted from the court system.[442] The goals of mediation are varied. Michael Jackson

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[441] One case involved an 18 year old offender charged with assault. Prior to the offender entering the meeting room, the committee considered the circumstances of the assault provided by the police (a drunken assault on one of her friends at a party) and developed a tentative recommendation. As the offender had no criminal record, the police had recommended a suspended sentence with probation. The committee decided on a one year probation order requiring her to abstain from alcohol consumption, take alcohol counselling and apologize to the victim. The offender did not agree. She emphasized that her friend had received only six months probation for a similar offence. A struggle ensued back and forth as the committee attempted to convince the offender she should agree with the recommendation while the offender tried to convince the committee to reduce the recommended probationary period to six months. Eventually, the committee members came to the unanimous conclusion that the offender could either agree with their recommendation or have the charge referred back to the court without recommendation (in which case the offender could "take her chances with the judge"). The offender then agreed with the recommendations and the matter was finalized pending appearance before the judge on the next court date.

[442] Conducted outside of court this process is sanctioned for young persons by s. 4 of the *Young Offenders Act* and, although not specifically mentioned in the *Criminal Code*, such programs for adults have been accepted within the prevailing justice system. However, Bill C-41, awaiting Royal proclamation as of July 24, 1995, proposes to formalize recognition of this process, called "Alternate Measures" in ss.

described the objectives of an Aboriginal diversion program which operated in High Level, Alberta in 1981 as including:

> (1) short circuiting the law breaking-incarceration cycles of native offenders;
>
> (2) giving native people a better understanding of the criminal justice system;
>
> (3) increasing community participation in and "ownership" of the criminal justice system and
>
> (4) minimizing the penetration of native people into the criminal justice system.[443]

With these objectives in mind, advocates of criminal mediation have suggested local communities are well equipped to achieve resolution of many disputes previously handled by the court system. In 1975, the Law Reform Commission of Canada discussed the advantages of this community participation in mediation:

> The continuing interest in diversion is fed by many sources. There is a growing disappointment with an over-reliance on the criminal law as a means of dealing with a multitude of social problems. At the same time we realize [that] rehabilitation does not provide a full answer to the problem of crime. Increasingly, it has recognised that crime has social roots and sentencing policies must take into account not only the offender but the community and the victim as well .... The general peace of the community may be strengthened more through a reconciliation of the offender and victim [than] through their polarization in an adversary trial .... Diversion encourages the community to participate in supporting the criminal justice system to the degree that was not always possible under the trial model. Professionals, para-professionals, ex-offenders and ordinary citizens are encouraged to join the delivery of services to the criminal justice system, for the diversion program rests upon a community base.[444]

717-717.4.

[443] Jackson, "Locking Up Natives", *supra* note 179 at 277.

[444] Law Reform Commission of Canada, *Studies on Diversion, working paper no. 7* (1975) as cited in M. Jackson, "In Search of Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities" (1992) U.B.C. Law Rev. Special Ed. 147 at 178.

In an Aboriginal context, the relationship between the community, victim and offender within the mediation process was explained by Donald McKay Jr. of Cumberland House:

> So we bring these two people face to face and ask them why'd you do it, for what reason, and then we get them started talking to each other and say, the accused can say well how can I pay you back, what can I do for you, you know? Maybe I can work for you for if it's 100 hours, right now in winter time, shovelling snow or chopping wood, or any kind of little chores around the house, you know, just as a kind of form of restitution, instead of paying back money all the time? Sometimes people bust a window or kick a door down or something like that. Well maybe that person can you know, put some money in by replacing a window or door and that type of thing, but that's the biggest thing I have with these community circles. We know the people that's been victimized and we also know the people charged, and I just think it's a whole community healing process. We know them better than the court systems.[445]

In addition to promoting offender/victim reconciliation and compensation, local mediation committees also focus on changing offender behaviour. Cyril Roy, Chairperson of the Cumberland House Sentencing Circle Committee, believed interaction between his committee and offenders promoted a change in their behaviour.[446]

Mediation is the only model of community participation considered in this

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[445] McKay interview, *supra* note 320.

[446] Roy interview, *supra* note 322. Similarly, RCMP Constable Murray Bartley of Cumberland House, in an interview on December 14, 1994, commented on the deterrent effects of the mediation process on offenders (although he questioned whether victim restitution was always possible):

> [M]any of these offenses are so minor, there's really no victim. And to order [monetary] restitution is impossible and I think it's a lot more difficult to face a group of people in your community such as elders, ... and, if there is a victim, people you've actually victimized, and to have to actually personally apologize to them, [it is harder] than to just receive a fine and walk away in a courtroom.

thesis which allows local community members the final decision on disposition.[447] Despite this ultimate decision-making power, the breadth of mediation is limited by the range of offenses referred to the committee by the police and courts. Constable Murray Bartley, stationed in Cumberland House, suggested that mediation should only be available for minor property offenses and not for more serious crimes of violence, which he doubted the committee would be able to handle.[448] However, Donald McKay Jr. felt that his committee could deal with more serious referrals:

> I guess I questioned the judge a couple of times on what kind of cases we could deal with, I guess the far more serious cases, say assault and stuff like that, are too serious for us, according to the judge or court system, to deal with. But we've been dealing with say breaking and enter, mischief, damage of property and cases like that. Assault charges maybe between two young people stuff like that we've been dealing with. But far more serious assault charges where a weapon was used, those ones we haven't been able to deal with ..... [However], I keep saying this. I've probably said it ten times, but we are the ones that live here in this community. We are the ones that have to live with these people that commit crimes. And I think we as a community should be dealing with them.[449]

The scope of offenses to be considered by the local community was questioned by the Cumberland House Sentencing Circle Committee on December 13, 1994 in the context

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[447] Interview by telephone with Judge Bria Huculak (7 December 1994). Judge Huculak stressed the empowering impact on communities of this final decision-making power. The community's role in diversion was further reflected in the comments of Judge Fafard, when interviewed by telephone December 16, 1994, as he described a recent conversation with an RCMP officer:

> When I was in Wollaston Lake, the day before yesterday, the Corporal there, the man in charge of that small detachment, came up to me and said have you got anything at all you can send me, any materials at all, I've been trying to research and study what we can do that might be culture[ally]-appropriate here... in Wollaston, so that we can get some things going to resolve many of these issues without being in court. Take them away from our system and give it back to them somehow, and I said well I'll gather what material I can on mediation diversion, I think that's where we can start, and I'll send it to you.

[448] Bartley interview, *supra* note 364.

[449] McKay interview, *supra* note 320.

of an offence referred by the judge for a sentencing recommendation. The offence was assault causing bodily harm involving a serious attack during which the victim was kicked in the face. Initially, a consensus appeared to form among committee members that this charge was too serious for consideration. One member of the committee argued in favour of consideration, claiming that the court would be referring increasingly difficult cases. The committee then appeared to gain more confidence and commenced discussing the case.

This example suggests that experience will increase the confidence of local community members to deal with more difficult and challenging cases. According to Fafard P.C.J. speaking in the context of the development of sentencing circles: "It seems that if people have things done for them for them and long enough, they lose confidence in their own abilities."[450]

This chapter has discussed various models used to facilitate community participation in sentencing and diversion in Aboriginal communities. The following chapter is an analysis of the community sentencing initiatives operating in six Aboriginal communities of central and northern Manitoba and Saskatchewan.

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[450] Fafard, *Sentencing Circles: Progress Report*, *supra* at note 23. Recognition of community decision-making experience and confidence was reflected in his comments, during our telephone interview December 16, 1994, regarding community perceptions of punishment:

> I think that to a large extent people haven't made up their minds about this, well, because they've never been called upon to think about it. We've done all the thinking and dictating, and now we're asking people to make decisions, we're presenting them the opportunity to think about it and the motivation to give it some thought. They're motivated to think about it because they have some responsibility to decide, you know, so now people really have to seriously address their minds to it.

During my telephone interview with Judge Bria Huculak on December 7, 1994, she indicated that, during her attempts to establish the mediation/diversion program in Pelican Narrows, she sensed the local community lacked the confidence to proceed on their own and wanted to start the mediation process with her direct input.

PART THREE: CASE STUDIES: COMMUNITY SENTENCING INITIATIVES IN SIX ABORIGINAL COMMUNITIES OF CENTRAL AND NORTHERN MANITOBA AND SASKATCHEWAN

Chapter Six: Case Studies of Six Aboriginal Communities

The following case studies contain for each community: a community overview and description, a summary of the introduction and development of community sentencing and mediation and a discussion of the perceptions of community members, judges, Crown and defence counsel, police and probation officers participating in these initiatives.[451]

6.1 Sandy Bay, Saskatchewan

6.1.1 Community Overview:

Sandy Bay[452] is located 22 kilometres west of the Manitoba border and 198 kilometres northwest of Flin Flon, Manitoba.[453] It is situated on the Churchill River across from Island Falls.[454] Prior to 1927, the Sandy Bay settlement was located a few miles downriver from the present site.[455] With the closing of the Hudson Bay trading

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[451] Police and Crown prosecutors were not both interviewed in all communities. In Saskatchewan, the RCMP often represent the Crown at sentencing. Where it was not possible to interview both, the views of one were taken as representations of the Anglo-Canadian justice system.

[452] Field trips were conducted to Sandy Bay October 18-20 and November 12-17, 1994 and April 18-20, 1995. Data collected included observations of provincial court, the community-at-large and interviews with community members and court party members involved with the sentencing initiatives. Written information was also obtained through INAC, the libraries at the University of Manitoba and the Government of Saskatchewan.

[453] L. Morin, *The People of Wasawakasik* (Papyrus Printing, 1992) in ch. 1.

[454] *Ibid.*

[455] K. Goulet, *Oral History as an Authentic and Credible Research Base for Curriculum: The Cree of Sandy Bay and Hydroelectric Power Development 1927-67* (M.Ed. Thesis, University of Regina, 1986) at 80.

post at the old site and the opening of a store at Island Falls by Churchill Power Corporation, settlement at the current site was accelerated.[456] Drawn by the prospects of employment constructing the Island Falls power plant, people from Pelican Narrows and Cumberland House, Saskatchewan and Pukatawagan, Manitoba moved to Sandy Bay commencing in 1928.[457] Other than employment with the Island Falls company, means of support were hunting, trapping and fishing.[458]

Most people in Sandy Bay are Cree and speak the "th" dialect.[459] Speakers of this dialect have been identified by various terms including "Rocky Cree", "Woods Cree"[460] and "Stoney Cree".[461] In 1994, the population was 1200.[462] The community has two stores, a Roman Catholic church, an RCMP detachment with three officers, a K-12 school and a nursing station. It is connected to settlements of the South by a gravel road open all year.[463]

The Provincial Court convened in Sandy Bay once a month. The court party,

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[456] *Ibid.*

[457] L. Morin, *supra* note 453 in ch. 1.

[458] *Ibid.*

[459] Goulet, *supra* note 455 at 79.

[460] *Ibid.*

[461] A. Morin interview, *supra* note 101.

[462] Ray interview, *supra* note 285.

[463] See L. Morin, *supra* note 453 in ch. 1. The influence of European settlement and colonization is obvious from the following community history written by this Aboriginal women, born in Sandy Bay:

> The village started with a trading post, church, hospital and school. The priest, school teacher, and trader were practically the only white men in the village. It was these three men who exerted the strongest influence on the people for naturally enough the church, school and store were the main centres.

including the judge, court clerk and defence and Crown counsel fly to Sandy Bay on court day and are driven to court in an RCMP vehicle. Court was held in the basement of a Roman Catholic church located centrally in the village.

6.1.2 Introduction and Development of Community Sentencing:

The first sentencing circle held at Sandy Bay occurred during the summer of 1992. However, community participation in the sentencing of young offenders began in 1989. Provincial Court Judge Claude Fafard described the formation and functioning of the Youth Sentencing Advisory Committee:

> The idea for a sentencing advisory committee came from my efforts to create a mechanism to get some community input. As a provincial court judge, I don't sit with a jury. I have no authority under the *Criminal Code* to have a jury of people with me to decide the facts. However, I can get advice from the community after the verdict has been reached in a case. If a person is found guilty, many opportunities to consult with the community are available.... In putting together the pre-sentence report, for example, the probation officer will go out and speak to those involved in the case, the victim, and to the relatives of the offender. However, the pre-sentence report doesn't give you the wisdom of the Elders and others who live in the community- those who may know the offender and the victim- but who are not directly involved in the case. So there was a need for some mechanism to involve them.... I began in Sandy Bay because I have some close friends there. We had coffee during an adjournment and we discussed the possibilities. I discussed the ideas with another provincial court judge and he was very favourable. I then planted the idea with the community that, if they wanted to have input into the court process, they should identify people to be on a sentencing advisory committee.... [464]

Harry Morin, a committee member, described the procedure:

> And the first thing that happened was the magistrate [judge] designated the young offenders to us, and he would say ... "I expect your recommendations at the next court date." So, normally, court is once a month so we had a month to

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[464] C. Fafard (Address to the Fifth Northern Conference, Sitka, Alaska, April 1991) in *Self-Sufficiency in Northern Justice Issues* (Vancouver: Simon Fraser University, 1992) at 270-71.

> work on it. So what I'd do then, was, we had consent forms made.... After that was done, then we'd set a meeting date with the young offender. Normally we held ours at the village office at the council chambers, where it was more private and after hours nobody would bother us, and we'd sit down with the young offender and start questioning the young offender - what he's done, what had happened. And we try looking at why was he doing these things.[465]

Committee member Ina Ray felt her committee positively influenced the young offenders referred through opening lines of communication with them:

> I don't think any of those young people, well maybe one or two, have repeated or got into trouble again with the law .... But more important than that, I think, is the whole rapport that I think we set up with these young people, just making connection with them as an adult and as the older people that were on this committee. It's not very often that we have the opportunity to reach out and to talk to our young people. You know in this busy world they look after their interests, we look after ours, and yet we're all living in this community together, and yet we don't have that chance to sort of talk between generations.[466]

In 1992, Sandy Bay became the first Saskatchewan community to conduct a sentencing circle. Judge Fafard explained:

> A recent phenomenon in native justice development in Saskatchewan is the sentencing circle. The idea did not originate here, as far as I have been able to ascertain, it originated in the Yukon with Territorial [Court] Judge Barry Stuart in the Phillip Moses case .... This method of doing a sentencing hearing first came to my attention when I read about it in a newspaper article. This was in February or March, 1992. I wrote to Judge Stuart to get a copy of the Moses case before it was reported. I subsequently gave an interview on Northern radio and described the procedure and rational for it. It was my hope that this would generate some interest and that an application for a sentencing circle would be made somewhere and we could see how this would work. It was not to be. It seems that if people have things done for them and for them long enough, they lose confidence in their own abilities. Sandy Bay was chosen as the sitting of

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[465] H. Morin October interview, *supra* note 135.

[466] Ray interview, *supra* note 285.

the first sentencing circle in Saskatchewan.[467]

Harry Morin, a participant at the first sentencing circle, described the process:

> Well, we just kind of played it by ear. There was no set guidelines or nothing. We just said "Okay, we'll deal with him, [the offender]" .... [We got] a good mix of people, some young, middle-aged, elders, the RCMP, the magistrate [judge], ... the accused and his family. And we just hacked it out. ... But, instead of looking at punishing the guy, we looked at what's causing him to do these things.[468]

Lawyer Sid Robinson described a sentencing circle held at Sandy Bay July 22, 1992:

> Judge Fafard began his own experiment with sentencing circles in Sandy Bay ... in cases involving a young offender named ... [J.R.], a young offender named ... [J.O.M.] and an adult named David Stanley Natomagan. For these cases, about 20 or 30 chairs were put in a circle and everyone sat down and to discuss the cases at hand. The whole thing worked quite well. Judge Fafard acted as a facilitator and led most of the discussion. However, there was considerable input coming from community members with respect to each of the cases dealt with. I expect the final result in each case was similar to what Judge Fafard might have come up with on his own, but the results were definitely more of a consensus than the decision of Judge Fafard alone.[469]

Another circle, involving 20 participants, was held August 19, 1992 for Peter Antoine McCallum who had committed arson. Sid Robinson reported the offender "received a lot of support from community members who claimed the house he burned down was not a very good house whereas Peter, himself, was a good fellow." The offender received a suspended sentence with probation conditions requiring alcohol treatment.[470]

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[467] Fafard, *Sentencing Circle: A Progress Report, supra* note 23. See Chapter Six of this thesis for a discussion of the interplay between judicial introduction of sentencing initiatives and local community dynamics.

[468] H. Morin October interview, *supra* note 135.

[469] Memorandum to file by Sid Robinson (27 July 1992).

[470] Memorandum to file by Sid Robinson (20 August 1992).

Approximately 20 circles had been held in Sandy Bay as by October of 1994.[471] The range of cases dealt with included assault, assault with weapon, theft under $1000 and arson.[472] Size and makeup of the sentencing circles varied although most included family members of the offender and victim.[473] Constable Brennan identified this lack of consistency and felt circle sentencing would benefit from an established group of community members participating in all circles with only the offender, victim and various family members changing.[474]

By fall of 1994, interest in circle sentencing had declined in Sandy Bay.[475] In November, 1994, a sentence advisory committee was formed at the suggestion of Judge Fafard. A few cases were referred to it for development of a community recommendation on sentence, to be presented at a later court date. This committee

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[471] Although no official record of the circles has been kept, Harry Morin estimated, on September 19, 1994, that 19 or 20 sentencing circles had been conducted. Defence council Felicia Daunt, counsel to the first Sandy Bay circle, estimated on September 28, 1994 that 20 sentencing circles had been held in Sandy Bay. Judge Fafard, when contacted September 19, 1994, mentioned that, often, a number of offenders had been dealt with in one sentencing circle and that his estimate of the total offenders dealt with in Sandy Bay sentencing circles was 20.

[472] This information was provided by RCMP Cst. Brian Brennan of Sandy Bay who had represented the RCMP at several Sandy Bay sentencing circles.

[473] H. Morin October interview, *supra* note 135.

[474] Brennan interview, *supra* note 150.

[475] Interview by telephone with Regional Crown Prosecutor Robin Ritter (6 December 1994). On October 19, 1994, a sentencing circle had been scheduled for Sandy Bay. The circle, respecting a charge of assault, did not proceed as the victim did not attend and, according to the RCMP court officer, had no interest in participating in the circle. On October 20, 1994 a sentencing circle had been scheduled for Pelican Narrows. On this date, the chairperson of the local sentencing circle committee appeared before the judge and indicated that, due to other activities and meetings being conducted by the Peter Balantyne band, there were not sufficient people available to proceed with the circle. This decline, in part, resulted from a lack of interest in circles by offenders and their counsel. However, this decline may also have been due to the novelty of circle sentencing wearing off together with a shortage of local volunteers willing to participate in the circles and provide subsequent offender supervision and support. Discovery of the exact reason(s) for the decline would require more inquiry into the local perceptions of community members, a point of reference encouraged by the post-colonialism framework outlined in Chapter One.

was still functioning the following spring: Judge Fafard referred an offender April 19, 1995.

6.1.3 Perspectives on Community Sentencing:

[a] Community Perspectives:

Although perspectives on the sentencing initiatives varied within Sandy Bay,[476] common themes emerged from community members interviewed.[477] Harry Morin supported a focus on discovering underlying causes of deviant behaviour, rather than punishing specific transgressions.[478] Verna Merasty, a participant in two sentencing circles, viewed her role as providing emotional support for the offender:

> It don't matter what kind of circle, I feel good being part of it, just to make that person [offender] understand, we do care, because we're there for that person, just to let him know, we don't have to say anything to him, we're there for him, and sometimes he need to hear that, because kids - sometimes I find children, they don't hear that at home, you're special, you're pretty, or you're a good person - So they need to hear that outside, it don't matter.[479]

She gave the example of a woman's healing circle formed after the killing of a local women by her partner. Verna, herself a victim of a past abusive relationship,

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[476] One individual spoken to at a local restaurant on October 20, 1994 said that sentencing circles were being used by offenders to avoid punishment and he had been to jail "before there were sentencing circles". He believed there had to be a punishment for wrongdoing but considered personal service to the victim to be a form of punishment.

[477] Those interviewed were predominately persons involved in either the youth sentencing advisory committee or circle sentencing.

[478] H. Morin October interview, *supra* note 135.

[479] Merasty interview, *supra* note 109.

commented:

> Well I've been, I go to a woman's healing circle, especially women that went through violence, and that's been happening for quite some time, and that only woke people up since that incident of [Corrine, the deceased] .... yes because many times of course I've been doing that all the time, but at that time nobody wanted to talk about it, and I could understand, because I felt the same, I didn't want to talk about it, like I said it had a lot to do with shame, and I had a lot of fear, but somehow I overcome that by talking about it, I eased whatever tension I feel inside, and I feel good after talking about it, especially to a group of people, a group of ladies that don't want to talk about it, I said it could happen to you.[480]

Greg Bragstad[481] believed circle sentencing shamed the offender and, as a result, deterred recidivism.[482] Harry Morin identified as a benefit community supervision by community members following a circle:

> You see the nice part of it is, like, the follow up is a lot greater ... and you're also blocking off the breaches [of probation] because you sentence somebody, any young offender that's been addicted to something, and all of a sudden you say okay, no consumption of alcohol or drug of any kind. Well, you're just setting them up. Here, locally, we can follow them up, because we know where the person lives, we keep an eye on them, and if he starts missing, like I said earlier, his counselling sessions or his appointments, then we go and check on him and say hey, you better get down there. That's where it's a lot greater, because like I say, these guys come in once a month, and you don't see them again. They just set up these guidelines and poof, you know, and they don't care whether you breach or not. And here's a system that cares, you know.[483]

He suggested an estrangement existing between local community members and representatives of the prevailing justice system, such as judges and probation officers, who only appeared in town on court day. He expressed faith in the ability of local

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[480] *Ibid.*

[481] Director of the Sandy Bay Outpatient Centre and participant in several sentencing circles.

[482] Bragstad interview, *supra* note 156.

[483] H. Morin October interview, *supra* note 135.

community members to support and supervise offenders.[484]

Greg Bragstad believed circle sentencing had affected Sandy Bay and specific offenders by facilitating a sense of ownership in justice matters among local residents and by deterring the number of people committing offenses.[485] Ina Ray expressed a desire for more local community input into the justice system because of the number of young offenders being sentenced to jail and the lack of help available to these youths while in custody.[486]

[b] Judicial Perspectives:

Judge Claude Fafard, of La Ronge, the presiding Provincial Court judge in Sandy Bay, believed that the criminal justice system suffered from a lack of credibility in northern Aboriginal communities. He hoped the sentencing initiatives would improve this situation:

> [T]he whole problem with our criminal justice system is that we don't have credibility at the ground level. That's where we have to build it first, but at the

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[484] H. Morin October interview, *supra* note 135. This sense of estrangement between the court personnel and community members was also evidenced in Greg Bragstad's comments: " ... the judge flies in from La Ronge. He's here at 8:00 [a.m.] and he's gone [later that day]. The community members are saying we don't want this kind of [offender] action in our community, so it puts more onus on the person than the judge saying it."

[485] Bragstad interview, *supra* note 156.

[486] Ray interview, *supra* note 285. She stated:

> Yeah. Well it sounds so final, you know, sentence, I can almost hear the jail door slamming behind them and locked up. As much as I know about the people in jail, they don't really get any help at all, they're just kind of locked up and you pay your dues and then you come back, and a lot of the young people going into jails in Sandy Bay or wherever, especially Aboriginal youth, they're very troubled and that's why they get in trouble in the first place. They have a lot of things on their minds, they don't know how to cope with them, and they see getting into trouble as a way of getting attention or yeah, getting the attention they need.

> same time we have to have eyes behind our heads, because we have to see to it that those people who can exercise some influence and power over us, such as the Court of Appeal, such as the Ministry of Justice, don't intervene with us too much or at all possibly, while we're doing this business, while we're building this credibility. I still base myself on the premise that any system of justice that doesn't have credibility is useless, or practically. But if you have it, you can't go wrong.[487]

In introducing circle sentencing, Judge Fafard developed criteria[488] controlling selection of cases. He expected the range of cases handled by circle sentencing would expand over time:

> I don't know if those criteria will always be useful or if we'll always stick with them. Certainly I think they will change, you know? But at the beginning while we're gaining experience, we've found they're useful, they've kept us from getting into difficulties that will erode the credibility or prevent us from building up credibility. I suppose I shouldn't say erode because I don't know that we have very much yet. We're trying to build a bank of it .... Then once we've got a bank of credibility, we can start taking some risks, more risks, we can start doing things that we're afraid to do now .[489]

As of summer 1995, only one of his sentencing circle cases had been appealed.[490] He believed this was largely due to the criteria adopted:

> [The lack of appeals is] probably ... because of, I suspect, our criteria. We can more or less tell by assessing the case before it goes into a sentencing circle and the potential of rehabilitation of the offender that presents itself on the brief summary that's given to us, whether or not it's the kind of case that any court could take a calculated risk. It may be outside the [Court of Appeal] range, but the Court of Appeal itself goes outside the range sometimes to take a calculated risk, and I guess that's what's happening. If the sentencing circle and the motivation of the offender can bring up enough factors, enough resources, and enough potential for rehabilitation, that the sentencing circle or a

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[487] Fafard December interview, *supra* note 8.

[488] See statement of these in ch. 5, *supra* note 381.

[489] Fafard interview, *supra* note ?

[490] Following the Sandy Bay circle, the Crown appealed the suspended sentence given to Conrad Bear on a charge of assault against his spouse.

> judge can say well, this may not be the norm, this may not fit into the precedent quite exactly, but it's a good case for a calculated risk. So I think that's what we're doing, we're taking through the sentencing circle, a calculated risk more often than a judge alone would I think, because we have better information and better motivation on the part of the offender.[491]

Despite his recognition of the judge's power and duty to pronounce sentence within Anglo-Canadian law, Judge Fafard had always followed the consensus developed by circle participants.[492]

The possibility existed that a sentencing circle would be subject to local political pressures. This, as Judge Fafard noted, would damage community perceptions of fairness. One criterion adopted by him was the voluntary participation of non-political community leaders and Elders.[493] At the Northern Justice Society Conference,[494] he raised this point in questioning whether the credibility of the circle sentencing process likely would be harmed if the circle became dominated by a local political elite.

In October, 1994, he began directing cases to a local sentence advisory committee in Sandy Bay,[495] to be discussed at a hearing or circle outside of court. While decentralization was an important goal, he believed a judge should be present periodically from time to time to guard against power imbalances between circle participants:

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[491] Fafard December interview, *supra* note 8.

[492] *Ibid.*

[493] Elected community officials.

[494] Held June, 1993 in Kenora, Ontario.

[495] Similar to the committee already functioning at Pelican Narrows.

> At the beginning, until people in the community have some experience with sentencing circles and understand the issues and the pitfalls, I think it's probably important to have some objective outsider there to monitor these things and guard against the pitfalls. But I'm confident that, over time, as people get experience in the sentencing circle, and the purpose of it and problems that can occur if you have an imbalance of power, I think that then people will see to it themselves .... But I still think it's a good idea from time to time to select a case in which a judge will be present because I think it gives you an opportunity to monitor the dynamics of the circle. And if something is going awry or if a certain person or group of persons in that circle is exercising some unwarranted amount of power over other people, and I think if you sit periodically in one of the circles they're having in the community, you can sort of tell what's going on .... If there are some personality conflicts or if you have a group of people sort of banding together to take over control or something ....[496]

Fafard viewed circle sentencing as complementary to mediation/diversion[497]. Similarly, Judge Bria Huculak[498] stressed the importance of developing a mediation/diversion program in addition to circle sentencing.[499]

[c] Defence counsel perspectives:

Lawyer Sid Robinson[500] commented on the few sentencing circles occurring in early 1995 at northern court points. He thought this was due to both fewer requests from offenders and declining judicial interest in the circles. The amount of court time consumed by sentencing circles was a factor limiting their development:

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[496] Fafard December interview, *supra* note 8.

[497] Which is currently functioning in Cumberland House and is proposed for Sandy Bay and Pelican Narrows.

[498] Formerly of La Ronge and now presiding in Saskatoon. She had presided in Sandy Bay from time to time.

[499] Huculak October interview, *supra* note 17.

[500] Interview by telephone with Sid Robinson (17 February 1995).

> Of course, the great difficulty with sentencing circles is that they are fairly time consuming. I expect we spent close to two hours [on July 22, 1992] sentencing the accused involved. With our present resources, I think sentencing circles are going to be used sparingly.[501]

He suggested that development of mediation/diversion may reduce the number of charges in court and thereby allow more time for sentencing circles. Sentence advisory committees[502] would facilitate a circle format while relieving time pressures on the court. Lack of funding for participants of circle sentencing as a limiting factor, in his view. Sentencing circles in such locations as Sandy Bay have been supported and co-ordinated through community volunteers who are heavily involved in a multitude of community activities. In his view, a salaried infrastructure was required to support circle sentencing but he sensed a reluctance on the part of government officials to consider such funding.

[d] Crown or Police Perspectives:

RCMP Constable Brian Brennan had been stationed in Sandy Bay since June, 1993.[503] He had been involved in several sentencing circles and expressed concern over the lack of organization and structure in circle sentencing. He favoured community sentencing recommendations developed in the absence of the judge to conserve court time:

> I think sentencing circles could be an excellent pre-court, post-charge

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[501] Robinson July memorandum, *supra* note 469.

[502] As developed in Sandy Bay and Pelican Narrow.

[503] Brennan interview, *supra* note 150.

> appearance method of dealing with a lot of cases .... especially with the youth ... if it was in the power of the police to say, well, we believe this should go before a sentencing circle, if the person's willing to accept that. And then they would go before a sentencing circle before the person makes a plea in court and ... the sentencing circle would make the recommendation to the judge that this person should receive whatever sentence they believe. Person goes to court, basically reconfirms his guilty plea in front of the judge, judge will accept the sentencing circle and you wouldn't tie up the courts with a lot of trials and adjournments and what-not. Because up here we do court once a month, and every second month is a docket day, and every second month after that is a trial day.[504]

He viewed circle sentencing as inappropriate for major indictable offenses and stressed the necessity of Crown and victim agreement prior to formation of a sentencing circle.[505] He recognized the deterrent effect of sentencing circles upon offenders and suggested this process may be effective in achieving reconciliation between offender, victim and community:

> [W]hen the sentencing circle is actually taking place, you actually see a lot of things come out that may not be relevant to the exact charge, but there's other emotions and things that have been brewing for a long time. And it seems that once these people have got this out in the open, we don't really have any

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[504] *Ibid.*

[505] *Ibid.* He stated:

> If the Crown opposes it, that's it. ...basically the police are the only ones that are in any possession of all the evidence, they know exactly what took place and how the victim feels and if the victim says "I don't want to do a sentencing circle, I'm terrified" say, of the guy that assaulted him, then as the Crown, we have to represent that victim, and if we take the position that we oppose it, that's it. It has to be a majority; everybody has to be on the same wavelength, same consensus. There's not much sense in me representing the Crown at a sentencing circle where I don't think I should be and I think this guy should be sentenced according to case law by the judge because I know he's going to get x number of years. But if he goes before the sentencing circle, and he's an intimidator in a small community, no-one's going to sit there knowing that well, we better not give this fellow too much jail time, because he's going to come back and they're be retaliation and stuff. ... if you have one group that is uncomfortable with the process, then it loses its mandate and it's just not going to work. There has to be some checks and balances and I think if the Crown opposes it, it should be done.

problem again between those two people.[506]

He illustrated this point by describing a sentencing circle held for a young offender charged with assaulting another youth. During the circle it became apparent that this assault was only symptomatic of a longstanding dispute between the two families involved. After fully airing this dispute, a form of reconciliation between families was achieved. The police had not had problems with the offender or either family since the circle.

[e] Probation Officers' Perspectives:

Diane Christianson was the probation officer for Sandy Bay.[507] Stationed in Creighton, Saskatchewan, she had covered this court point since April, 1993 and had little involvement with circle sentencing other than preparation of pre-sentence reports in cases where an offender had asked for a circle.[508] She believed circle sentencing had empowered Sandy Bay community members and had resulted in a greater sense of offender accountability to community and family.

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[506] *Ibid.*

[507] Interview by telephone with Diane Christianson (21 October 1994) Creighton, Saskatchewan.

[508] In one case, she indicated the victim was opposed to a sentencing circle. This was reported to the court and Judge Fafard declined the request.

6.2 Cumberland House, Saskatchewan

6.2.1 Community Overview:

Cumberland House[509] is located on an island in the North Saskatchewan River 140 kilometres north of Carrot River and 85 kilometres south-east of Flin Flon, Manitoba. This community is connected to the main land by ferry in summer and an ice road in winter. Inaccessible at freeze-up and thaw, Cumberland House is isolated during April and November from the communities of southern Saskatchewan.[510] Cumberland House is currently divided into two settlements; the town site with approximately 1000 residents[511] and the Cumberland House Reserve with approximately 400 residents.[512]

Settlement of Cumberland House occurred as a result of the fur trade.

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[509] A field trip to Cumberland House was conducted from December 11-14, 1994. A further trip was commenced on June 21, 1995 but ended *en route* at Melfort, Saskatchewan when I was advised belatedly that the sentencing circle committee meeting scheduled for June 22 had been cancelled. Data collected included observations of mediation/diversion and sentence advisory hearings held by the local committee December 13, 1994 and interviews with committee members, a police officer and lawyers and judges involved with the sentencing initiative. Further written material was obtained through community members, INAC and the libraries at the University of Manitoba.

[510] A bridge will be constructed starting in 1995 and will be completed in 1996. The unusual geography of Cumberland House is reflected in comments by local resident Donald McKay Jr. when interviewed December 13, 1994: "We are very much isolated. As everybody knows in Saskatchewan, Cumberland is an island and we are isolated and we do have a very close community in many respects, and there's other sides of the community too that are not as close."

[511] The townspeople include approximately 300 Metis persons and 600 status Indians who gained status through Bill C-31 but who have not been accepted for membership by any Band including the Cumberland House Band.

[512] This figure was estimated to me by Cyril Roy. A community abstract provided by INAC indicated that the Cumberland House Band is made up of four reserves with the largest located at Cumberland House. Total band membership in 1993 was 564 with 263 living on and 301 living off the four reserves. In addition 58 non-Indians and 18 members from other bands reside on the reserves. No specific figure is available for the Cumberland reserve.

Established by Samuel Hearne in 1774 as the HBC's first post in the interior of Rupert's Land, Cumberland House developed into a major distribution centre by accessing the Saskatchewan River as a "major water highway."[513] Today, Cumberland House is no longer dependant on the river for transportation. Although some community members were involved in trapping during the winter, the fur trade no longer dominates local life. During my field trip from December 12-14, 1994, the major economic activity noted was construction of a bridge across the Saskatchewan River. Swampy Cree is the first language of most residents.[514]

The provincial court sat in Cumberland House two days a month. The court party flew in from La Ronge. Probation service were provided from the Creighton office of Probation Services. Community services included a Northern Company store, a gas station, a motel, a restaurant, a K-12 school, an indoor skating facility and an RCMP detachment.

6.2.2 Introduction and Development of Community Sentencing:

Judge Bria Huculak introduced circle sentencing to the court in Cumberland

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[513] D. Christensen, *Cumberland House Historic Park* (Regina: Department of Tourism and Renewable Resources, 1974) at 3.

[514] The community seemed slow-paced yet friendly and I was welcomed warmly by all residents I met. My observations of Cumberland House were similar to those made in 1960 by J. Kew, *Cumberland House in 1960* Report #2 *Economic and Social Survey of Northern Saskatchewan* (Saskatoon: Centre for Community Studies, University of Saskatchewan, 1962) at 11:

> In Cumberland House today there is little evidence of the romantic past of York boats and canoe brigades. The truth is, this is a quiet little back-woods settlement where everyone knows everyone else and where nothing much happens. The streets are muddy, many houses are roughly built. Most of the people speak Cree at home and English whenever necessary.

House after her appointment to the Bench in 1992.[515] Constable Murray Bartley, RCMP court officer since June 1993, described an early sentencing circle:

> John Dorian [the offender] was a simple assault on, actually, a young offender, as well as interfering with the lawful use of property, those two offenses. It was something that had been ongoing for a long time. The relatives of John were complaining about having problems with him at their residences and they wanted the police to do something about it, and John had a lengthy criminal record ... and as a result the judge wanted to see if we could break the cycle of family problems and decided a sentencing circle would be appropriate .... What happened with John is that people from the community, Elders from the community, sat on the sentencing circle, myself and the judge, the victim that had been assaulted, and the victims regarding the interfering with the private property .... John was given weekend sentences, or intermittent sentences .... John actually became very argumentative and upset during the sentencing circle due to some of the questions that were being asked about his drinking and about his bullying tactics in the community. And he was quite upset about that, actually .... The victim [of the assault] participated, the victim being a youth, I believe he's 17, and however he was quite intimidated by the whole process, never [having] been to court before and so really said very little as far as recommendations to what John should be doing .... When John got upset, the judge tried to calm him down verbally. John was actually ... in a lot of denial as to his drinking, and the problems he causes when he drinks, and felt that an apology was sufficient as opposed to any incarceration or any restitution of any kind .... His sisters [victims of the property offence] actually came across quite well. They did suggest as to appropriate sentencing, they made statements as to John's past history and his drinking problems and how that needed to be

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[515] I had difficulty ascertaining the number of sentencing circles that had been conducted here. Constable Bartley claimed only two sentencing circles were conducted. Other community members referred to sentencing circles in addition to those described by Bartley. Some confusion may result from the description by mediation/diversion committee members of their work as "sentencing circles." Community interest in the approach may by seen through local reaction to a conventional sentencing which occurred in early 1993. In *R v. Chaboyer* (19 May 1993), Cumberland House, Saskatchewan (Prov. Ct.) the offender pleaded guilty to theft of a large amount of money from her employer, Canada Post. At the time of sentencing her counsel asked the presiding judge to consider formation of a sentencing circle. This request was refused and the offender was sentenced to nine months incarceration. The sentence was subsequently appealed. One of the grounds of appeal was that the court erred in failing to direct formation of a sentencing circle. In support of her appeal, a number of letters were sent from a cross section of community members. The following excerpt from one of these letters (addressed to the Saskatchewan Court of Appeal and included in the offender's factum) suggests community recognition of the circle sentencing approach: "I strongly feel that sentencing her to nine months jail was not the route to go. Res[ti]ution, I can see or having her do some community work. The sentencing circle would have been more appropriate." See Letter from Recreation Director of Cumberland House to Saskatchewan Court of Appeal (21 May 1993).

addressed.[516]

Donald McKay Jr. also described a sentencing circle in which he had participated:

> We gathered around and it was called a sentencing circle .... The judge was present. We were sitting around in a circle and we brought the accused and also the victim into the circle and then judge led off by saying this person's being charged for this and this is the person being charged and this is the victim. From there, the judge gave us guidelines to follow on what we thought would be I guess a reasonable sentence for the particular person who was charged and that was the person who had pleaded guilty to the charge.[517]

By December, 1994, no sentencing circles had been held recently at the Provincial Court had subsided.[518]

However, significant interest existed in the so-called "sentencing circle committee" formed at the suggestion of Judge Bria Huculak in 1994. This committee mediated cases diverted by the police or court. It also acted as a sentence advisory committee, developing community sentencing recommendations for cases referred by the court. Donald McKay Jr. explained the committee's procedure:

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[516] Bartley interview *supra* note 364. Constable Bartley also participated in a young offender's sentencing circle:

> It was in 1992, and that was a case that I was very disappointed with, that was probably the first sentencing circle ... that we had, and I suppose you can trump it up to growing pains, that happens when ... you begin a new treatment type of situation, but the young offender was charged with ... theft over $1,000. He was also charged with break and enter and theft [into]the post office and ... leaving the scene of an accident. He also was charged with theft of mail, and I believe there was one more charge. I can't recall what that was, but sitting on the sentencing circle were elders, myself and the judge. I believe there was one relative of the young offender that sat on it, and no restitution was ordered because it would've been impossible for him to pay it. And he received six months of probation .... I recommended a custodial sentence in that regard. He had a previous young offender criminal record, and he was into real serious offenses, one being indictable. And I don't believe it drove a message to the accused or to the community, [with only] six months probation.

[517] McKay interview, *supra* note 320.

[518] This may have represented a loss in interest in circle sentencing among community members given the active participation of the local committee in mediation and sentence advisory.

> Basically it's all I guess kind of a format where we take turns, each of us around the sentencing circle, talking and asking questions to both the accused and the victim, and we decide after that you know, right in front of the accused and the victim, we decide what kind of recommendations we're going to make to the court system on this particular person. But we have to talk with the accused and victim and see they agree with what we see, what we agree to make recommendations [on] to the court.[519]

On December 13, 1994 at the Cumberland House Village Office board room, the committee mediated three young offender cases and considered a sentence recommendation in one adult case. All four offenders appeared before the committee. The committee also considered a mediation case and an adult sentence recommendation for offenders not appearing.[520] Despite the committee's interest in helping offenders and encouraging victim/offender reconciliation, two members[521]

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[519] McKay interview, *supra* note 320.

[520] The first two young offenders appearing had entered a residence under construction, kicked holes in the door and wall and caused $600 damage. The committee took turns suggesting an appropriate disposition. In conclusion, and after receiving agreement from the offenders, each youth was directed to do 37 hours of personal service work for the victim, attend appointments with a local counsellor and abide by a curfew for three months. Committee members took turns speaking to the boys about the seriousness of their actions and, although stressing the helping role of the committee, warned such future behaviour would not be tolerated. Both offenders were told failure to comply with the committee's disposition would result in the matter being referred back to the police and formal court system.

The next young offender case involved a boy who had falsely reported to the police that his school principal had attempted to influence him not to testify in court. Members of the committee were visibly upset by the boy's actions and questioned him at length about his conduct. The boy's mother was called to the hearing. She expressed hope her son had learned his lesson through being brought before the committee. The boy was directed to apologize to the victim, abide by a curfew, attend counselling with a local youth worker and a Mental Health psychologist and take learning disability tests.

An adult offender next appeared before the committee. She had assaulted her victim at a party by grabbing her hair and punching her. Judge Huculak referred this case for a sentencing recommendation from the committee. In her presence, the committee presented a consensus recommendation, developed in her absence, of probation for one year with conditions requiring counselling, refraining from alcohol and an apology to her victim. The offender was openly critical of the recommendation claiming her friends received only six months probation for the same charge. An interesting argument ensued between the offender and committee members. Finally, committee members told her she could either accept their recommendation or "take her chances with the judge". She reluctantly agreed to the committee's initial recommendation.

[521] Interview with Marie McDonald & Mira Nini (13 December 1994) Cumberland House, Saskatchewan.

clearly viewed mediation by their committee as limited to one per offender.[522] Committee members appeared to support a "tough love" philosophy: being firm with offenders to deter future deviance.

The sentencing circle committee initially considered minor offenses referred by the court or police. RCMP Constable Murray Bartley explained:

> I've spoken to Judge Huculak about the criteria, and there isn't a list specifically of cases that can or cannot [be considered] .... I guess there is exceptions to that, spousal assaults being one, that aren't referred to mediation/diversion. *Narcotic Control Act* offenses wouldn't be you know, obvious cases such as murder or sexual assault, wouldn't be related to that .... That is a practice, it's certainly not written down I don't believe, however just in my discussions with Judge Huculak, anything that comes before the court that we're not sure of as to whether it should be given to mediation diversion or not, we simply send them into court and present the cases on both sides, and then the judge makes that decision as to whether she feels it's appropriate or not, mediation/diversion .... I think that the way it is right now, in dealing with more minor offenses, property related, those type of offenses. I think that is sufficient.[523]

Committee Chairperson Cyril Roy explained the committee's involvement supervising offenders:

> [W]e keep in touch with people like if we do send them to a place where they have to go and do some community service work or somebody that he's done damage on his property or something that he has to do for the next month or so. We have a person doing a checking up on the people to see if this client [offender] is showing up at this house .... That's what I'd like to see and I see when the judge comes in here and passes sentence and a probation worker's

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[522] The final case to come before the committee on December 13, 1994 also demonstrated the committee's resolve only to allow offenders one appearance. A young offender had been diverted. The disposition included a curfew and was based on the understanding he was leaving to attend school in Saskatoon. In fact, the offender had never left and was routinely breaching his curfew. The committee emphatically stated they were not prepared to meet again with this offender and suggested his case be referred back to police to be dealt with in court.

[523] Bartley interview, *supra* note 364. Committee member Donald McKay Jr., when interviewed December 13, 1994, advised that the committee had been dealing with charges such as break and enter, mischief, damaging property and minor young offender assaults.

> here for that day, then they fly out the same day, and there's nobody in the community that's going to monitor these people and see how they're doing. And as the sentencing circle committee, at least they [the offenders] know that the people are in this community and people are watching what they're doing. At least they have somebody that's keeping an eye on them and watching them to see if they're making their commitments to go to work or do something else.[524]

He described the committee's focus on helping offenders and the community as a whole.[525] Donald McKay Jr. explained the importance of victim/offender reconciliation in the committee's operation. He believed his community was capable of increased participation in sentencing and mediation: "We know the people that have been victimized and we also know the people charged, and I just think it's a whole community healing process. We know them better than the court systems."[526]

Although Judge Huculak was transferred to Saskatoon by the summer of 1995, the committee continued to function, meeting with several offenders on June 28, 1995.[527]

6.2.3 Perspectives on Community Sentencing:

[a] Community perspectives:

Committee members emphasized the benefits of community sentencing to both

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[524] Roy interview, *supra* note 322.

[525] *Ibid.* He stated:

> There's got to be ways of trying to heal the community itself, and even in the circle itself. Like I ... try and help this young person, to try and make him understand, this is not the way life is. [We suggest] this is the way you should try and run your life. This is the way you try and do it the best you can. Those are some of the things that the committee has brought up. And we're hoping that some day we can go into that direction and help mostly the young offenders because we have to approach the young offenders now, or to start looking for the future.

[526] McKay interview, *supra* note 320.

[527] Telephone discussion with Cyril Roy (21 June 1995).

offenders and the Cumberland House community in terms of familiarity with the people affected and the language used. Cyril Roy explained:

> It's totally different for them going to court and coming to a group of people that they know in the community. And making recommendations to him and seeing that these people sitting in the sentencing circle, that we're trying to do something and trying to address his problems and trying to make him see where his problems are .... The way I see it in the court system is sometimes [offenders are] not given that opportunity, that much time to say what they have to say. Maybe they have a little sort of a fear because of different people in the court, and there's people that are standing up there and they don't know how to address these matters standing there alone themselves. I can see it as totally different when they're [before the] sentencing circle because ... both languages are used [here] in Cree and English ....[528]

Committee member Marie McKenzie felt her committee had an advantage over probation officers who only came to Cumberland House once a month and, therefore, had difficulty relating to community members. In her view, Aboriginal offenders were intimidated by white judges and RCMP officers and could relate better to other Aboriginal people, facilitating communication of relevant information.[529] Committee member Mira Nini thought offenders were more likely to speak in front of her

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[528] Roy interview, *supra* at note 322. He also observed:

> Sometimes I'm sure people will say well I might as well say guilty, and maybe it'll be a lesser sentence or maybe not get jail, maybe I'll let probation, but I think it's better to see when they come to ... our sentencing circle [committee], that the people from the local community deal with this thing locally and that the recommendations this committee give to this offender, that he follows it and abides by it and that I think it's going to work better that way instead of going to jail or getting probation or something like that.... In the long run I can see ...that we're hoping that it will work. Like if we are trying to look in that direction and our vision is to try and see that this is helping the community and also helping the victim himself. And also the offender, to try and keep things going in the community, at the community level. Instead of a judge coming in and saying well, I'll give you three months or eight months probation and another recommendation I'm going to give you is you seek treatment and so on.

[529] McKenzie and Nini interview, *supra* note 521.

committee than to a judge, in part because offenders were able to converse in Cree.[530]

Committee member Abigail Flett commented on the number of young people sent away to jail. Her anxiety focused on lack of information about how such youth are treated in jail. She wanted young offenders left in the community for counselling and supervision by community members. She believed jail had the effect of building anger in offenders who usually returned to Cumberland House after release. Community service work was a better choice.[531] Donald McKay Jr. commented on estrangement between local community members and the prevailing court system, and stressed the desirability of localising control of dispute resolution:

> This is a small community. We see them every day. Everybody knows everybody in Cumberland House .... From my point of view I think the people see the judge coming in as an outside person, which he is, most of the community or all sees him as an outside person coming in to deal with problems that arise in the community. They think if people begin to realize that we, the people around the sentencing circle are people from around the community and want to help the community and help the people in the community both accused and victims. Again, I think they'd rather see them or at least I would rather see them come through a sentencing circle because when the judge flies in here maybe once or twice a month and we in the community have to live with these people.[532]

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[530] *Ibid.*

[531] Interview with Abigail Flett (13 December 1994) Cumberland House, Saskatchewan.

[532] McKay interview, *supra* note 320. Similarly, Elder and committee member Moise Dussion, when interviewed December 13, 1995 stated:

> The kind of things we know, when we see the young offenders, every once in awhile I talked to them, be nice to them, and tell them not to do this and that, kind of behave themselves and ... I think they kind of listened more to the local people than to a judge .... Because we talk to them. We see them here and sometimes we make agreements that .. one of the people sits in the circle visit them once or twice a week and they be told what to do and ask them what they've done,to run into mischief .... Because a judge only comes here once a month, first time once a month, and that's the only time she see the kids. It's mostly teenagers .... when we [the committee] do that right here in our own town, we think that they'll listen to us a little better than putting them away [in jail] for so long and some of them get mad and when they get mad, they want to do it over again [after

Despite the fact that the committee dealt only with minor charges, it was clear that the members felt empowered by their involvement role and by the potential for more local control over dispute resolution and offender re-integration.

[b] Judicial perspectives:

Judge Bria Huculak presided at the Provincial Court sittings in Cumberland House from her appointment in early 1992 until her transfer to Saskatoon in January, 1995. She was largely responsible for local introduction of circle sentencing and development of a local mediation program. She encouraged community members to choose a mediation model they were comfortable with and believed the sentencing circle model was chosen by committee members because of their familiarity with circle sentencing. Although sentencing circles had opened up the justice system to local communities, in her view mediation conferred full community decision-making without judicial involvement and was therefore preferable.[533]

[c] Crown counsel or police perspectives:

Although Constable Murray Bartley approved of the work done by the local committee, he was concerned about lack of co-ordination between mediation/diversion programs across Saskatchewan. Offenders diverted in one location were not identified within the police system and could, therefore, re-offend and be candidates for

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they are released] .... because we talk to them. Every chance I got, I talk to them.

[533] Huculak interview, *supra* note 17.

diversion in other communities because historics were not available.[534] He identified a potential problem with circle sentencing and local mediation:

> The problem you have sometimes with sentencing circles and mediation/diversion is that the groups themselves are related to many of the people here, and so there is some nepotism involved. And also there's the people that appear, some of them that sit on the sentencing circles for example, are intimidated by the accused that appear before them .... I think [offender intimidation]is still a problem even though the judge is there, because the judge will then leave on a plane and not be back here for another month, but those people are still left here with that person [offender] in the community.[535]

As a result, he viewed judicial intervention in Provincial Court circle sentencing as necessary to prevent offender retaliation and ensure consistency between sentences:

> I think that the sentencing circle with the judge can be very good. However it is only as good as its weakest link, so what you have to do in sentencing circles is you have to have people on the sentencing circle who are objective, that will not be intimidated, that are not concerned about damage to their property after they sentence someone, not concerned about retribution. ... Also ... I believe the judge ... has not always ensured that the penalty fits the offence. The judge has always gone by the recommendations of the group .... [The accused is] a community member and ... they have to face the accused on a day to day basis afterwards in addition to being able to face them on that day of court. They're less apt to give him the penalty that he would get normally anywhere else. And I just think the judge has to ensure that the penalty fits the crime, and I don't believe that's always been done.[536]

He recognised the deterrent effect on offenders who appeared before this committee, noting it was more difficult to face a group of community members, including Elders and victims, than to simply plead guilty in court, get a fine and walk away. [537]

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[534] Bartley interview, *supra* note 364.

[535] *Ibid.*

[536] *Ibid.*

[537] Bartley interview, *supra* note 364.

Although his approach to circle sentencing and the committee's operation was positive, he did not believe all offenders would benefit. He used "John" as an example:

> Since that sentencing circle, John has been arrested probably five times by myself. He just got escorted three days ago by the plane to do another term of incarceration of about 6 months for a similar offence .... Sentencing circles I believe are good, but in his case, he is not a person that it really affected as to his ... behaviour since he's been in the sentencing circle.[538]

He recognized both local mistrust of the prevailing justice system and the empowering effect of the Sentencing Circle Committee in Cumberland House:

> I've lived here for two and a half years now. People in this community have talked to me about the judges and defence lawyers, prosecutors, clerk of the court, flying in on a plane together, all of them being white with the exception of one defence counsel. And they've expressed concern about them talking about cases on the plane or in vehicles when they drive up if that's the case, so they feel that it's not really that they're giving a fair, objective deal. I think that them deciding what to do with many of the minor offenses with youths and adults, they're taking back more of their own community, doing things themselves, solving their own problems, basically.[539]

[d] Defence counsel perspectives:

Lawyer Felicia Daunt had attended court frequently in Cumberland House and was one of the first defence counsel in Saskatchewan to be involved in circle

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[538] *Ibid.*

[539] *Ibid.* These observations reflected an earlier description by Kew, *supra* note 514 at 106, of local mistrust of the court system at Cumberland House in 1960:

> There is a close relationship between the Constable and local judicial agents. "Summary conviction" cases (minor cases) are heard by a Justice of the Peace, who is Metis, in the Constable's office. The Justice, who has no special training for his job, is often briefed by the Constable, an action which tends to blur the usual distinction between judge and prosecutor. For more serious cases, an outside Police Magistrate with formal legal training is flown to the settlement. There he is met by the Constable and usually goes to the Constable's office before opening the public hearing in the community hall. It is commonly suspected by the people that the Constable influences the opinion of the Magistrate before the hearing. Indeed, some people accept this as a matter of course, having an imperfect idea of court impartiality.

sentencing in various northern locations. At the sentencing circles she had attended, she sensed a positive reaction from circle participants.[540] She observed that community members were, in effect, making the sentencing decision although the judge formally imposed it:

> I kind of get the impression that (and actually this was my first impression in the first sentencing circle I did) it was the circle that was doing the sentencing. And it is just a technicality that the judge actually imposes the sentence. Different judges have a different approach though. For example, another judge would say specifically at the end "I choose to accept your recommendation and therefore I am sentencing" and she would sort of formally sentence the accused.[541]

She felt such circles influenced the police to take a less severe position on sentence after hearing from the offender and community.

[e] Probation officers' perspectives:

Steve Melaschuk of Creighton, Saskatchewan was the probation officer serving Cumberland House.[542] He viewed the sentencing initiatives as a form of community empowerment facilitating self-respect through involvement in the justice system. Although his only involvement with circle sentencing was supervising offenders ordered to report to him through a probation order, he viewed mediation/diversion development in Cumberland House, and other centres, as encouraging local justice involvement and decision making.

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[540] Interview by telephone with Felicia Daunt (28 September 1994).

[541] Interview with Felicia Daunt (19 April 1995) Sandy Bay, Saskatchewan.

[542] Telephone discussion with Steve Melaschuk (19 September 1995) Creighton, Saskatchewan.

6.3 Pelican Narrows, Saskatchewan

6.3.1 Community Overview:

Pelican Narrows is located 100 kilometres northwest of Flin Flon, Manitoba on a 1,304 acre reserve inhabited by the Peter Balantyne band. This band signed Treaty No. 6 in 1889 as part of the Lac La Ronge band. The native language at Pelican Narrows is Cree. Its population is 2200.[543] In recent years, the Peter Balantyne band had been divided by a land settlement reached between the Chief and Council and the federal government. A dissident group within the band had tried unsuccessfully to prevent the agreement's execution.

Court was held three days a month at Pelican Narrows. The court party flew in from La Ronge and probation services were provided by road from Creighton. Local services included an elementary and high school, a variety store, a post office, the Peter Balantyne band offices, an alcohol treatment centre, a health centre and a seven member RCMP detachment.

6.3.2 Introduction and Development of Community Sentencing:

In the spring of 1994, Judge Claude Fafard began referring cases to a local "sentencing circle" or "healing circle" committee at Pelican Narrows, organized by the Chief and council, for community recommendation on sentence. Cases were considered in the presence of victims and offenders. Proceedings, conducted in Cree, developed a

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[543] The above information was provided by INAC.

sentence recommendation presented later at court. Judge Fafard described the committee's development:

> The band has appointed people to be responsible to see that this portfolio stays on the move. So the interest is always there. I can easily refer cases to a sentencing circle in Pelican Narrows. A lot of those cases I don't attend myself. I just refer the case to the sentencing circle. They get together, they have their circle and then they give me written recommendations. And that seems to be working fairly well.[544]

Co-ordinator Derek Custer said the committee met with the offender and the victim (if he or she was willing) and reached a recommendation on sentence.[545] He emphasized the committee's desire to have offence victims present[546] and the committee's role in supervising offenders.[547] This supervision role was emphasized by RCMP Corporal Bob MacMillan:

> [B]ecause these [offenders are] before a sentencing circle or healing circle, they know who was in the healing circle, and so it's almost like having another extra eight sets of eyes out there because these people know each one of these eight persons was there, knows what's happened, knows what the recommendations were. So, if the recommendations were not to drink, well then you have got to

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[544] Fafard December interview, *supra* note 8.

[545] Custer interview, *supra* note 436. For a discussion of the procedure used see Chapter Five (s. 5.4 The Sentence Advisory Committee).

[546] "When we started off, we thought the victims would be there but ... [during our first circles] the victim wasn't there. So we had to go without the victim. Just recently the victims of each crime have started to show up within the circle. And that is good for the circle, so there's an understanding between the victim and offender, that the victim is ... given an apology from the offender, and the reason for that is ... we want to keep a healthy environment within the community so there's no revenge taken from the victim towards the offender. We want him to, we want to make him understand that. So that is why we recommend that the victim will be in the circle too."

[547] *Ibid.* "The rest of the committee, they supervise as well, you know, they keep an eye on the accused as well; within the community. Because ... one person can't really supervise so many clients. So what we do is, because there's 13 ... [committee members] involved and they live in different areas of the community, they can keep an eye on that individual as well. So, therefore, the person that's in trouble with the law, he is very cautious because there's a lot of people keeping an eye on him ... So that's how it works. Not only one person, but a committee itself and there ... are more people getting involved, then the better it works for us. The recommendations will be followed."

> be careful. And then the word's going to get back, and there's a lot of community pressure .... If you go to jail from a white judge, nobody cares, "Oh well." However, if the community gets on your case, then it's a different story, because now you've got different people of the community, maybe the heads of different families, and they're going to tell their family and everybody will know that he was at a sentencing circle, and Joe Blow got six months probation with no drinking. Well now there's a whole bunch of people that know that he shouldn't be drinking, and they apply pressure. So I think in a lot of ways it should work.[548]

Derek Custer explained that his committee had also developed a rule forbidding subsequent appearances before the committee which served as an inducement for offenders to take advantage of this one opportunity by making positive changes in their lives consistent with the committee's conditions.[549]

Some sentencing circles were held with Judge Fafard in attendance. "The Pelican Narrows circle" involved ten offenders, both adults and youths, charged with a serious assault on a youth. This circle had 25 participants including Judge Fafard, the offenders, members of their families and other community members, two police officers and a defence counsel.[550] The victim was not in attendance as Judge Fafard had recently sentenced him to custody in another case. The circle opened with a prayer in Cree by a local Elder. Judge Fafard outlined the range of sentence under the *Criminal Code* and the *Young Offenders Act* for the offenses involved.[551] Corporal

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[548] Interview with Corporal Bob MacMillan (16 November 1994) Pelican Narrows, Saskatchewan.

[549] Custer interview, *supra* at 436. Despite this rule, one of the ten offenders appearing before the Pelican Narrows circle had previously appeared before the committee and had re-offended.

[550] Corporal MacMillan later advised me that the remaining community members were mainly band employees, many of which who were members of the sentencing circle committee.

[551] All offenders were charged with aggravated assault which carries a maximum penalty under the *Criminal Code* of 14 years imprisonment and under the *Young Offenders Act* of two years closed custody.

MacMillan then outlined the offence circumstances[552] after which circle participants took turns speaking to the offenders and suggesting appropriate sentences. A consensus developed that one offender, the only one with a previous record and apparently the instigator of the assault, should not receive the same sentence as the other nine because he had appeared before the committee earlier on a similar charge. Circle participants felt he should receive a short jail sentence, followed by probation with conditions similar to that imposed on the other nine offenders.[553]

Implementation of local mediation was being considered at Pelican Narrows by the spring of 1995.[554] Corporal Bob MacMillan described the benefits of this approach:

> If ... [local mediation] works ... it will eliminate a lot of our work, because a lot of our work right now is the type of mischief which would be broken windows. ... Somebody's having a party and somebody asks somebody to leave and they don't want to. They get thrown out of the house and they grab a rock and throw it through the window and they phone us up and we go investigate. Really, what the victim wants is the window to be repaired. Period. But, if it gets into the legal process, it doesn't work that way.[555]

In addition to compensating the victim, he suggested mediation would also avoid time-consuming investigatory work by the police.

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[552] The offenders had attacked the victim at his home by forcing their way into his home and then by kicking and beating him. The police believed beer bottles and logs had been used in the beating which left the victim unconscious and bleeding when discovered after the attack.

[553] Including conditions of conditions of counselling at the local alcohol rehabilitation centre, 156 hours of community service work, abstention from the possession or use of alcohol or firearms, taking an anger management course and writing an apology to the victim. These conditions had, in effect, been drawn by the sentencing circle committee who met during the week prior to court to consider these cases.

[554] Interview with Corporal Kirke Hopkins (18 April 1995) Pelican Narrows, Saskatchewan. Corporal Hopkins indicated that, while mediation/diversion for young offenders was in place through the Department of Social Services, referrals to a local committee had not yet begun. He also stressed the use of police discretion in charging results in a form of mediation as not all complaints results in formal charges.

[555] MacMillan interview, *supra* note 548.

6.3.3 Perspectives on Community Sentencing:

[a] Community Perspectives:

Chairperson Derek Custer stressed the need for community education about his committee to expand its effectiveness:

> The circle was questioned at first. But I think people are starting to realize what's going on. You know, people are starting to have interest in it. I think they're starting to realize that it's benefitting the criminals within the community, instead of going to jail, they'd prefer to stay here and that's one of the objectives within the circle that we have. We'd rather have the offender stay within the community instead of going out to jail, because he just brings resentment when people go out to jail. So when we keep them in the community, they're starting to realize that there's caring people in the community, they want to do something good for them.[556]

Committee member Cecile Merasty[557] noted that most people were scared to serve on the committee as they feared offender reaction but felt community education would facilitate greater community participation. Merasty also believed most offenders appearing in Provincial Court did not understand the procedure or language used by the judge and, therefore, remained mute. However, during circles conducted in Cree before by the sentencing circle committee, offenders were empowered to explain why they committed the offence and what steps they were prepared to take in correcting such wrong. She commented on the counter-productivity of sending local offenders to jail, which resulted in a further build-up of anger and retaliatory behaviour upon return to Pelican Narrows. Both Derek Custer and Cecile Merasty acknowledged jail had a

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[556] Custer interview, *supra* note 436.

[557] Merasty and Custer interview, *supra* note 148.

role for serious crimes but felt minor property damage and assaults should be dealt with locally through community-based sentences.

Community members speaking at the Pelican Narrows circle stressed that their committee's work would provide an opportunity for community empowerment as long as offenders recognized their wrongdoing and agreed to change their behaviour. Although recognizing the importance of community participation in the committee's work, one Elder viewed further outside resources as necessary to continued development of circle sentencing in Pelican Narrows. Another Elder maintained that the local community would have a greater impact on offenders than outsiders such as the court party.

[b] Judicial Perspectives:

Judge Claude Fafard questioned whether the justice system can be in any way effective in a community without local participation and suggested the community's "face" may be better than that of an external system. He believed the justice system worked best when a community believed in and had faith in it.[558] He was impressed with the efforts of the Pelican Narrows community through its sentencing circle committee and said, if asked a year and a half earlier, he would not have believed or predicted such involvement.[559] Despite the early stage of this initiative, he viewed the committee and the introduction of circle sentencing as having had some impact at

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[558] **Fafard November discussion, *supra* note 24.**

[559] *Ibid.*

Pelican Narrows as measured by a decrease in the court's case load.[560] Judge Bria Huculak viewed development of a local mediation program as complementing the community's desire for justice system participation but felt local community members lacked confidence in proceeding with this program.[561]

[c] Crown or Police Perspectives:

Corporal Bob MacMillan expressed RCMP support for the development of circle sentencing both in court and through the local committee. He viewed development of local mediation as a further step in community justice involvement and felt local people wanted a greater say in the justice system:

> They recognize the judicial system in the North doesn't fulfil the role it should be fulfilling, and they've wanted a say for quite some time. This is their opportunity to finally have some say. And there's a couple people, some people in the Band that are very gung ho. James Merasty, for one, is pretty much a leader in bringing or changing the justice system to where the people actually will have input into the justice system. So ... there has been a lot of evolution over the last one and a half years, and things are going to continue to evolve here.[562]

He recognized failings of the prevailing Canadian justice system in Northern Aboriginal communities:

> The judicial system, in my opinion, ... doesn't work in the North, at all, for these people .... [For example] two people have a fight on Monday. The victim calls us Tuesday. We investigate it. By the time we collect statements and everything else, it's been two weeks down the road. In the meantime, these two persons have patched up their problems, are friends again. And then all of

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[560] Fafard December interview, *supra* note 8.

[561] Huculak interview, *supra* note 447.

[562] MacMillan interview, *supra* note 548.

> a sudden a summons comes in the mail three weeks later from the offence, to the guy that was the accused and then two months later he's going to court for it. In the meantime, the victim is going, "Well, our problem's over. Why are we doing this?" And then the accused goes to jail. So it solves nothing. The victim is mad then because he was put in a position where he had to come testify against a person he didn't want to testify against. The accused is mad because he thinks "Well, why are the police doing this if this guy's not mad any more. Then all of a sudden you're sending me to jail too?" So it's not a system that's ... right for the people here. I mean, when something happens here they have to be handled forthwith, now, because that's where the problem is now. Two weeks from now, the problem's gone, it doesn't matter any more.[563]

He viewed community opinion as having more impact on offender behaviour than police or court involvement in a community such as Pelican Narrows but doubted circle sentencing would work in a larger community, like Saskatoon, due to lack of community supervision of the offender and lack of awareness and concern about the offender's actions.

[d] Defence Counsel Perspectives:

Lawyer Cathy Bohachik was counsel to one offender at the Pelican Narrows circle and had participated in other sentencing circles in the North. Although she had never attended a meeting of the Pelican Narrows sentencing circle committee outside of court, she believed they were well organized and actively involved in the cases referred to them. She questioned the effectiveness of a sentencing circle with multiple offenders (such as the Pelican Narrows circle which had ten) as less offender feedback is possible compared to a one offender circle. Despite the criteria developed by the La

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[563] *Ibid.*

Ronge judges, she felt there remained confusion respecting which cases would be deemed acceptable for circle sentencing and felt further guidance from the court was required. She hoped circle sentencing would continue as it was a useful tool in combatting recidivism.[564]

[e] Probation Officers' Perspectives:

Diane Christianson was the provincial government probation officer covering Pelican Narrows. She resided in Creighton, Saskatchewan, 120 kilometres south-east of Pelican Narrows.[565] While she was not involved directly in circle sentencing, as Probation Services left such matters to the local community, she made recommendations to the court in pre-sentence reports about the appropriateness of community sentencing involvement. One pre-sentence report she had prepared recommended against a sentencing circle based on victim disagreement with this. This recommendation was followed by Judge Fafard.

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[564] Telephone interview with Cathy Bohachik (28 June 1995).

[565] Approximately 120 kilometres by road from Pelican Narrows.

6.4 Hollow Water First Nation, Manitoba

6.4.1 Community Overview:

Hollow Water[566] is located 190 kilometres north-east of Winnipeg on the east shore of Lake Winnipeg. It covers 4,000 acres of land within the pre-Cambrian (Canadian) shield. The Band's native language is Ojibway. As of 1994, on-reserve population was 490 and off-reserve was 512. This Band is a signatory to Treaty 5 signed in 1875.[567] Hollow Water is bordered by the Metis communities of Aghaming, Manigotogan and Seymourville. Total resident population of Hollow Water and the surrounding communities is 1200.[568]

No regular court sittings are held at Hollow Water. Provincial Court for this community is held 100 kilometres to the south in Pine Falls. However, since December of 1993, the Provincial Court of Manitoba has convened in Hollow Water to conduct two sentencing circles which dealt with five offenders charged with sexual assault.

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[566] Field trips to Hollow Water were conducted February 6 and 22, 1995. Data collected included interviews of Berma Bushie, Co-ordinator of CHCH, CHCH assessment team member Lorne Hagel and Judge Murray Sinclair, observations of a community sentence review conducted February 22, 1995, discussions with community members at the review and written material provided through CHCH, INAC, the Solicitor General of Canada and assorted newspapers.

[567] This information was provided by INAC.

[568] Interview with Berma Bushie (6 February 1995) Hollow Water First Nation, Manitoba. CHCH deals with offenders and victims from Hollow Water and the three Metis communities.

6.4.2 Introduction and Development of Community Sentencing:

Hollow Water represents a unique example of a "community driven" approach to dispute resolution and the healing and treatment of offenders and victims. Its development was described by Rupert Ross:

> In 1984, a group of social service providers got together, concerned about the future of their young people. As they looked into the issues of youth substance abuse, vandalism, truancy and suicide, their focus shifted to the home life of those children and to the substance abuse and family violence that often prevailed. Upon closer examination of those issues, the focus changed again, for inter-generational sexual abuse was identified as the root problem. Other dysfunctional behaviour came to be seen primarily as symptomatic. By 1987, they began to tackle sexual abuse head on, creating what they have called their Community Holistic Circle Healing Program [CHCH]. They presently estimate that 75 percent of the population of Hollow Water are victims of sexual abuse, and 35 percent are "victimizers".[569]

CHCH Co-ordinator Berma Bushie described frustration with the prevailing criminal justice and child welfare systems as factors contributing to CHCH's development:

> We also studied the Child Welfare Act, the legal system and how it was dealing with these [child sexual abuse] cases, and we were horrified to find out that our children were further victimized ... Child Welfare's practice at the time, and probably still is, is when a child disclosed [he or she was] ... removed from the family and, in a lot of situations, a child was removed from the community. And then there's absolutely no help offered to the offender. Everything was turned over to the legal system and charges laid, court would take place, and that's it. And the child would be expected to testify against the offender in criminal court, and to us that's not protecting our children. So based on the laws that continue to govern us, we feel that we have to ensure protection for our children, we have to have a say in what happens to them.[570]

The procedure followed by CHCH's assessment team is complex and includes provision of support and treatment for victims and victimizers and their respective

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[569] Ross, *Duelling Paradigms*, *supra* note 28 at 243. These figures confirm the cycle of violence as some of the abusers must have been previously victimized.

[570] Bushie interview, *supra* at note 568.

families.[571] A thirteen step process is followed by the assessment team[572] after initial disclosure of sexual abuse by a child.[573] This team is further divided into support teams for the victim, victimizer and family.[574] After ensuring safety of the victim, the accused person is confronted by an assessment team member who encourages the accused to take responsibility for his actions and to participate in CHCH. Berma Bushie explained:

> We feel as a community it's our job to go and confront the offender and not to rely on the RCMP because they haven't been very successful in getting people to take responsibility for what they've done. When people see the RCMP, they just clam up, won't speak, and so we feel as a community we have a better ... track record of getting people to take responsibility for what they've done .... Nine times out of ten, the offender takes responsibility, and we inform the offender of the plan in place. We inform them of the community approach. We also inform him about the treatment expectations, the circles that ... he's going to have to go through. We also tell the offender that he has to go plead guilty in court ...[575]

When criminal charges followed a disclosure, the CHCH approach promotes acceptance of responsibility by the offender through entry of an early guilty plea in

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[571] Hagel interview, *supra* note 368.

[572] As of February 6, 1995, the assessment team comprised seven abuse workers, the local child and family service supervisor, a support worker, a counsellor from the band, two Native Alcohol (NADAP) workers, a public health nurse, a local band constable, an RCMP officer from Pine Falls, a person from the Roman Catholic church, two people from provincial Child and Family Services and the local school principal.

[573] See T. Lajeunesse, *Community Holistic Circle Healing: Hollow Water First Nation* (Ottawa: Solicitor General Canada, 1993) in Appendix A. who set out the steps as: 1. disclosure, 2. protecting the child/victim, 3. confronting the victimizer, 4. assisting the victimizer's spouse, 5. assisting the family or families directly affected and the community, 6. meeting of assessment team, 7. victimizer must admit and accept responsibility, 8. preparation of the victimizer, 9. preparation of the victim(s), 10. preparations of all family or families, 11. the special gathering, 12. the healing contract implemented and 13. cleansing ceremony.

[574] Bushie interview, *supra* note 568.

[575] *Ibid.*

court. Assessment team members then ask the court to adjourn sentencing for at least four months to allow treatment with the offender to begin.[576] Offenders are expected to participate in four circles culminating in a sentencing circle.[577] These circles involved: first, the offender disclosing details of his offence to the CHCH assessment team, second, the victim telling the offender how the abuse had affected her life, third, the offender describing his actions to his family and fourth, the offender facing his community in a sentencing circle.[578]

CHCH has actively opposed offender incarceration and has argued that jail can not break the generational cycle of violence[579] as it only reduces the chances of other victims and abusers coming forward. Berma Bushie stated that incarceration provided no treatment for offenders and has failed to deter sexual abuse:

> When a person is incarcerated ... they return, thinking that they've paid their price for their crime. And the chance of re-offending is very high, because there's no treatment, absolutely no treatment in the jail system for offenders. And why I say that is because one offender that was incarcerated and was

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[576] Berma indicated that this period of time was requested so that the assessment can be ensured that offenders are committed to healing.

[577] As explained by Rupert Ross when interviewed January 4, 1995, prior to the introduction of circle sentencing in December, 1993, the assessment prepared and presented recommendations on sentence to the court sitting in Pine Falls. Therefore, the sentencing circle is relatively new to the process.

[578] Bushie interview, *supra* note 568.

[579] See Community Holistic Circle Healing, *CHCH Position on Healing* (Hollow Water, 1993) at 3-4 where it was argued:

> The legal system's use of incarceration under the guise of specific and general deterrence also seems, to us, to be ineffective in breaking the cycle of violence. Victimization has become so much a part of who we are, as a people and a community, that the threat of jail simply does not deter offending behaviour. What the threat of incarceration does do is keep people from coming forward and taking responsibility for the hurt they are causing. It reinforces the silence and therefore promotes, rather than breaks, the cycle of violence that exists. In reality, rather than making the community a safer place, the threat of jail places the community more at risk.

> willing to work with us ... sat in jail under the pretence of some traffic violations. And so how could he deal with his crime ... when he has to pretend that he's in there for something totally innocent. So that's the reason why we don't want our people going to jail. And they come back thinking they've done their [time], they've paid for the crime, and in most cases we have no way of working with these people because it would have to be totally voluntary on the offender's part [after release].[580]

A focus within the CHCH process has been restoring harmony to victims and offenders and the community-at-large through traditional holistic practices.[581] In addressing this goal, a conjunctive relationship developed between CHCH and the criminal justice system both prior to and after sentencing.[582] A protocol between the Manitoba Department of Justice and CHCH was negotiated in 1991 in which the Department recognized CHCH's program as an option for treatment and supervision of sexual assault offenders and agreed to consider a non-custodial sentence if recommended by the assessment team.[583] This protocol was negotiated by CHCH to give the assessment team input into sentencing and avoid repeatedly educating Crown

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[580] Bushie interview, *supra* note 568. Assessment team member Marcel Hardesty supported this analysis, when spoken to February 22, 1995, by explaining he had asked a sexual offender, recently returned from jail, whether he would commit the offence again. The offender responded that he would be sure not to get caught if he did it again. Marcel questioned the lesson being taught by jail.

[581] CHCH, *Position on Incarceration* (Hollow Water, 1993) at 4. The position paper outlined this focus:

> [W]e are attempting to promote a process that we believe is more consistent with how justice matters would have been handled traditionally in our community. Rather than focusing on a specific incident as the legal system does at present, we believe a more holistic focus is required in order to restore balance to all parties of the victimization. The victimizer must be addressed in all his or her dimensions - physical, mental, emotional, spiritual - and within the context of all of his or her past, present and future relationships with family, community, and Creator. The legal system's adversarial approach does not allow this to happen.

[582] Hagel interview, *supra* note 368.

[583] Protocol for Manitoba Department of Justice Support for the Community Approach of the Hollow Water Community Holistic Circle Healing. Brandon, Manitoba (1991).

attorneys about the CHCH approach.[584]

The first sentencing circle at Hollow Water occurred December 9, 1993[585] and involved serious sexual assaults perpetrated both parents on their children. The assessment team foresaw dire consequences for the offenders if this case was to be dealt with in the conventional system, given the potential magnitude of sentence.[586] Representations were made by CHCH to the Provincial Court requesting a sentencing circle be held at Hollow Water. The submission characterized circle sentencing as an extension of the community's role in holding offenders accountable and healing the pain inflicted:

> In our conjunctive relationship with the legal system we see our role as one of representing our community. We do not see ourselves as "being on the side of" the Crown or Defence. The people they represent are both members of our community, and the pain of both is felt in our community.
>
> Until now our efforts have focused on (1) attempting to help both crown and defence see the issues in the court case as the community sees them, and asking for their support, therefore, in representing the community's interests, and (2) providing the court with a pre-sentence report which outlines the situation as we see it, informs the court of the work we are doing with the victimizer, and offers recommendations on how we see best proceeding with the restoration of balance around the victimization.
>
> Now, however, we believe that it is time to expand the community's involvement in this process. We believe that it is time for the court to hear directly from the community at the time of the sentencing ..... Up until now the sentencing hearing has been the point at which all of the parties of the legal

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[584] Bushie interview, *supra* note 568.

[585] Rollason, "Ceremony Heralds Healing," *supra* note 29. This circle is hereafter called the "Hollow Water circle."

[586] According to assessment team member Lorne Hagel, Judge Murray Sinclair advised the circle that, given the offenses and circumstances involved, eight to ten years incarceration would be a realistic sentence for these offenders in the prevailing system. When interviewed January 17, 1995, Judge Sinclair advised me that the initial Crown position on sentence was five to six years incarceration while even defence counsel conceded that two and a half to four years incarceration may have been appropriate for one offender with less jail time for the other.

> system (crown, defence, judge) and the community have come together. Major differences of opinion as to how to proceed have often existed. As we see it, the legal system usually arrives with an outside agenda of punishment and deterrence of the "guilty" victimizer, and safety and protection of the victim and community; the community on the other hand, arrives with an agenda of accountability of the victimizer to the community, and restoration of balance to all parties of the victimization.
>
> As we see it, the differences in the agendas are seriously deterring the healing process of the community. We believe that the restoration of balance is more likely to occur if sentencing itself is more consistent in process and in content with the healing work of the community. Sentencing needs to become more of a step in the healing process, rather than a diversion from it .... The sentencing circle promotes the above rationale .... As we see it, the sentencing circle plays two primary purposes (1) it promotes the community healing process by providing a forum for the community to address the parties at the time of sentencing, and (2) it allows the court to hear directly from the people most directly affected by the pain of the victimization. In the past the crown and defence, as well as ourselves, have attempted to portray this information. We believe that it is now time for the court to hear from the victim, the family of the victim, the victimizer, the family of the victimizer and the community-at-large.[587]

The Hollow Water circle commenced at 7:00 a.m. with a sunrise and pipe ceremony and ended at 9:00 p.m..[588] The circle involved over 200 community participants.[589] At

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[587] CHCH, *The Sentencing Circle* (Hollow Water, 1993) at 3-4. This submission also recommended at 5-10: appropriate circle participants, community preparation for the sentencing circle, physical setting of the circle and the process and rules to govern the circle. These recommendation appear to have been adopted by Judge Sinclair. See "Trial by Healing Circle" *Canadian Lawyer* March, 1994 at 7-8.

[588] Sinclair interview, *supra* note 73.

[589] See Rollason, "Ceremony Heralds", *supra* at note ? where the author described the process followed:

> While the smell of sweetgrass filled the air, two circles were formed in the centre of the hall for the sentencing of a man and woman charged with incest. The inner circle of about 40 people held the key participants- including both offenders and victims- while the outer circle consisted of about 200 other relatives, friends and community members .... Just before court was called to order, a man holding a tray of burning sweetgrass and buffalo grass went around the inner circle, allowing each participant to "wash" the smoke over their hair, faces and clothes. Passing an eagle feather from hand to hand, each person spoke in order around the circles. The discussion went around a total of four times. During the first circle, people spoke about why they were there. During the second, participants were able to speak to the victims. The third and fourth circles were designed to be separate - one centring on the effects of the crime and the other on "restoring balance" to the offenders. However, when the proceedings threatened to extend well into the night, the last two circles had to be melded into one ....

its conclusion, all participants, except a cousin of one of the victims but including the crown prosecutor, agreed jail would be counterproductive for these offenders. Judge Sinclair indicated to me that these offenders had progressed from a state of total denial to one of total acceptance and responsibility for their actions. In addition, the two had actively worked in convincing 100 other sexual abusers from Hollow Water to come forward and admit their actions publicly.[590] At the circle's conclusion, Judge Sinclair imposed a three year suspended sentence on each offender with probation containing a condition that each offender follow the directions of the CHCH assessment team.

Despite the many disclosures of abuse resulting from "the Hollow Water circle", only one subsequent sentencing circle had been conducted and no evidence was found of an increase in sexual assault charges laid against Hollow Water residents.[591] This suggested many incidents of abuse were being dealt with locally outside the conventional justice system or were not being dealt with at all.[592] Local involvement in dispute resolution reflected the framework of legal pluralism discussed in Chapter One. At one level, the community was working conjunctively with the formal justice system, through the involvement of CHCH members in court

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[590] Sinclair interview, *supra* note 73.

[591] When interviewed January 23, 1995, assessment team member Lorne Hagel said he was seeing more cases being dealt with outside the criminal justice system: CHCH was dealing with offenders without charges being laid. Also see P. Moon, "Native Healing Helps Abusers: Offenders Admit Guilt, Avoid Jail Terms" *The Globe and Mail* (8 April 1995) A1 & A5 which stated that, since 1986, only five offenders had been jailed instead of entering the CHCH program. 48 offenders were stated as enrolled in the treatment program. With only five offenders having been sentenced within a sentencing circle, the fourth circle in the CHCH process, and with few offenders having been incarcerated outside the program, it appeared likely that many offenders in the program had not been charged.

[592] Another explanation could be that incidents were being ignored.

assessments and circle sentencing. At another level, the community was apparently operating separately from the state, assuming complete control of dispute resolution.

As part of this local system of social control, and in an effort to hold offenders responsible for their actions and encourage their active participation in treatment, a community review was held on the six month anniversary of each sentencing circle. During an interview on CBC radio, Berma Bushie explained:

> One of the things that the community does is, after sentencing, we tell the offenders "for the next three years, you are on probation and every six months we are bringing the case back to the community, for the community to review how you are doing in treatment ...." [The community review] is one of the ways , besides probation, ... used to make sure that people are following the [sentencing circle's] recommendation.[593]

A community sentencing review held at Hollow Water February 22, 1995 for three sexual offenders[594] was attended by approximately 30 community members including

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[593] Bushie radio interview, *supra* note 108. The review process encourages community assistance in holding offenders accountable for their victimization and promoting active participation in their treatment. As explained by Berma Bushie when interviewed February 6, 1995:

> We found that after the first sentencing circle back in December, 1993 ... that in the treatment area that ... there was a regression on the part of the offenders. They were getting back into their denial process. They were getting back to creating negative support for their case and stuff like that.... [W]e felt that ... [our assessment] team was not strong enough to stop the regression and to get the people [offenders] back on track with their healing. And because the community came out to speak and give recommendations to the court for their sentencing [circle] .... We felt as a team ... we needed to go back to the community to report ... what was happening. ... And as a team we felt that, before we thought about going through [the process of charging the offenders with breach of] probation and bringing this case back to court, ... we felt that we ... should go back through the community. First, give all the details ... and have the community help us decide where this case should go. ... And they [the community members in attendance at the review] felt that these people should be given a chance, and that, again, they repeated their support for these people. They repeated their expectations of the kinds of treatments they wanted the offenders to take, and the work that they wanted them to do. And we said "Okay, we'll do that and six months down the line, we'll come back and we'll report to you and see how these people are doing."

[594] Sentenced in a circle subsequent to the Hollow Water circle. This review is hereafter referred to as "the Hollow Water review."

one of the victims.[595] This review followed a similar format to the first Hollow Water circle. During successive rounds of the circle, review participants learned of the treatment and progress of all victims and offenders and, in turn, addressed the three offenders and one victim in attendance. Participants also developed recommendations for continued offender treatment and victim support.[596]

6.4.3 Perspectives on Community Sentencing:

[a] Community perspectives:

CHCH's development provided an interesting insight into local community dynamics and justice perspectives. Initially, CHCH assessment team members became very unpopular within the community as many people blamed them for raising painful memories. Berma Bushie referred to this period as the "crucifixion":

> I would say [the "crucifixion" lasted] about the first five years, from '86 to '91. I think it took our community that time to finally accept that this problem is here, that many, many of our people have been affected by sexual abuse, and that it continued to affect our children, and once our community was able to focus on the children, then they couldn't deny the problem any more. And our children I feel more than once have saved our community because they're the ones that began to disclose about current situations and through that process it helped our community begin to accept the problem because they could not

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[595] The victim in attendance was victimized by two of the offenders. She was apparently sitting in a circle with her abusers for the first although she did not speak. The other victim had moved to Winnipeg. An assessment team member assigned to each victim and offender was present and reported to the circle.

[596] Comments by review participants evidenced strong community pressure on offenders to continue and advance treatment. Several women , while acknowledging progress made by each offender, openly challenged the offenders not to regress in their treatment and to assist the assessment team by naming their other victims. Berma Bushie commented to the offenders that jail "would have been the easy way out for you." She thanked them for taking responsibility for their actions and for facing their community in the circle.

> deny the children. They could deny us, the adults, trying to break the cycle. But the children helped the community accept the problem and begin to look at ways of dealing with it at the community level.

Although CHCH had come to enjoy significant public support, she described its dynamic relationship with the Hollow Water community:

> We find that we cannot leave our community behind. Why I say that is in the last two years, our team has concentrated on developing the treatment and making sure that was solid and in place. And so ... we did not have the time to work on the community piece. What we used to do was a lot of workshops, just keeping that consciousness open, and teaching the adults and there was a lot of group work being done. So there was a lot of prevention aspects to our work. In the last one and a half years, we haven't been able to do that. So we've kind of left our community back there.[597]

When interviewed February 6, 1995, she feared her community was slipping back into a state of denial about sexual abuse and felt that re-emphasis on community education was required.

Assessment team member Marcel Hardesty viewed CHCH as one means of community empowerment. In his opening remarks at "the Hollow Water review", he described self-government as people gaining "control over their own lives", not merely control over financial resources. Despite the close relationship between CHCH and the justice system, assessment team members believed this link should eventually be severed. Marcel Hardesty believed his community could hold abusers responsible for their actions through public awareness of specific victimizations and education and treatment of offenders.[598] Berma Bushie described the process she envisaged after separation from the prevailing system:

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[597] *Ibid.*

[598] Discussion with Marcel Hardesty (22 February 1995) Hollow Water, Manitoba.

> We would use exactly the same process where the offender has to take responsibility for their action. Minus the court. That would mean ... some kind of justice body, maybe Elders, an Elders panel, Elders group, or maybe Chief and Council [would exist] where these people come and state their guilt, and take responsibility, and we would use exactly the same process as we have been. That's putting them through the circles, and doing the sentencing circle ....[599]

She observed that local control of the justice system would allow CHCH to enforce a five year treatment plan on offenders as opposed to the maximum probation period of three years under the *Criminal Code*.[600]

[b] Judicial Perspectives:

Judge Murray Sinclair presided at both sentencing circles conducted at Hollow Water as of summer, 1995. At the request of the CHCH assessment team, he agreed to facilitate movement of the court to Hollow Water and to preside at both circles.[601] When interviewed January 17, 1995, he discussed the current problem of domestic abuse in many Aboriginal communities which arose, he said, partly from oppressive practices of governments and other external systems. These contributed to the inability of Aboriginal communities to shape appropriate social conduct for their members. Residential schools imposed an institutional model on Aboriginal children which taught external control rather than internal control through development of appropriate

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[599] Bushie interview, *supra* note 568.

[600] Although noting that sexual abuse treatment was a life-time process, she viewed five years as the amount of time required to render an offender healthy enough to become a resource to the community.

[601] Bushie interview, *supra* at 568.

value systems.[602] He believed the current justice system had not been effective in dealing with sexual abusers from Aboriginal communities. Court proceeding took place away from the offender's community (at The Court of Queen's Bench in Winnipeg). If convicted, offenders faced a penitentiary term during which sexual abuse treatment rarely occurred. Upon release, they usually returned to their community without the benefit and supervision of a probation order.[603]

At "the Hollow Water circle", he agreed with the circle consensus that jail would be counterproductive,[604] but noted the suspended sentences imposed were based on exceptional circumstances.[605] The CHCH assessment team had worked extensively with these offenders and their victims and provided the court with substantial documentation supporting such a sentence. He was impressed with the progress of CHCH which he described as a "community driven" (rather than "judge driven" or "offender driven" process). The community foundation of CHCH was evidenced during

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[602] He believed a socialized dependence upon external control systems lead to misbehaviour when such controls were removed.

[603] Because of s. 737(1)(b) of the *Criminal Code*, a probation order cannot follow a jail term of over two years.

[604] Specifically, he joined the consensus which acknowledged:

> 1. Jail would not break the cycle of abuse for the specific offenders. The only thing to be broken would be the offender's healing circle;
> 2. Jail would discourage offenders in the community from coming forward for help(ie. there would be no incentive to participate if major jail time was the result); and
> 3. Jail would serve as a disincentive for victims to come forward (they are more likely to come forward if they think that their parents will not go to jail).

[605] Both offenders took unconditional responsibility for their actions, participated fully in treatment and worked actively in Hollow Water convincing over 100 victimizers to come forward and admit their actions. He said he had met with CHCH assessment members prior to the first sentencing circle and had made his position clear that jail was a distinct possibility for such offenses and that there could be no guarantee of a suspended sentence.

his first sentencing circle at Hollow Water where he felt like an invited guest but not the focus of attention.

[c] Crown or Police Perspectives:

Crown attorney George deMoissac represented the Crown at both sentencing circles conducted at Hollow Water. He viewed CHCH as a highly trained and dedicated community-driven organization and felt that the protocol negotiated with the Department of Justice had the full support of local community members. It had been designed for the unique circumstances of Hollow Water as a remote community with a community-based approach to addressing inter-generational sexual abuse. The CHCH assessment team had done sufficient groundwork to satisfy him, at both sentencing circles held, that a suspended sentence would be consistent with the parameters of the protocol. Although he believed the evolution of circle sentencing at Hollow Water was in its infancy, he interpreted the community's rationale for supporting this approach as being that victims would be more likely to disclose abuse if they were less concerned about their abusers going to jail.[606]

[d] Defence Counsel Perspectives:

Jill Duncan represented one of the offenders sentenced at "the Hollow Water circle". As reported in *Canadian Lawyer*[607], she observed the circle melded "traditional

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[606] Interview with George deMoissac (29 June 1995) Winnipeg, Manitoba.

[607] "Trial by Healing Circle", *Supra* note 587.

court requirements with a healing circle". She found community participation at the sentencing circle to be a sign of strength and community support for this process and viewed circle sentencing as appropriate for sexual assault charges given what she believed to be the "learned" nature of this offence. Despite her generally positive experience at the sentencing circle, she expressed concern about the applicability of this approach outside of communities such as Hollow Water. She viewed circle sentencing not as a "native/non-native issue but rather a rural/urban issue" and doubted that a healing circle would work in Winnipeg "because most residents don't know their neighbours."[608] She believed this approach could work in Hollow Water because "they are all long-time residents who form a tight-knit community and will be accountable for the ... [offenders]."[609]

[e] Probation Officer Perspectives:

The assessment team of CHCH was named as the body to supervise all offenders sentenced during the sentencing circles held at Hollow Water.[610] Berma Bushie commented that "outside" probation officers simply did not know the resources within her community.[611] Questions surrounding the power to charge offender with breach of probation had created confusion within the CHCH assessment team. In

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[608] *Ibid.*

[609] *Ibid.*

[610] Technically, offenders were to report both to the CHCH assessment team and to the assigned probation officer from the Department of Justice. In reality, offender supervision was conducted entirely through CHCH.

[611] Bushie interview, *supra* note 568.

February, 1995, the team was considering having an offender under their supervision charged with non-compliance of a probation order condition. However, it appeared that the final decision rested with a probation officer from outside the reserve, suggesting that the community's powers are curtailed by justice system requirements.

6.5 Waywayseecappo First Nation, Manitoba

6.5.1 Community Overview:

Waywayseecappo[612] is located 351 kilometres northwest of Winnipeg. The reserve encompasses 24,856 acres of rolling land. The community's economic base is agriculture. On-reserve facilities include an K-12 school, a health office, Band office, recreation facilities and a community centre. This band is a signatory to Treaty 4 signed in 1874. It has approximately 1500 members with two thirds residing on the reserve.[613] Its native language is Ojibway.[614]

Sergeant Roy of the RCMP Rossburn detachment[615] indicated Waywayseecappo had grown in population substantially since the late 1980's during a program of

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[612] A field trip was conducted to Waywayseecappo March 2, 1995. Data collected respecting Waywayseecappo included observations of court conducted March 2 and interviews with members of the Elder's Advisory Counsel, Judge Giesbrecht, the local probation officer, a band councillor in charge of justice matters, an R.C.M.P. Sergeant from Rossburn and defence and crown counsel. Written information was also obtained from INAC.

[613] L. Longclaws, L. Barkwell & P. Rosebush, "Research Note: Report of the Waywayseecappo First Nation Domestic Violence Project" (1994) XIV:2 Can. J. Nat. St. 341 at 343.

[614] Above information obtained from INCA in Winnipeg.

[615] Whose area includes Waywayseecappo.

housing construction. He sensed a recent development of a middle class on the reserve with an increase in on-reserve employment opportunities through such projects as the Waywayseecappo School.

Prior to December, 1993, the Provincial Court sat only in Rossburn, approximately 15 kilometres from Waywayseecappo. After this date, monthly court hearings were held on the reserve. Court is held in a local community hall across from the band office.

6.5.2 Introduction and Development of Community Sentencing:

The Provincial Court at Waywayseecappo is conducted in a circle-format.[616] The Elders' Justice Advisory Council[617] sits in the circle with the judge, police, the local probation officer and defence and Crown counsel.[618]

This sentencing initiative grew out of consultations between Judge Giesbrecht and local community representatives and a justice proposal submitted by this First Nation to the provincial government.[619] The Chief and Council of Waywayseecappo had asked for court to be moved from Rossburn to the reserve.[620] Judge Giesbrecht

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[616] The hearings include only docket court and sentencing for accused or offenders from the local community. Trials and preliminary hearings continue to be held in Rossburn.

[617] Comprised of up to five Elders from this first nation and hereafter referred to as "the Elder's Council."

[618] Interview by telephone with Judge B. Giesbrecht (24 February 1995).

[619] Interview with Judge B. Giesbrecht (2 March 1995) Waywayseecappo First Nation, Manitoba.

[620] Judge Giesbrecht advised me 95 percent of the cases heard in Rossburn originated from Waywayseecappo.

met with local community representatives and agreed. Government funding was obtained in response to the justice proposal for hall rental for court, establishment of a resident probation officer and a per diem allocation for Elders sitting on the Elder's Council.[621] Consultation within the Waywayseecappo community determined the model to be used in court would be the Elder's Council.[622] In addition to sitting with the judge and court on scheduled court days[623], the Elder's Council also held meetings a week before and after monthly court dates. Offenders and accused persons appearing in court were either ordered or encouraged by the court, with support from the Elders, to attend such meetings which featured traditional Ojibway lessons, talking circles, healing circles, sweetgrass, smudging and traditional prayers.[624]

Court on March 2, 1995 was held in a rectangular room. The front half contained a circle of chairs with microphones in the centre recording proceedings. The back half contained rows of chairs set up in conventional courtroom fashion.[625] The circle included Judge Giesbrecht, three Elders, Sergeant Roy, local probation officer Herman Mantuck, defence counsel Merv Hart and Bob Harrison and Crown attorney Lawrence McInnes. Court opened and closed with an Ojibway prayer offered by an

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[621] Interview with Herman Mantuck (2 March 1995) Waywayseecappo First Nation, Manitoba.

[622] Discussion by telephone with Band Councillor Tim Cloud (9 March 1995).

[623] Which on March 2, 1995 included meeting with and discussing some of the cases to be dealt with prior to court opening.

[624] Mantuck interview, *supra* note 621.

[625] Judge Giesbrecht expressed some concern to me that the room was not ideally shaped to accommodate a "circle-type" of court as the remainder of the community in attendance were essentially relegated to the role of audience. This appeared to be the case as the accused called forward appeared not to know whether they should sit with the court party in the circle or stand during consideration of their charge(s).

Elder who wore a ceremonial dress and held an eagle feather in her hand. Proceedings included a combination of docket[626] and sentencings carried over from earlier court dates or other court locations. The Elders, who sat on both sides of the judge, participated only in sentencing.[627]

During sentencing, Crown and defence counsel made submissions on offence and offender circumstances and on appropriate sentence. Judge Giesbrecht then asked the Elders to comment. They provided information about each offender, stated their opinion on his needs and made recommendations on appropriate sentence. No victims appeared in the court circle and no offenders personally addressed the court.[628] The Elders generally voiced a perspective opposing jail.[629] Judge Giesbrecht accepted their recommendation in one case and, while acknowledging respect for their views, disagreed in another.[630]

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[626] Arraignments and pleas or elections.

[627] Which on March 2, 1995 involved three cases out of the total list of approximately 30 adult and youths appearing before the court. Most persons appearing simply had their charges adjourned to a later date.

[628] With the exception of the young offender who was asked by Judge Giesbrecht if he understood the terms of his probation order and that court was being adjourned to June on his outstanding charge. He said he understood.

[629] Crown Attorney Lawrence McInnes, when interviewed after court, noted the Elders rarely, if ever, suggest jail for an individual but do distinguish between cases in the forcefulness of their submissions against jail. Indeed, on March 2, 1995, the Elders forcefully argued against jail for a young offender charged with a break and enter in Rossburn. Judge Giesbrecht accepted their recommendation and placed the young person on strict probation despite the Crown's request for closed custody disposition. However, regarding an adult offender charged with breach of recognizance by drinking and contacting his spouse (who he was also charged with assaulting), the Elders, while not advocating jail, were less vocal in their defence of this offender. Apparently, this offender had been ordered or asked to attend the Elder's Counsel meeting back in January when his charge had been adjourned. He had only recently done so. Judge Giesbrecht sentenced the man to 75 days in jail.

[630] Placing a young offender on probation in the former case while sending an offender to jail for breach of recognizance on the latter.

6.5.3 Perspectives on Community Sentencing:

[a] Community Perspectives:

Members of the Elder's Council were interviewed after court. One Elder stressed her role as a traditional Ojibway healer. All Elders acknowledged the importance of traditional Ojibway spirituality to their work with offenders and believed their Council was having a positive effect, although they did not further evaluate its impact.[631]

Local probation officer and community member Herman Mantuck was also interviewed. While unable to make a final judgement on the impact of the Elder's Council given its short duration, he thought offenders felt more comfortable appearing before their Elders at Waywayseecappo than before the conventional court in Rossburn. He viewed the Elder's Council as a starting point for local community involvement in the justice system by incorporating traditional Ojibway teaching and practices into court procedure. He predicted the impact of the Elder's Council would not be seen for some time as many local people were still not aware of the Council's functioning. However the sentencing initiative, in his view, had served as a form of

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[631] Crown attorney Lawrence McInnes later told me that all Elders currently sitting on the counsel were abstainers from alcohol consumption. He said one of these elders viewed former Prime Minister John Diefenbaker as a great enemy of their people because his human rights initiatives had lead to removal of the prohibition of alcohol on reserves. Sergeant Roy stressed that the specific Elders chosen by the chief and counsel for the Elder's Counsel were highly respected at Waywayseecappo. By contrast, both Roy and McInnes indicated that some other Elders on the reserve did not enjoy such community respect and noted that one such Elder had been in custody on March 2 and had been remanded in custody for a later appearance in Brandon court.

community empowerment for Waywayseecappo and a means for his people to achieve a stronger sense of their own identity. Overall, he believed the Elder's Council had given some offenders a chance to stabilize their lives through use of traditional Ojibway practices.[632]

[b] Judicial Perspectives:

Judge Brian Giesbrecht[633] had attended court at Waywayseecappo on a number of occasions since introduction of the Elder's Council. He was supportive of the Elder's Council initiative and hoped it would facilitate more local involvement in justice matters.[634] While stressing local community responsibility for choosing the Elder's Council model as a vehicle for local participation, he noted health problems among Elders on the Council as a problem affecting development of this sentencing initiative.[635] He also questioned the degree of respect accorded these Elders by younger persons in the community.[636]

Regarding community sentencing development, he commented on the

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[632] He was not prepared to generalize the Elder's Panel experience at Waywayseecappo to other communities. He stressed that all communities are different and noted his believe that local community interest in re-establishing the prominence of traditional Ojibway teachings and practices facilitated the initiative. He believes communities in which Christianity is strong are less likely to accept the type of re-integration of traditional practices seen at Waywayseecappo.

[633] Who resides in Brandon and is an Associate Chief Judge of the Provincial Court of Manitoba.

[634] He recognised that previously outsiders had performed all functions within the system for the people of Waywayseecappo.

[635] As of March, 1995, of the five elders on the panel, two elders were unable to participate as one had cancer and one had high blood pressure.

[636] Giesbrecht February interview, *supra* note 618.

significant number of initiatives which had been commenced and abandoned in Aboriginal communities of Manitoba and Ontario over the past 20 years.[637] He believed these projects failed for a variety of reasons including changes in local leadership,[638] a loss of government funding or the departure of a key person involved in the initiative.[639]

[c] Crown or Police Perspectives:

Crown Attorney Lawrence McInnes and RCMP Sergeant Roy were interviewed after court March 2, 1995. Both viewed the Elder's Council as a positive step for the community of Waywayseecappo and as a vehicle for local community empowerment.[640] Both acknowledged the respect accorded Elders on the Council by local community members and felt these Elders possessed valuable insight to assist sentencing deliberations. Sergeant Roy indicated the difficulty, at such an early stage, of interpreting the Council's impact. He reported no change in recent RCMP case statistics from Waywayseecappo although the local population had increased steadily in recent years without any corresponding increase in case load. Both men viewed the

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[637] He noted an elder's panel set up by Judge Kopstein some years back at the Rousseau River Reserve in Manitoba which functioned for some time and then "fell apart". Judge Kopstein, interviewed May 31, 1995 in Winnipeg, described an Elder's sentencing panel used by him at Rousseau River in the mid-1970's. Two Elders, appointed by the Chief, sat with him during court and advised him on appropriate sentence. Judge Giesbrecht's analysis pointed to a long-term difficulty in keeping the community, and perhaps judges and lawyers, interested and involved in community sentencing.

[638] With the new leadership not supporting the initiative.

[639] Usually a judge or influential community member.

[640] Overall, Lawrence McInnes observed significant progress by the Waywayseecappo community. He commented that, 20 years ago, the reserve was an extremely violent place with a significant number of murders. He felt the situation has improved greatly.

role of local probation officer Herman Mantuck as indispensable to success of the Elder's Council.

[d] Defence Counsel Perspectives:

Defence lawyer Merv Hart had appeared regularly in Waywayseecappo court since the introduction of the Elder's Council.[641] He thought that the Elders' focus was on offender rehabilitation rather than retribution and that they were decent people attempting to help local offenders. He recalled the Elders being very stern when addressing several young offenders who had broken into the local school and suggested that the embarrassment of appearing before the Council served as a potential deterrent to his clients.

[e] Probation Officer Perspectives:

Herman Mantuck's job activities included supervision of offenders on court ordered probation and undertakings and preparation of pre-sentence reports for adults and youth.[642] He viewed the Elder's Council as a positive first step for his community although he felt the specific impact of this approach would not be ascertainable for some time.

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[641] Interview by telephone with Merv Hart (8 June 1995) Brandon, Manitoba. Merv is employed by Manitoba Legal Aid in Brandon.

[642] He regretted he had not had sufficient time to focus on community education through meetings and workshops. Indeed, it appeared his presence and work was indispensable to the functioning of the Elder's Council initiative.

6.6 Mathias Colomb Cree Nation (Pukatawagan), Manitoba

6.6.1 Community Overview:

Pukatawagan[643] is located 819 kilometres north of Winnipeg, 210 kilometres north of The Pas[644] and 40 kilometres down river from Sandy Bay, Saskatchewan. The community is accessible by air (through an airline owned by the Mathias Colomb Band), by rail and, in winter, by an ice road from The Pas.

The Mathias Colomb Band was formed in 1910 after a group separated from the Peter Balantyne Band of northwest Saskatchewan. In 1994, the band had a total membership of 1,921 and an on-reserve population of 528. Community services included a hotel, restaurant, convenience store, laundromat, heath-care centre and school. Police services were provided by a detachment of the RCMP, through local band constables and a volunteer "peace keeper" group which patrolled regularly and assisted community members in need.[645]

Prior to the establishment of an RCMP detachment and local sittings of the provincial court in Pukatawagan, dispute resolution was handled within the local community. Elder Gabriel Bighetty gave an example:

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[643] A field trip was conducted to Pukatawagan from April 9-12, 1995. Data collected respecting this community included observations of court held April 11, interviews with the local Justice Committee, defence counsel Joyce Dalmym, RCMP Corporal Robert Brossart, probation officer Karen Dumas and Judge William Martin. Other written materials respecting Pukatawagan were obtained through the Justice Committee, INAC and the libraries at the University of Manitoba.

[644] Information obtained from INAC.

[645] Interview with Corporal Robert Brossart (11 April 1995) Pukatawagan, Manitoba.

> The old people in the old days, I think they were doing way better before the white people came to the community because I remember I just seen just the edge of it of that thing being settled. In 1930, in the years '30, '31, in between there, people that put themselves into trouble in them old days, the Chief and the Councillors used to have their own court. They didn't have a court every month, every once in a while. If they would have three people that been in trouble themselves, they'd get them three people and they'd put in court to talk to them and then the Chief would give a sentence to George. "Well, George, you've been doing that" .... So, they'll tell George, "you go and cut three cords of wood, that's your penalty". Well, George had a woman cut three cords of wood, then he'll go to the Chief and the Councillors and say "well, I cut up my three cords of wood". They don't take his word. They go and check to see if that's three cords of wood there.[646]

In the 1970's, Pukatawagan came to be known as "Dodge City of the North" due to its high rate of violent crime.[647] By 1995, this situation had improved, in part due to the local Justice Committee. Committee member Hy Colomb described the changes:

> And then we started to talk about ... the year 1975, when our Pukatawagan community was a bad place. And you must have heard about that. I don't have to ask you because if you didn't hear about it, it is very funny because the rest of the world did. So, I says we'll try to bring out a community way better than how it was and [show] how it is now.[648]

Recent years have also witnessed renewed emphasis on traditional Aboriginal practices at Pukatawagan.[649] Healing circles had been used within the community outside of the

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[646] Interview with Gabriel Bighetty (10 April 1995) Pukatawagan, Manitoba.

[647] See B. Lowery, "Local Native Officials Tame North's Dodge City" *The Winnipeg Free Press* (16 November 1992) B3 where the author commented on this history and subsequent changes within Pukatawagan:

> In its violent heyday during the 1970's, Pukatawagan ... was seeing four slayings a year in a population of only 1200. The RCMP believe this may have been the highest per capita homicide rate in North America. But over the past four years only one homicide has occurred on the reserve, the RCMP report.

[648] Interview with Hy Colomb (10 April 1995) Pukatawagan, Manitoba.

[649] During an interview with lawyer Joyce Dalmyn January 27, 1995 in Winnipeg she stated: "I'm not sure at what point people started going back to traditional ways or never really left them. There are still people who live out on the trap line. And now that is a skill or course that's being taught in school ...."

Provincial Court and the local Crisis Centre had conducted a family healing workshop during the summer of 1994.[650]

Resistance to the Provincial Court system was apparent at Pukatawagan during the 1980's. Members of the band became disenchanted with the circuit court servicing the reserve from Thompson. Under Chief Pascal Bighetty, a band council resolution was passed prohibiting the court party from entering Pukatawagan.[651] Joyce Dalmyn described the changes to Provincial Court in Pukatawagan resulting from this incident:

> Pukatawagan used to be run out of the Thompson court system and during the time when Pascal Bighetty was chief, there was a problem where the community BCR'd [passed a band resolution banning] the Thompson court party for various reasons which remain somewhat mysterious, but have something to do with the Crown wanting to leave at 4:30 and other such things and never getting through a docket. And at the request of Chief Bighetty, Judge Martin specifically, out of The Pas, was requested to come to Pukatawagan and have court. So the whole system shifted where probation from The Pas had to take over and the court parties started travelling out of the Pas.[652]

The Provincial Court now sits in Pukatawagan once a month. Court is held in a local community hall.

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[650] *Ibid.*

[651] See G. York, *The Dispossessed: Life and Death in Native Canada* (Toronto: Lester & Orpen Dennys, 1989) at 170 where the author described this resistance:

> Bighetty believed the judges were ignoring the wishes of his 1,400 band members, who wanted tougher jail sentences to battle the rising crime rate in Pukatawagan. "Northern courts have become a farce," the chief declared in 1986. As his frustration mounted, Bighetty warned that he might prohibit the provincial judges from entering his community. A senior provincial official scoffed at the threat and accused the Indians of "grandstanding". That was the last straw for Pascal Bighetty. "The ban is on," the chief announced. "Any provincial court judge, official or lawyer who sets foot in our community will be charged with trespassing." The people of Pukatawagan had the legal right to keep outsiders off their reserve, so the monthly court proceedings were shifted to Lynn Lake, the nearest town.

[652] Dalmyn interview, *supra* note 649.

6.6.2 Introduction and Development of Community Sentencing:

The focal point of community sentencing participation in Pukatawagan has been the Justice Committee. Committee member Hy Colomb, a former chief of the First Nation, described the committee's development:

> Pascal Bighetty was the Chief that time, in 1983, so he talked to us about having a Justice Committee here. And then from there we started to go on the court day. Well, they have court here every month. So we started. Like before, we didn't go to the court on the court days. So we decided. We brought it up in our meetings we should go to the court days so we'll know how this guy gets his sentence and then we'll know who was there and how many times this guy had been on the courts off and on. We'll learn something from there if we go to court on the court days ....[653]

He said the Justice Committee began by meeting with and counselling troubled community members and subsequently actively involved the RCMP and the band's Chief and Council in their deliberations. Committee member Liz Bear described the Justice Committee's organization:

> There are still eight members. There are four women and four men and each one is assigned a specific group to deal with when it comes to dealing with the referrals received from the courts or from the RCMP or from any organization that wants to deal with the misbehaviour of an individual because we all have our own little expertise, I guess, our knowledge of these certain groups.[654]

A community review of the Justice Committee had recently been conducted revealing concerns about its ability to deal with more serious cases of abuse. The Committee was able to deal with "minor charges like first-time offenders" but it could not deal

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[653] H. Colomb interview, *supra* note 648.

[654] Interview with Liz Bear (10 April 1995) Pukatawagan, Manitoba.

with cases such as sexual abuse or acts of physical abuse and assault charges.[655] By April, 1995, the Committee was dealing with the mediation of disputes referred from the RCMP, the provincial court and community members or agencies. Members were also regularly attending at Provincial Court to advise the judge on sentencing for specific offenders.

Corporal Brossart stated that cases were referred to the Justice Committee for mediation both by the RCMP and the Provincial Court.[656] Liz Bear described how cases were also referred to the Justice Committee by local community members without involvement of the formal justice system:

> Like the commonest ones that we have is harassment ... family feuds or whatever or there was a misgiving at some time and when the person is perhaps under the influence. They go and verbally harass the person in a public area or they vent out to their kids or stuff like that. We get those referrals made here .... We always ask the complainant, what would you like to see out of this situation? What's your recommendation? Then I bring that back here and then we talk about it again. Say Mrs. Smith put a complaint against Mrs. Somebody. So I want to ask Mrs. Smith what do you want? What would you

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[655] During an interview April 11, 1995 at Pukatawagan, RCMP Corporal Robert Brossart noted the limited range of cases considered by the Justice Committee:

> Right now with the women's groups opposing the Justice Committee getting involved in things such as serious things like spousal abuse, the courts no longer refer that to the justice committee to deal with. As with some of the more serious complaints, sitting on with the Justice Committee, they felt that they weren't capable of dealing with more serious matters because they were like I say still in the learning stage, still trying to deal with smaller problems, the social problems of the community and more minor matters and just things that they can basically deal with by talking to people and healing them that way ....

[656] *Ibid.* He stated:

> A case can go two ways to the justice committee, it's either referred directly from our office after receiving a complaint or the provincial judge's court will send a matter over to be dealt with by the justice committee and they'll hear the circumstances and they'll set some kind of penalty or some kind of help to work with the person .... Now the charges vary depending on what we send to them, but we have a tendency of sending less serious charges to them because they're still in the developmental stages and still learning court procedures etc., so they try to work out some of the minor squabbles and minor assaults and things like that that happen within the community.

be comfortable with to make this thing settle?[657]

The Committee met regularly with offenders, and often victims, in an effort to resolve disputes. The Committee often directed offenders to take corrective action such as counselling by an Elder, alcohol treatment or making an apology or restitution to the victim. Committee member Hy Colomb gave an example:

> And then like the other times that I was telling you, when we have our meetings and the guy who makes the trouble comes in, and then our chairperson, Chief Caribou, would tell this guy here, he says "you go and see George every week for two months". Well that means this guy has to go and talk to George eight times. Well George will be talking to this guy and explaining him all kinds of things, how to get him out of trouble. After two months, George had a report in to us that this guy had been to him there every week, eight times. Well, that was his sentence. But that's good ....[658]

Reconciliation between offender and victim was a goal of the Justice Committee as Liz Bear explained:

> We ask the victim to come in. Either they come in with the offender there - like the two parties involved - or one at a time we hear their side of the story. If the victim or the complainant is comfortable, they can come and listen as to what we're going to say to the perpetrator or whatever you want to call him .... That's our intent to always put people back into a relationship ... relative, wife's family, wives, whatever way. It is to come back and see and to stand corrected that somebody did indeed do a wrong; otherwise, that complaint wouldn't be here .... There would be an apology given. There would just be a time that they air out their differences here and we're sitting and we're giving guidance or providing some advice.[659]

To increase compliance with their dispositions, the Committee developed a

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[657] Bear interview, *supra* note 654.

[658] Committee member Gabriel Bighetty described efforts by the committee to compensate victims monetarily for property damage suffered by deduction from the offender's welfare cheque: "So because they can't pay, the only thing to do is just find out what to do now. We go and ask the Council and the Chief to take out from their welfare so much every month in order to pay what they break it ....".

[659] Bear interview, *supra* note 654.

practice of allowing offenders to appear before it only three times, after which the offender would be referred back to the formal court system.[660] Despite the less serious nature of cases being referred to the Committee by the RCMP and court, Joyce Dalmyn noted that, for a time,[661] many spousal assault charges were referred to the Justice Committee for mediation, largely because the Crown realized there was little chance of conviction given the reluctance of complainants to testify. This form of resistance to the court system was described by Corporal Brossart:

> Spousal assaults, for a while, were going to the Justice Committee .... Reason for that ... is testifying is not really big or high on the priority list. We've received numerous complaints at this detachment. However when it comes time for the actual trial date, very few trials go ahead due to the fact the complainant no longer wishes to pursue the matter .... They find it easier with the Justice Committee to maybe try and help that problem or assist it as opposed to with the provincial courts. The spouse doesn't want to testify. Therefore, the charge is stayed and nothing is done ....[662]

The Justice Committee also participated in sentencings at the Provincial Court either through providing advise to judges respecting specific offenders or, together with other community members, through formal and impromptu sentencing circles. Judge William Martin described the evolution of community sentencing participation in the Provincial Court at Pukatawagan:

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[660] Interview with George Colomb (10 April 1995) Pukatawagan, Manitoba. George explained:

> Three times to Justice Committee. Whether they are going to take their Elders' advice or whether he is going to take advice what they are working for. If they don't do it, the next time he come in on the third time, he doesn't show up or he doesn't want to do it, he wants to play his own game, so we just give him to the [Provincial] Court. So that's where he cannot speak for himself. He could speak for himself in here but over there is a different world, he couldn't even speak for himself. All he has to do is what the court said. He has to do it whether he likes it or not....

[661] During an eight month period in 1993.

[662] Brossart interview, *supra* note 655.

> It was about six years ago that the Chief of the Pukatawagan Band started an initiative, I think assisted by Joyce Dalmyn, to institute and get rolling a type of Justice Committee at Pukatawagan and to explore the possibilities of having the court function with more input from the community itself. Initially, there were five, possibly six, members of that Justice Committee and I speak now of 1989/1990 and we held some very moving and, to my mind, very fruitful sentencing meetings with the whole of the community present ....[663]

When advising on sentence, members of the Justice Committee initially sat with other community members and subsequently sat beside the judge.[664] Joyce Dalmyn described one memorable consultation between the presiding judge and the Justice Committee:

> The judge said that he viewed any sexual assault to be serious and one where jail was appropriate, and then he stated to the Justice Committee, I feel that in this case jail is appropriate, but I want you to tell me whether you think I should give him a really high fine, around $1000, or whether I should send him to jail. And then he conducted a poll or a vote and the Justice Committee voted and decided that this man should get a $1000 fine in addition to probation terms which is what the Justice Committee had basically recommended to the judge because the offender had already indicated he would go to a lengthy alcohol treatment program, and he had a number of things

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[663] Interview with Judge William Martin (11 April 1995) The Pas, Manitoba. An issue raised by Justice Committee members was payment for their attendance at court. As explained by Theresa Bighetty:

> When the court time the Justice Committee don't go in the court because we don't get paid. That's why they don't like to go there - don't want to sit there for nothing .... Well, everybody likes to get paid when they do something.... This thing is not really settled yet. I remember I got paid a couple times there going on the court dates. I get paid just a couple of times. But before that, we didn't get paid before that. And now, I believe, right now, by this time now, I think is now settled now....

[664] This evolution was described by Joyce Dalmyn on January 27, 1995:

> There have been different trends throughout the oh almost three years I've been going to Pukatawagan. Initially the Justice Committee members were just sitting in the audience. And for about the past at least two years rather than having rows of chairs in the audience, we have the chair set up so that there's a large circle formed, or sometimes a double circle depending on how many people are present, because docket days often there are 60 or 80 people on a docket, so the circle sometimes is quite large. So the Justice Committee used to sit among the members of the public and then some members of the Justice Committee felt that they should be sitting somewhere else. So there had been various meetings at various times where the Chief has invited the court party to meet with him at lunchtime or the justice committee has met with us, and we've had a couple of different meetings between the entire court party and justice committee members and members of the RCMP. So there's been sort of this evolution, but now, as a whole, they tend to sit at the front with the judge ....

> going in his favour including being accepted for university and all sorts of other things. So I've never seen anything quite that particular, but based on the vote, the justice committee prevailed and he got $1000 fine in addition to probation![665]

The first formal (planned) sentencing circle occurred at the Provincial Court in November, 1993.[666] Two hundred community members attended. An eagle feather was passed around the circle and all were given a chance to speak, including the victim's parents, on the appropriate disposition for the young offender concerned. The circle featured traditional practices including sweetgrass and drums.[667]

Joyce Dalmyn indicated that four or five sentencing circles had been planned in advance and that informal/impromptu circles happened "every second month but sometimes two to three times a day". She said the technicalities of circle sentencing had been introduced to this community by probation officer Brenda Goulet of The Pas who was of Aboriginal descent and had "very strong beliefs in native healing and traditional methods." Regarding the first sentencing circle Dalmyn commented "it seemed to me at the time that it was something that was novel and new to the members of the community...."[668]

The sentencing circles at Pukatawagan, both planned and impromptu, all appear to have followed the same procedure with counsel giving their submissions first,

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[665] *Ibid.*

[666] This circle was not technically focused on consideration of sentencing of an offender but similarly considered the appropriate disposition for a young offender review pursuant to the *Young Offenders Act.* The offender had been convicted of criminal negligence causing death.

[667] Dalmyn interview, *supra* note 649.

[668] *Ibid.*

followed by community members and then the offender. Each participant would speak in turn as an eagle feather was passed around the circle.[669] No criteria for selection of appropriate cases for circle sentencing has been developed at Pukatawagan. Joyce Dalmyn indicated most circles, either planned or impromptu, were initiated by the request of offenders or the direction of judges:

> But it sort of seems that the Crown never initiates the circle.... Quite often it will be [initiated by] an accused, usually with some involvement of counsel, who recognized that there's benefit because there are people sitting in court who are going to say, don't send this guy to jail. So quite often it will be the accused who'll either come up with it totally on his own or who counsel will say, do you think we should get the community involved, especially if they're telling counsel I've been doing this and that. On the other hand, sometimes it's just the judge .... Sometimes they need some justification for their decision. Sometimes I think they want to hear from the community, because it's one thing for me to stand up and say, my client states that he has not had a drink since this offence occurred in March. And if there's somebody sitting in the community who's his next door neighbour, that person is going to say well no, that's not true I saw him drunk last week. So I think sometimes that's what the judge is looking for, so sometimes it's initiated by the judge and there's really no warning.[670]

Joyce Dalmyn stated that victims had usually been involved in circle sentencing, and described concerns about lack of victim involvement in mediation through the Justice Committee.[671] Concerns had also been expressed to her over lack

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[669] *Ibid.*

[670] *Ibid.*

[671] *Ibid.* She stated:

> One of the problems when we initially were diverting matters from court to the Justice Committee, one of the big problems that happened was, the victims were not being involved. And then the victim would come to court and say "Well, this is crap, I don't want anything to do with it, I want this guy to be punished." So then in order for the Crown to allow something, it was stated very specifically in court that the victim had to go to the Justice Committee meeting ....

Corporal Brossart also echoed this concern:

of impartiality by the Justice Committee members:

> And I know there have been concerns expressed to me by certain accused in certain cases, that, "Well I went to see the Justice Committee because I was told to and it wasn't fair because well so-and-so are the parents of the victim. So I didn't get a fair hearing." So that certainly has been a concern. "And I asked them [the relatives] to step aside and they wouldn't." So those concerns have been expressed to me by certain people. Some members of the justice committee have from time to time sort of specifically said, I'm not going to say anything because of this or that. So there is a real concern. And especially when there are these circles that take place, it's very easy to stack them, and the judges do not at this point seem to be looking out for that, they don't ask people to identify themselves, to say who they're related to, they just basically take whatever anybody says in the circle. But they do make a point of trying to have the victims present, which I think is important and maybe that serves to counter-balance ... [any such bias].[672]

Despite such concerns, the Justice Committee was facilitating ongoing community participation in Provincial Court sentencings, and mediation.

6.6.3 Perspectives on Community Sentencing:

[a] Community Perspectives:

Residents interviewed were all members of the Justice Committee. Gabriel Bighetty commented on the impact of his Committee on offender behaviour:

> Finally, a guy realizes that's the way I should do and there's lot of guys starting to change. Even the jailbirds when they're coming in and they start fooling around like that, we talk to them too. They're starting to slow down . . . and

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So now they're trying the healing aspect of it, where a lot of times the victim isn't taken into consideration, where the courts show, okay, this victim's been assaulted, this victim has had a broken window. As a result of that, buddy is going to pay a fine, or pay you for the damage or he's raped you, he's going to jail for a period of time. Whereas on the other side the Justice Committee well it's all an alcohol problem, we'll send you to a NADAP worker or to an alcohol treatment or anger management treatment.

[672] Dalmyn interview, *supra* note 649.

> slow down, don't do that. We talk nicely ....[673]

He also felt that too many Cree people were sent to jail by the courts but believed the Justice Committee was improving this situation by effecting changed behaviour among the offenders they dealt with. Liz Bear viewed the Justice Committee as having empowered the community of Pukatawagan through promoting local justice participation.[674] She stressed her Committee's focus on healing, treatment and reconciliation as compared to the prevailing system's focus on punishment and incarceration.[675] She also believed that local offenders would be more likely to accept treatment by direction of the Justice Committee than the provincial court:

> Maybe if the Justice Committee made that recommendation it wouldn't sound like such an order. When you get a court order to go to a rehab centre, there is very much resistance .... because they are being ordered to go and they only go and satisfy that condition. They are not going there for themselves.[676]

[b] Judicial Perspectives:

Judge William Martin had witnessed the evolution of community sentencing

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[673] G. Bighetty interview, *supra* note 646.

[674] Bear interview, *supra* note 654. Similarly, George Colomb perceived that offenders were empowered to participate more in proceedings before his Justice Committee than before the court. G. Colomb interview, *supra* note 660.

[675] She stated:

> The focus over there for them is incarceration, that's the courts. They go by punishment for anything committed. We're saying yes, there is some sort of punishment but we're not going to send you out to jail. We're going to try and help you deal with it here and we listen to you. You offer some solutions on how we can help you or what would you rather see. You know you have a choice here. You learn to quit your behaviour by going out and learning why you abuse. You know what other factors, what environment do you have to change in your home, what do you have to work on and are you committed to going to work with somebody here?

[676] Bear interview, *supra* note 654.

participation at Pukatawagan:

> I was very impressed with not only what was said, but the fact that people whom I had never heard speak before were able to air their feelings about themselves, the community, what it needed and, whether or not it was relevant to the sentencing process. It was worthwhile listening to these people. And often they wouldn't deal directly with the accused himself or with the problem associated with sentencing, but they would let me know in a general way just how the community felt about that particular person and whether or not there was any hope for rehabilitation and so forth. In a general way, as well, I found the Aboriginal people in that community, notwithstanding its reputation for violence, to be very forgiving and understanding of the problems of their fellows ....[677]

Although he heard all community members who wished to speak about sentencing, he viewed community advise as a resource only to be accessed after a finding of guilt or guilty plea and after sentencing submissions by counsel. He recognized the possibility of informal dispute resolution tribunals in Aboriginal communities:

> It is difficult to say where it might go from here. But I think without a concerted effort by our courts and/or the Aboriginal people themselves to form their own courts or mediation boards or whatever might be the answer [it will go nowhere]. But I do believe that some form of justice could easily be worked on the reserve using Elders as peacemakers so to speak, especially in family disputes and things like that. They have the resources to order a person to take anger management. They have the resources to give alcohol counselling and so forth....[678]

He said such tribunals would deal with minor offenses while more serious transgressions would be referred to a Crown attorney.

[c] Crown or Police Perspectives:

RCMP Corporal Robert Brossart recognized a difference in focus between the

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[677] Martin interview, *supra* note 663.

[678] *Ibid.*

prevailing justice system and the Justice Committee:

> I suppose each has got its pluses and minuses to it. The Justice Committee itself tried to work with the person to make them a better person. I've seen repeat offenders that have gone to the Justice Committee, I've seen them abuse and assault and re-assault. But then again I've also seen that from the provincial courts. One system as opposed to the other, I don't know if one's better than the other .... Because the majority of the decisions from the Justice Committee, or all I've ever seen, are to get counselling, and there's no form of deterrent. As opposed to the provincial system, you do something wrong you get some community hours like we've seen this morning or a fine or sentenced to jail. With the Justice Committee all it is is healing. They try to work with the person, make them a better person and try to deal with it that way. So they'll send them for NADAP counselling, alcohol counselling, anger management. They'll send them out on some kind of counselling ....[679]

While recognising the Committee's focus on healing the offender, he questioned the degree of offender follow-up done by Committee members.[680]

[d] Defence Counsel Perspectives:

Defence counsel Joyce Dalmyn had noted varied perspectives among offenders respecting Justice Committee involvement: some perceived this as the route to a lighter sentence or no sentence at all yet others appeared to have genuinely benefitted from such community support and involvement.[681] She also noted strategic considerations, as defence counsel, in deciding whether to request a sentencing circle:

> As defence counsel I have to be careful, I'm not going to ask for a sentencing circle if my client doesn't have the people who will come to court and say good things about them .... I think the judge takes the view that the Justice

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[679] Brossart interview, *supra* note 655.

[680] He stated: "The follow-up is really relaxed to. You can give any sentence you want, but if there's nobody to check or follow-up on that sentence, makes it very difficult."

[681] Dalmyn interview, *supra* note 649.

> Committee is impartial, which is an unfair view, because the Justice Committee are all members of the community who have relatives....[682]

She was concerned that judges had drawn negative conclusions from a lack of community comment about an offender. She viewed this as unfair because "sometimes people don't say anything because they don't know the person or just don't care ...."[683]

[e] Probation Officers' Perspectives:

Karen Dumas was the resident probation officer in April, 1995 and sat in an advisory role on the Justice Committee. She noted that some probation orders had directed offenders to report directly to the Justice Committee and that the Justice Committee was consulted and allowed input into the preparation of pre-sentence reports for the Provincial Court. She also commented that victim and offender involvement before the Justice Committee had helped to promote the healing process at Pukatawagan.

6.7 Conclusion

These case studies each disclosed a unique experience with the introduction and development of community sentencing and/or mediation. Perspectives of estrangement from and dissatisfaction with the prevailing court and justice systems co-existed with cries for local involvement in the development and supervision of offender sentences

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[682] *Ibid.*

[683] *Ibid.*

and dispositions. Community sentencing and mediation consistently resulted in the empowerment of local participants. The following chapter analyzes the findings of my study and provides a blueprint for further sentencing research and reform in Aboriginal communities.

PART FOUR: FINDINGS AND CONCLUSION

Chapter Seven: Summary and Conclusions

7.1 Development and Functioning of Community Sentencing and Mediation

This study considered the development of community sentencing and mediation in six Aboriginal communities of Manitoba and Saskatchewan. Data from these communities, together with Canadian case law and secondary materials considered, yielded four models facilitating local participation: circle sentencing, the sentence advisory committee, the Elders' or community sentencing panel and the community mediation committee. Circle sentencing[684] involved community members and victims who, together with offenders, defence and crown counsel, probation officers, police and judges, joined in designing and, in some cases, supervising offender sentences. The sentence advisory committee[685] considered cases referred to it from court and developed sentencing recommendations in the absence of the court party. The Elders' or community sentencing panel[686] sat with the judge and offered advice on appropriate sentence in specific cases.[687] The community mediation committee[688] dealt with cases

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[684] Practised at the Provincial Court sitting in Sandy Bay, Pelican Narrows and Cumberland House, Saskatchewan and in Hollow Water and Pukatawagan, Manitoba.

[685] Functioning through the "Sentencing Circle Committee" at Sandy Bay, Pelican Narrows and Cumberland House and the "Justice Committee" at Pukatawagan.

[686] Referred to as the Elder's Justice Advisory Council at Waywayseecappo First Nation and as the Justice Committee at Mathias Colomb Cree Nation (Pukatawagan).

[687] Both bodies appear to have also met prior to and after court without the presiding judge to discuss and consider specific cases.

referred by the police or court, and with direct or indirect participation of the victim, to decide a course of action (such as treatment or restitution) to be followed by the offender.

Case selection in all models was controlled by judges, with the exception of mediation at Cumberland House and Pukatawagan. In these communities, the police primarily controlled case referral, although some cases had been referred for mediation by the court at Cumberland House and by local community members at Pukatawagan. At Hollow Water, although the community had requested formation of both sentencing circles conducted to date, the final decision to move court to the reserve for circle sentencing was made by Judge Murray Sinclair. Formal selection criteria for circle sentencing have been established by judges presiding in northern Saskatchewan. Although this guideline development may be explained by the longer history of circle sentencing in these Saskatchewan communities compared to the Manitoba communities studied, the guidelines also reflected Judge Fafard's desire to provide a clear statement to the public of conditions precedent to circle sentencing. In *R. v. Joseyounen*,[689] he wrote:

In deciding whether or not to hold a sentencing circle the court is exercising a

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[688] Functioning through the Sentencing Circle Committee at Cumberland House and the Justice Committee at Pukatawagan. Although not yet functioning in the spring of 1995, a mediation committee similar to that operating in Cumberland House was being formed in Pelican Narrows and Sandy Bay. Mediation for young offenders and adults was already being conducted in these communities on an informal basis by representatives of the Departments of Justice and Social Services. When considering mediation/diversion, it should be recognized that police often find themselves in the role of mediator. Corporal Kirke Hopkins of Pelican advised, when interviewed April 18, 1995, that the significant discretion available to police officers in laying charges often places them in a position of working out a solution between aggrieved parties without the laying a charge.

[689] *Supra* note 380.

> judicial function. That means the decision must not be made arbitrarily; it must be made with reference to certain criteria. Those criteria must be such that the public can be made aware of them. A democratic society cannot suffer a situation where a reasonably well-informed person with the application of due diligence cannot discover what rule (what law) is being applied .... These criteria are not carved in stone, but they provide guidelines sufficiently simple for lay people to understand and [are] also capable of application so that our decisions are not being made arbitrarily. It is imperative that the public, aboriginal and others be able to know what is happening in the development of sentencing circles: the credibility of the administration of justice depends on it.[690]

Case law from across Canada disclosed no other formal judicial criteria for circle sentencing case selection, although some common factors emerged. These were a desire for rehabilitation on the part of the offender and a community prepared to assist and support him or her during and after sentencing.[691] Another approach used to control case selection for circle sentencing was the negotiation of protocols between local communities and justice system representatives. For example, the Protocol of the Katapamisuk Society was negotiated between the Poundmaker Band of north-central Saskatchewan and representatives of the Provincial Court, Department of Justice, police and legal aid commission and established criteria and procedures for circle sentencing and mediation/diversion. The Protocol negotiated between the Hollow Water First Nation and the Manitoba Department of Justice in 1991 formalised the relationship between CHCH at Hollow Water and the formal justice system, and

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[690] *Ibid* at 1. For a statement of these guideline see discussion in ch. 5 above.

[691] See discussion of circle sentencing case law in ch. 5. During a radio interview by Joan Melanson on July 16, 1995 on CBC's Sunday Morning, Judge Fafard indicated he had received a letter from a Quebec judge supporting the criteria set out in *Joseyounen* and suggesting similar criteria was being employed by that judge.

facilitated the introduction of circle sentencing.[692]

A wide variety of offenses had been disposed of through the community sentencing and mediation approaches studied.[693] In northern Saskatchewan, the criterion requiring that a case be one "which the court would be willing to take a calculated risk and depart from the usual range of sentencing" appeared to have had the effect of restricting circle sentencing to offenses and offenders for which a period of incarceration considerably less than two years would have been the norm. Other than *Taylor*,[694] no Saskatchewan circle sentencing case involved a sexual assault, an offence which usually resulted in a penitentiary term according to appellate sentencing guidelines. The sentencing circles conducted at Hollow Water were, by contrast, sexual assault cases. Although the local dynamics at Hollow Water were complex, the protocol negotiated with the Department of Justice appeared to have been a major factor in allowing community sentencing for an offence which previously had resulted in an automatic penitentiary term. An unanswered question was whether certain offenses, especially those involving domestic violence, were unsuitable for circle sentencing. Feminist scholarship has argued convincingly that the historical power imbalances existing in abusive relationships make violent men poor candidates for mediation.[695] Yet cases of spousal assault had been considered within sentencing

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[692] See Appendix C and D for reproduction of these protocols.

[693] See discussion in ch. 5 regarding the range of offenses considered in circle sentencing.

[694] *Supra* note 194. The judge in this case, however, did not apply the criteria developed by the northern judges.

[695] See H. Astor, "Swimming Against the Tide: Keeping Violent Men Out of Mediation" in *Women, Male Violence and the Law* (Sydney: Institute of Criminology, 1994) 147.

circles in northern Saskatchewan. The consideration of such cases by circle sentencing, or other community sentencing or mediation approaches, requires great caution to ensure the victim has significant support and that she has not been coerced into participating.

While retaining control of the final sentencing decision, judges applied different approaches to community sentencing participation. Judges in northern Saskatchewan, after approving a case for circle sentencing, acted to facilitate a circle consensus, which, without apparent exception, they imposed. This provided a direct role for the community in decision-making. Judge Fafard explained:

> [The community] may not have the final say because I can't give it to them, but I'm giving them a role in the decision-making process and they're genuinely getting to believe that, if it's within reason, I won't interfere with it because I never have interfered with it. I've never had reason to disagree with a recommendation ....[696]

By contrast, judges presiding at Pukatawagan and Waywayseecappo, Manitoba used Elders and community members, together with Crown and defence counsel, in a strictly advisory capacity, making it obvious that the final sentencing decision was theirs.

Although a goal of circle sentencing was to promote consensus among circle participants, different interpretations of "consensus" were apparent.[697] Both the Sandy Bay and Pelican Narrows circles resulted in unanimous support by circle participants for the sentence eventually imposed. According to Judge Murray Sinclair, of the over

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[696] Fafard interview, *supra* note 8.

[697] This term was not defined in the La Ronge judge's criteria, or within any of the case-law considered.

200 participants in attendance at the Hollow Water circle, only the cousin of one victim opposed the circle's consensus that jail would be counterproductive for the offenders. The Saskatchewan Court of Queen's Bench in two cases[698] accepted a circle consensus despite strong opposition by the Crown. Not surprisingly, both cases have been appealed.[699] Whether unanimous or not,[700] a viable consensus for the court appeared to depend on the active support of community representatives including the victim, the Crown (usually) and police,[701] the offender and the judge.

Judge Robert Kopstein of the Manitoba Provincial Court, who had introduced an Elder's Sentencing Panel at the Rousseau River reserve in Manitoba during the 1970's, recognized the importance of Crown support for such an initiative.[702] Constable Brian Brennan of Sandy Bay stated that Crown support for circle sentencing in specific cases was essential. The importance of Crown support is further shown by a comparison of the Hollow Water and Winnipeg circles. Both cases involved serious sexual assaults against children. At the Hollow Water circle, the Crown supported the circle's consensus and suspended sentences were imposed by Judge Sinclair. At the Winnipeg circle, the Crown opposed a similar recommendation and Mr. Justice Scollin

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[698] *Morin, supra* note 346 and *Taylor, supra* note 194.

[699] Both cases were pending before the Saskatchewan Court of Appeal as of August, 1995.

[700] All sentencing circles were open to the public. As a result, people with no interest in the specific cases or knowledge of the offenders or victims involved would not be prevented from participating. It was doubtful that solitary opposition by such a community member would nullify a consensus of all other circle participants.

[701] In Saskatchewan, police often represented the Crown at docket court and sentencing circles. In Manitoba, a Crown attorney was present at all court sittings.

[702] Kopstein interview, *supra* note 183.

sentenced the offender to a penitentiary term.[703] Confusion over the roles of Crown and police existed in northern Saskatchewan. Often the police served as Crown prosecutor in court. Most sentencing circles in Sandy Bay had been conducted with police officers acting for the Crown. This can cause confusion when, as happened after the Sandy Bay circle, the Crown appeals a sentence reached with support of the police officer prosecuting at the sentencing circle.

The sentencing and mediation approaches studied evidenced varied recognition of Aboriginal traditions and practices. A prayer was offered in Cree by an Elder at both at Pukatawagan court April 11, 1995 and at the Pelican Narrows circle. An Ojibway prayer was offered at Waywayseecappo court March 2, 1995 and at the Hollow Water and Winnipeg circles. No prayer or traditional ceremony preceded the Sandy Bay circle or the Cumberland House Sentencing Circle meeting December 13, 1994. Sweetgrass and pipe ceremonies have been used during court at Hollow Water and Pukatawagan and were used during the Winnipeg circle. Offenders and other circle participants were allowed to speak their native language in all court and mediation hearings observed. The "Aboriginal practices" incorporated into community sentencing and mediation included both spirituality (signified by prayers, sweetgrass burning or pipe ceremonies) and process (such as grassroots consultation, community consensus

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[703] In delivering sentence, Scollin J. noted the contrast between the restorative focus of Aboriginal justice and the retributive focus of the Anglo-Canadian justice system. Despite his belief that a penitentiary term would serve to deter this behaviour in the offender's home community, he felt he could not avoid a penitentiary term in view of provincial appellate sentencing guidelines for sexual assault. This case highlights the futility of community sentencing approaches for cases in which the Crown does not support the consensus or where the circle's recommendation is outside of the accepted appellate sentencing range and likely to be appealed by higher Crown authority.

and sharing). As discussed in Chapter Two, the circle itself is viewed by Aboriginal people as having traditional significance.[704] Whether or not such a specific historical link existed for the First Nations in this study, the circle format employed in court and mediation represented a more egalitarian process of adjudication[705] which reflected the communal traditions and aspirations of Aboriginal society. Although the Aboriginal practices described above formed an integral part of the sentencing process, their inclusion appeared to be an adaptation to the prevailing court system rather than an adoption of traditional Aboriginal dispute resolution practices. Anglo-Canadian adjudication practices were retained, with the judge controlling the final sentencing decision and the voices of defence and Crown counsel often predominant in an otherwise consultative process. Despite the continued prominence of judges and lawyers, these community sentencing approaches demonstrated the flexibility of Anglo-Canadian law in allowing both local participation and recognition of traditional Aboriginal practices during sentencing.

7.2 Impact of Community Sentencing and Mediation on Offenders, Victims and Communities

All initiatives studied were in their infancy. Conclusions regarding their impact on offenders, victims and communities were, at best, tentative and largely anecdotal. For example, lawyer Joyce Dalmyn described the positive impact of a sentencing

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[704] *Supra* notes 108 & 109.

[705] In comparison to the hierarchical approach followed in conventional court which focused almost elusively on the participation of Crown and defence counsel and the judge.

circle on a young man at Pukatawagan:

> There are some [offenders], for example., the young man I mentioned earlier who should have been in a penitentiary and [would have] gotten no benefit there, who, for some reason has done extremely well for two years. And I can't explain that. Did the input of the community help him? It must have. He spent three and a half out of the four preceding years in jail. Something good came [from the sentencing circle] for him. Is he an anomaly, or is he a norm?

During the Sandy Bay circle, Judge Fafard stated that, although two offenders sentenced before local sentencing circles had re-offended, the result of such circles had generally been positive. He believed offenders paid more attention to recommendations from the community than from a judge alone. "Before sentencing circles, I would leave your community at the end of the day without solving any of the underlying problems" he told the circle.

In attempting to assess the local impact of community sentencing and mediation, a shortcoming of my research was that I am a non-Aboriginal person residing outside of the communities studied. My contact with local initiative participants was limited by the cost of travel, the distance of each community from Winnipeg[706] and my status as an "outsider" to those interviewed.[707] Despite these shortcomings, I have attempted to accurately record and represent the comments of the community members, judges, lawyers, police and probation officers interviewed.

No data was available on recidivism rates for offenders dealt with through

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[706] See Appendix A for a map containing the communities studied and their proximity to Winnipeg where I was enrolled at the University of Manitoba.

[707] During my field trips, I frequently wondered whether an Aboriginal community resident would have received the same version of events and perspectives if conducting the same interviews. This brought into question whether my research would reflect the "Hawthorne effect", described in Chapter One, by which my presence changed the events observed and accounts received.

community sentencing or mediation in the communities studied. At Pukatawagan, Corporal Bob Brossart believed there had been little difference in recidivism between offenders sentenced in conventional court and those dealt with by the Justice Committee.[708] Although prominent cases of recidivism may have the effect of fuelling opposition to community sentencing,[709] the usefulness of this measure in assessing effectiveness of these reforms is questionable given the recent "track record" of the prevailing justice system in Aboriginal communities.[710] As Judge Stuart of the Yukon Territorial Court noted, "Whatever failures the [Sentencing] Circle may experience, it is important to note how the justice system ha[s] failed numerous times with the same offender."[711]

The impact of these initiatives upon offenders was gauged through interviews with initiative participants and through observations of offenders in court or during mediation. Although two former offenders were interviewed in Sandy Bay, no offenders were interviewed at the time of sentencing as most were preoccupied with their immediate case.[712] Several community sentencing participants interviewed

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[708] See *supra* note 679.

[709] See W. Goulding, "Sentencing Circle used Previously by Suspect" *The Saskatoon Star Phoenix* (6 June 1995) A6 which focused on the previous circle sentencing experience of person arrested on a charge of break and enter.

[710] See ch. 3 for a discussion of the problems associated with conventional sentencing practices in Aboriginal communities.

[711] Stuart, *supra* note 343 at 5.

[712] During my trip to Sandy Bay October 18-20, 1994, I met Dean Stuart, one of the first offenders sentenced before a local sentencing circle, while walking down the main street. He said he would speak with me later. I had planned on interviewing him upon my return in April, 1995. However, when I returned to Sandy Bay, he was in jail having been arrested for breaching a no-alcohol provision in his probation order. During this trip, I tried to interview Conrad Bear, the offender sentenced in the Sandy Bay circle. I went to

believed they were better equipped to control offender behaviour than judges, lawyers and probation officers. They viewed "peer pressure" during community sentencing and mediation as a significant factor in promoting changed offender behaviour. The immediate effect of peer pressure upon offenders was evident at the Sandy Bay and Pelican Narrows circles and during court at Waywayseecappo and Pukatawagan. Offenders sentenced on these occasions appeared humbled by the experience of coming before other community members. Circle sentencing committee member Donald McKay Jr. of Cumberland House described the impact of his committee on offenders:

> If the community people begin to deal with the community problems, you know, and people being accused of these crimes will come in, they are pretty nervous to face the community, but this person has to live in this community. Whether they get probation or jail, they're going to come back and live here. So I just think if they deal with the community and realize people around the sentencing circle are trying to help them out, I think more and more people will ask for the sentencing circle.[713]

By involving community members in sentence design and supervision, judges were accessing additional resources to encourage behavioral reform and, at the same time, to facilitate reconciliation among offenders, victims and the local community.[714] One

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his house the day after court but he declined to speak with me.

[713] McKay interview, *supra* note 320.

[714] See *Joseyounen supra* note 380 at 9 where Judge Fafard commented:

> It may well be that a welcome side-effect of the circle process is that fewer offenders are incarcerated .... [A]t the opening of the sentencing circle I inform the participants that without their assistance in finding an alternative a certain period of incarceration will be imposed .... [However], [t]he aim of sentencing circles is the same when the disposition is arrived at by other means: the protection of society by curtailing the commission of the crime by this offender and others. However, in sentencing circles the emphasis is less on deterrence and more on re-integration into society, rehabilitation, and a restoration of harmony within the community.

former young offender, who appeared before the Sandy Bay Youth Sentencing Advisory Committee in the late 1980's, described the positive impact he experienced through this process. When the committee challenged him to explain the reason for committing his crime (a break and enter), he felt able to tell the committee about his troubled home life. He said the committee had helped him by exploring the problems underlying his behaviour and by providing him with ongoing support and counselling. He had not re-offended since the initial offence. Another former young offender who had been sentenced through a Sandy Bay sentencing circle was contacted. She found the sentencing circle to be less threatening than regular court and was happy that her family and friends could be with her during the circle. Within the sentencing circle she felt she could explain to her community that she was not a bad person.[715]

The impact of these initiatives upon crime victims was difficult to assess. Out of respect for their situation, no victims were interviewed. Some understanding was gained through comments of participants and observations of victims during circle sentencing and the Hollow Water community review. CHCH at Hollow Water was the only initiative studied that evidenced a formal support system for victims. Although a clear emphasis on promoting reconciliation between offenders and victims was claimed by various participants within the other community sentencing and mediation initiatives studied, the involvement of victims and provision of victim support in these communities appeared disorganized and inconsistent. Although victims were usually

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[715] The positive effect of the sentencing circle on this offender was questionable as, on April 19, 1995 she was back in court pleading guilty to another assault charge. On this latter occasion, Judge Fafard told her the only way she could avoid incarceration was to agree to see a mental health worker as a term of probation.

present at the formal and informal sentencing circles conducted at Pukatawagan, lawyer Joyce Dalmyn and Corporal Robert Brossart questioned the lack of victim involvement in mediation conducted by the local Justice Committee. In northern Saskatchewan, victim involvement in circle sentencing and mediation was inconsistent. Although the victim had been active in arranging and participating at the Sandy Bay circle, the victim was not present at the Pelican Narrows circle nor did anyone speak on his behalf.[716] At the Sentencing Circle Committee meeting December 13, 1994 at Cumberland House, no victims appeared before the committee although some appeared to have been consulted previously by committee members. With the exception of CHCH at Hollow Water, victims appeared to participate less and have less support offered to them than did offenders.

A major impact of these initiatives on the communities studied was empowerment of community participants. Some viewed development of community sentencing and mediation as essential to their community's development and health. At Cumberland House, Sentencing Circle Committee Chairperson Cyril Roy stated that expansion of his committee's role in local dispute resolution was the "only way we can keep our community a little stronger and keep it going."[717] Lawyer Felicia Daunt observed that the impact of circle sentencing at Sandy Bay had been both positive and empowering:

Well, in Sandy Bay, in particular, I've noticed that sentencing circles have

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[716] This victim had been recently sentenced to custody and was also experiencing further medical problems resulting from the assault being considered in the sentencing circle.

[717] Roy interview, *supra* note 322.

> really had a very positive impact on the community. In Sandy Bay we used to see a lot more violent offenses and higher levels of violence than you do now. In general, I get the impression that the community has started to heal itself and I think sentencing circles were a step in that. It sort of got the people in the community together talking about problems that, although they're sentencing one person, the community shares.[718]

Despite these positive views, others spoken to at Sandy Bay were sceptical of the impact of circle sentencing. A Sandy Bay man advised, over breakfast, that he had been to jail "before there were sentencing circles". He viewed circle sentencing negatively, believing it allowed offenders to be sentenced without any penalty and "if you break the law, there has to be a penalty." Indeed, a perception appeared to be developing among Sandy Bay offenders by spring 1995 that sentencing circles were an "easy way out". Sentencing circle participant Harry Morin viewed this development as resulting largely from the lack of treatment options available for offenders in northern Saskatchewan. This shortage often meant that a suspended sentence with few probation conditions was the only available alternative to jail for some offenders, leaving the impression that little if any penalty had been imposed. Criticism of the circle process was also heard at the Winnipeg circle when an Ojibway man, the brother of both victims, openly challenged this approach and suggested that the victims and offender (his father) would have been better off to have participated in a session with a trained psychologist as opposed to the community members within the circle. Given such varied reactions and the short history of these initiatives, their longer term implications and impact were difficult to assess. However, in the short term, such approaches

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[718] Daunt interview, *supra* note 541. When interviewed December 16, 1995, Judge Fafard indicated there had been a fairly dramatic decrease in the court's case load since the beginning of circle sentencing there. He stated: "maybe you could conclude from that that it's having an impact on actual crime."

clearly had an empowering impact upon the community members involved in their development.

7.3 Justice Issues Raised by Community Sentencing and Mediation

This study identified several key issues whose resolution, by local communities and the Anglo-Canadian justice system will affect the evolution of community sentencing and mediation in Aboriginal communities. These issues involved the relationship of the evolving initiatives to local systems of social control and the prevailing justice system. In Chapter One, legal pluralism was introduced as a theoretical framework to assist interpretation of study data. This framework postulates a plurality of legal orders and systems of social control existing and inter-relating within each community. Donald Black suggested an inverse relationship between the strength of local community social control and dependence upon a formal/state legal code.[719] Sally Merry characterized the establishment of local community-based justice forums as a move towards "popular justice".[720] These were distinct from, yet tied to, local and state systems of social control. Popular justice forums were characterized by informality of process, local/lay participation and limited jurisdiction, all descriptors of the community sentencing and mediation initiatives studied during my research. Post-colonial scholarship, as considered in Chapter One, analyzed the relationship of dominance and resistance between European colonizers and the indigenous recipients

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[719] *Supra* note 58.

[720] *Supra* note 66.

of their colonial system. Recent post-colonial writers have suggested that local history and development can best be understood through the "eyes" of the colonized.[721] My study focused on obtaining local perspectives from Aboriginal residents of the communities studied to promote understanding of community sentencing and mediation to counter any biases held by non-Aboriginal participants and commentators. The theoretical framework adopted in this thesis, drawing on legal pluralism, post-colonialism and popular justice, will facilitate consideration of the following issues.

7.3.1 The Court's Supervisory Role in Community Sentencing Approaches:

The development of sentence advisory committees at Sandy Bay, Pelican Narrows and Cumberland House evidenced a move away from circle sentencing with a judge in attendance toward development of community sentencing recommendations reached in the absence of the court party. This reduced the amount of court time required for such cases but also raised the issue of the court's role in such a progression: whether to simply receive sentencing recommendations from a community committee or whether to actively facilitate a sentencing circle consensuses. Judge Barry Stuart of the Yukon Territorial Court[722] expressed concern about the absence of judges within the sentencing circle process. He viewed a judge's presence as the preferred means of identifying and controlling power imbalances between circle

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[721] See Spivak, *supra* note 54 where the author critiques the imperialist nature of nineteenth century English literature from the eyes of a third world person.

[722] Telephone interview with Judge Barry Stuart (30 September 1994). Circle sentencing has been used regularly in the Yukon since 1992. See Nemeth, *supra* note 8.

participants, although he recognized that such a role could be performed by a community member. While supporting the sentence advisory committee approach, Judge Fafard recognized the need for periodic judicial involvement in such circles, to ensure consistency and supervise potential misuse of the process:

> I guess I want to ensure some consistency you know, because you have several accused charged with the same or similar offenses, I want to make sure that the dispositions are fairly consistent, but I guess the greater thing is that it affects so many different people in that one community, that I'm almost afraid of some political influence. Because it touches on so many people, and I just sort of felt that maybe I should be there to ensure that politics doesn't get involved, that you don't have a powerful family dictating to a weaker family, that kind of thing.[723]

Despite this judicial caution over circle power imbalances, trained and experienced community members may eventually perform the facilitation function currently performed by judges during circle sentencing. Indeed, at the Sentencing Circle Committee meeting attended December 13, 1995 at Cumberland House,[724] committee chairperson Cyril Roy performed a facilitation role similar to that performed by Judge Fafard at the Pelican Narrows and Sandy Bay circles.[725] At the Hollow Water community review, Marcel Hardesty acted as a facilitator for the victim, offenders and

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[723] Fafard December interview, *supra* note 8.

[724] This meeting involved cases referred to the committee both for mediation/diversion and for a sentencing recommendation to the court.

[725] See Stuart, *supra* note 343 at 14 where Judge Stuart described the use of community members as circle sentencing facilitators in the Yukon:

> In some communities, the presiding Judge or Justice of the Peace act as facilitators. Other communities have persons as "Keepers of the Circle" who act both as host and facilitator of the Circle process. If a "Keeper of the Circle" is not a Justice of the Peace, the "Keeper" will call upon the Judge or Justice of the Peace to handle all legal matters required throughout the Hearing.

community members in attendance.[726] Although judges provided protection from power imbalances during court, the court party regularly departed these communities after court leaving community circle participants to deal directly with offenders in the court's absence, either immediately or upon the offender's return from jail.[727] As a result, development of mediation and facilitation skills will strengthen local/informal systems of social control which attempt to change offender behaviour and promote rehabilitation.

7.3.2 Political Influence and Judicial Independence:

Community sentencing and mediation involved interaction between local systems of social control and the formal justice system. As discussed in Chapter Two, the Anglo-Canadian system was imposed on Aboriginal people through European colonization during and following the fur trade era. Legal pluralism postulates the co-existence of formal and informal legal orders within the same social field. In the evolving community sentencing and mediation initiatives, the Anglo-Canadian court system, based on the principle of judicial independence from political interference and coercion, has inter-related with the opinions, informal relationships and power structures of local communities. This raises the potential influence of local politics and the popularity and status of specific offenders on decisions taken during community

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[726] The CHCH approach evidenced a recognition of power imbalances between offenders and victims. Separate support teams had been developed for sexual offenders and victims.

[727] In terms of legal pluralism, the power and control of judges and probation officers over local residents is limited by the small amount of time they spend in these communities.

sentencing. Judge Fafard, in expressing concern for the integrity and independence of circle sentencing, was adamant that power imbalances resulting from political influence be avoided, thereby preventing actual or perceived bias. In *Joseyounen* he wrote:

> In the Euro-Canadian model where the judge imposes sentence without the aid of a sentencing circle, the judge speaks for the people and attempts to deliver a fair, impartial and just disposition. This he does without fear of political interference while at the same time he attempts to reflect the legitimate concerns and aspirations of the community .... In exploring the flexibility of the criminal law of Canada and its ability to accommodate First Nations cultures and legitimate needs, let us not re-invent those things which are so important to an impartial system of justice. If we throw out the essence of impartiality we run the risk of doing grave injustice to both offender and victim. What I mean is the input of community elders and leaders must not mean the exercise of political influence in the circle to the detriment of the accused or a victim .... The principle of judicial independence in decision-making is one that is deeply ingrained in the Canadian population, including the First Nations. The many sentencing circles I have held have included the participation of chiefs, band councillors, mayors, and others in political office. I have never seen any of these persons attempt to influence the outcome by virtue of their political office.[728]

No direct attempt at political influence through community sentencing representations was observed during this study although the potential for such interference necessitated caution. Closely related to, and at times indistinguishable from, questions of local political interference, was the effect of offender popularity and status on the sentencing process. These appeared to be significant factors in the developing initiatives,

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[728] *Supra* note 380. Associate Chief Judge Brian Giesbrecht of the Manitoba Provincial Court found numerous examples of political interference by chiefs and counsellor in the operation of Dakota Ojibway Child and Family Services. See Giesbrecht J., *The Fatal Inquiries Act: Report by Provincial Court Judge into the Death of Lester Norman Desjarlais* (Brandon, Manitoba, 1992) at 210. While recognizing the dangers of local political interference, judges are not free of personal biases. See W. Gaylin, *Partial Justice: A Study of Bias in Sentencing* (New York: Alfred Knopf, 1974) in Ch. 3 where the author explored the inevitable personal biases held by individual judges which, in turn, effected their decisions on sentence.

especially at Pukatawagan. Lawyer Joyce Dalmyn explained that judges sitting at this First Nation were influenced significantly by a lack of community support for an offender:

> Sometimes people have nothing to say, which can be very unfortunate. And that's something as defence counsel I have to alert my client to, is if they want to have a circle, they had better make sure that they're going to have someone there to speak for them. Because if the feather gets passed around and no-one makes any comment whatsoever, I have heard a judge state, right on the record, "Well it's clear that because nothing has been said, obviously they're not willing to say anything good about this person therefore I can only draw the conclusion that there's no sympathy for this person and I have to use the harshest penalties available to me."[729]

This raised the possibility of community bias against unpopular or marginalized offenders. This occurred in *R. v. Howard*[730] where the British Columbia Court of Appeal reduced a sentence that had been unfairly aggravated by community animosity:

> The sentencing hearing had turned into an extended post hoc attack upon the accused when the sentencing judge permitted anyone who wished to comment on the accused's character or the impact of the [victim's] death on the native community to be heard.[731]

The Anglo-Canadian court system has evolved as a buffer between offenders and the harshness of public and victim reaction to their crimes. Indeed, one of the tenets of the formal court system is avoidance of personal reprisal by victims, or their agents, against perpetrators.[732] A concern with "popular justice" approaches, such as

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[729] Dalmyn interview, *supra* note 649.

[730] (1991), 15 W.C.B. (2d) 28 (B.C.C.A.).

[731] Contained in the case summary.

[732] See T. Marshall, *Alternatives to Criminal Courts: The Potential for Non-Judicial Dispute Settlement* (Aldershot: Gower, 1985) at 10: "The historical antecedents of our criminal adjudication system suggest that its main purpose is to preserve public order by substituting state sanction for private vengeance." [citation omitted]

community sentencing and mediation, is that local involvement not become a forum for the application of political pressure to the advantage of local elites and to the detriment of politically unpopular or marginalized offenders or victims.[733] When judges seek community sentencing advise, without the consent of offenders or victims, judicial vigilance will be required to ensure community comments and recommendations are not motivated by political considerations.[734]

In considering the complicated dynamics of community opinion and its intersection with judicial independence, community sentencing can be contrasted with the experience of jury sentencing in the United States (as discussed in Chapter Four). These jurors, who must not have personal knowledge of the offender or victim, have

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[733] See Giesbrecht *Inquiry*, *supra* note 728 at 213 where Judge Giesbrecht described the following examples of political influence within two Manitoba reserve communities:

> - Constable Ralph Roulette of the Ontario Provincial Police Force described an incident that occurred at the Birdtail Sioux Reserve when he was a constable with DOTC Police. Mr. Roulette had evidence that the chief's son was guilty of the offence of impaired driving. The chief ordered Mr. Roulette not to charge his son ....
>
> - Constable Edward Riglin of the Brandon City Police described incidents of political interference that took place when he was a constable with DOTC Police from 1986 to 1990. Constable Riglin was personally threatened with a band council resolution (BCR) banning him from the reserve on a number of occasions because he insisted on charging influential reserve residents with criminal offenses.

Also see A. McGillivray, *Therapies of Freedom: The Colonization of Aboriginal Childhood* (Faculty of Law, University of Manitoba, January, 1995) [unpublished] at 16-17 for examples of political interference with the operation of on-reserve child welfare agencies.

[734] In the Saskatchewan communities studied, an indication of community support for the offender was one of the conditions precedent to the formation of a sentencing circle making negative bias unlikely. Indeed, as a significant number of circle participants were supporters of the offender, any bias was likely in favour of rather than against the offender. This left open the potential of inter-family politics. Before the Sandy Bay circle, the offender's family met outside the court apparently concerned about the number of non-family community members and outsiders (I expect including myself although I did not participate in the circle) in attendance. At the start of the circle family members questioned whether non-family should be allowed to participate, suggesting an attempt by this family to control the sentencing process. As the circle was open to the public, Judge Fafard refused to disqualify anyone from the circle.

been criticized for a lack of experience in sentencing and their recurring tendency to be more affected by emotion and prejudice (and therefore to act less objectively) than judges. Although a major advantage of community sentencing is the provision of relevant, and (taken together) objective information to the court, another benefit is the personal relationship of community participants to the offender and victim. Although in effect representing a lack of objectivity and a partiality towards offender support and rehabilitation, these relationships allow community participants to provide the court with a better understanding of the problems causing offender behaviour and increase the resources available to the court in controlling and changing their behaviour.

7.3.3 Financial Infrastructure or Volunteer Support?

A question raised by the development of alternative sentencing approaches was the degree to which such initiatives should be supported by government funding as opposed to the voluntary efforts of citizens. Lawyer Sid Robinson of La Ronge viewed a financial infrastructure as essential to the evolution of circle sentencing in northern Saskatchewan. Financial compensation for Justice Committee members who sat with the court was raised as a significant issue in Pukatawagan. Judge Fafard, however, viewed payment as an interference with the independence of the court and preferred circle sentencing in northern Saskatchewan to continue to developing through the dedication of community volunteers.

Although community and volunteer support was essential to the continued

success of all initiatives, financial resources to train and pay support staff and establish treatment facilities contributed significantly to the development of several of the community initiatives studied. At Pelican Narrows, participation by most members of the sentencing circle committee was facilitated through their employment with the Peter Balantyne band. The committee's chairperson Derek Custer managed this committee as part of his assigned employment duties. At Waywayseecappo, additional government funding facilitated the movement of court from Rossburn to the reserve, the employment of an Aboriginal person as a resident probation officer and payment of a per diem allowance for the Elders sitting in court. At Hollow Water, most members of the CHCH assessment team were social workers employed by various levels of government. A shortage of treatment facilities in northern Saskatchewan, and a lack of money to build them, was slowing development of circle sentencing. According to Sandy Bay resident and sentencing circle participant Harry Morin, a shortage of accessible treatment resources had limited the sentencing options available for repeat offenders.[735] The expansion of support and treatment resources appears essential to the evolution of all community sentencing and mediation initiatives.[736]

7.3.4 Expansion of Community Sentencing Approaches:

Another issue identified through this study was the breadth of application and potential for expansion of community sentencing and mediation approaches. In Chapter

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[735] Interview with Harry Morin (18 April 1995) Sandy Bay, Saskatchewan.

[736] This highlights the inter-dependence of local systems of social control and the state system which provides funding and support needed to facilitate community-based rehabilitation, treatment and supervision.

One, the development of local/informal justice systems was described as a worldwide move towards "popular" justice characterized by conciliatory, rather than adversarial, processes.[737] In the context of community sentencing development, were local representatives to be involved in all sentencings at court, as in the Elders' Council at Waywayseecappo, or only in specific cases,[738] as in all other communities studied? Realistically, even assuming the appropriateness of circle sentencing for all offenders, current court resources in the northern Saskatchewan and Manitoba communities studied were insufficient to allow circle sentencing for every offender facing sentencing, given the time requirements of circle sentencing.[739] A significant increase in court funding (which appeared unlikely)[740] or a move towards the sentence advisory committee model or the Elder's sentencing panel model seemed to be the options available for making community sentencing available to more offenders.[741] A further option was broader-based diversion to local mediation committees.

A related question was whether community sentencing approaches could be

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[737] Merry, *Popular Justice*, *supra* note 66.

[738] Determined by the cases chosen in court by judges or for mediation by police or judges.

[739] Sentencing circles considered during this study involved a minimum of two and a maximum of fourteen hours.

[740] Given the fiscal difficulties faced by federal and provincial governments, significant increases in court funding appeared unlikely.

[741] Despite the attention attracted by circle sentencing development in northern Saskatchewan, the circles conducted, estimated to be ? by Judge Fafard at the Sandy Bay circle, represented a small percentage of the sentencings occurring. During the Sandy Bay court sitting on April 19, 1995, one sentencing circle was conducted and approximately 30 other offenders were sentenced in the conventional fashion.

used in larger, less isolated and ethnically diverse communities.[742] All initiatives studied were located in small and relatively isolated Aboriginal communities. In *Morin*,[743] the court directed a sentencing circle for a Metis man from Saskatoon after representations of support were made by the local Metis community. Although no definition of "community" had been judicially rendered so as to restrict the application of circle sentencing or other community participation approaches,[744] one strength of the sentencing initiatives studied was the ability of local community members to influence offender behaviour both during and after sentencing. Corporal Bob MacMillan of Pelican Narrows suggested local social control was more easily identified and accessed in smaller and more isolated communities than in the larger urban centres:

> You can't have a ... sentencing circle in Saskatoon that would work. I can't see how it would work, because who are the community that's going to be dealing with the offender? You're going to go to Saskatoon and you're going to find a few Elders somewhere that will come to a sentencing circle, impose whatever they feel is right for the accused, but then there's no follow-up. Who have these people got to go to? The rest of the community doesn't even know about it. Nor do they care.[745]

Although community based sentencing and mediation is not precluded in larger mixed centres, the social control which can be brought to bear on offenders in small

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[742] See the discussion in ch. 4 of the Aboriginal Legal Services of Toronto's Community Counsel Project and Operation Springboard's Community Sentencing Model which show the possibility of community participation in mediation in a large urban centre.

[743] *Supra* note 346.

[744] In *Cheekinew, supra* note 382 at 147, Grotsky J. commented:

> ... the nature of an offender's community, and its willingness to participate in the sentencing process, are factors which, in my respectful view, will in each particular case, depending always on the offender's suitability as a candidate therefor, be relevant to the determination of whether a sentencing circle ought to be established.

[745] MacMillan interview, *supra* note 548.

communities is a strength.

Whether these sentencing and mediation approaches will be applied to non-Aboriginal communities and offenders is unclear. These approaches have evolved within Aboriginal communities, largely in reaction to problems experienced with (and by) the prevailing justice system, and have utilized the strength of local resources and systems of social control in the sentencing process. Although these approaches appeared well suited to the communal tradition of Aboriginal society, nothing within Anglo-Canadian law prevents non-Aboriginal offenders from seeking community sentencing input. There is no reason to believe the same degree of concern and social control could not be found and applied among identifiable communities in non-Aboriginal society. Indeed, Operation Springboard's Community Sentencing Model, based on the circle sentencing experience of Aboriginal communities, utilizes a community committee to mediate offenses committed by an ethnically diverse cross-section of young offenders and adults in Toronto, Canada's largest urban centre.[746]

7.3.5 The Potential Effect of Statutory Reform and Appellate Sentencing Review on Community Sentencing:

The power of judges to involve community participants in the sentencing process is based in the broad discretion given to judges within Anglo-Canadian law. No reference to community sentencing participation, by sentencing circle or other means, appears in the *Criminal Code* although Bill C-41 provides that "[t]he court may

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[746] See *supra* note 310.

... require production of evidence that would assist it in determining the appropriate sentence"[747] and establishes a framework for development of "alternate measures" (mediation/diversion).[748] Regardless of these amendments, judges are clearly authorized to involve community members and victims in the sentencing process, making statutory reform unnecessary to the continued development of these approaches.

Although there has been no appellate comment on the appropriateness of community sentencing,[749] sentencing ranges set by appeal courts limit such approaches. As one aim of community-based initiatives is to change offender behaviour through community reintegration rather than jail, many community sentences fall outside of accepted appellate ranges. This draws criticism from those espousing the goal of province-wide sentence uniformity.[750] However, such arguments fail to take account of the availability and effect of local resources, including informal systems of social control and offender support within Aboriginal communities. These resources are either not available or not as easily accessed in larger urban centres. They provide a wider range of sentencing options to the court. The philosophy behind these developing

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[747] In s. 723(3).

[748] In s. 717.

[749] Provincial appellate courts in the Yukon (in *Johnson, supra* note 370) and Alberta (in *John, supra* note 395) had considered sentence appeals following a lower court sentencing circle. However, no Canadian appellate court had commented on the propriety and application of circle sentencing or other community sentencing approaches. This may reflect a view that such approaches are entirely within the discretion of the sentencing judge, leaving the sentence and not the process open to appellate review. Several sentencing circle cases were pending before the Saskatchewan Court of Appeal in July, 1995. If an appellate court acted to restrict application of community sentencing, statutory reform would be one of the few options available to ensure continued development of these approaches.

[750] See M. Mandryk, *Sentence Method Defended* Regina Leader Post 13 April 1995 A8 where Opposition Justice Critic Don Toth is described as suggested sentencing circles might be creating a two-tiered justice system granting "special treatment under the law based on race".

initiatives runs counter to the prevailing assumption that more severe penalties (including prolonged incarceration) will provide greater general and specific deterrence than community-based sentences. The community of Hollow Water disagreed with this assumption:

> The legal system, based on principles of punishment and deterrence, as we see it, simply is not working. We can not understand how the legal system doesn't see this. Whatever change that occurs when people return to the community from jail seems to be for the worse. Incarceration may be effective in the larger society, but it is not working in our community.[751]

Crown support of community sentencing in general and of specific sentences awarded was essential, as a Crown appeal could result in the imposition of a harsher sentence in accordance with any relevant appellate sentencing tariff. Of the many sentencing circles that Judge Fafard had conducted in northern Saskatchewan, only one has been appealed by the Crown. This infrequency of appeals was largely due to his insurance of Crown support before directing specific cases to a sentencing circle.

A further, and apparently as yet unaddressed question, was whether the *Charter of Rights and Freedoms*[752] has application to these community sentencing approaches. Does an offender have a constitutional right to be sentenced before a sentencing circle or to seek other community participation during sentencing? Can the *Charter* be used to resist attempts by judges to consult local community members at sentencing? No reported cases considered these questions nor were they raised by an offenders or counsel in any of the communities studied. As all offenders sentenced through

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[751] CHCH, Position on Incarceration, *supra* note 581 at 3-4.

[752] Enacted by Canada Act 1982 (U.K.) c. 11.

sentencing circles consented to this approach, use of the *Charter* as a shield against state oppression within circle sentencing is unlikely. The Charter's application is more likely to be raised where an offender does not consent to community involvement in the sentencing process or where community antagonism or lack of offender support aggravates sentence.[753] Consideration of whether a right to involvement of an offender's local community in sentencing might be an Aboriginal right protected by s. 25 of the *Charter* was outside the scope of this study. This question was not raised in any sentencing case considered.[754]

7.4 Aboriginal Justice Perspectives: Post-colonialism as a Way of Understanding Resistance to the Formal Justice System

Local perspectives reflected estrangement from and resistance to the Anglo-Canadian justice system and a focus on changing offender behaviour through healing, treatment and reconciliation. All Canadian Aboriginal communities are governed by a justice system and body of law imposed through European colonization. The post-

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[753] Although no reported cases dealt with application of *The Charter* to community sentencing, the effects of community antagonism were seen in *Howard, supra* note 730 while the negative interpretation of community silence at sentencing by judges in Pukatawagan was noted by Joyce Dalmyn, *supra* note 649.

[754] Despite the lack of judicial consideration of *the Charter* involving community sentencing, it has been applied in other sentencing cases. See *Smith v. R.* (1987), 34 C.C.C. (3d) 97 (S.C.C.) in which the mandatory seven year sentence for importing narcotics under the *Narcotic Control Act* was invalidated as it was held to violate of s. 12 of the *Charter*. Also see *R. v. Wallace*, [1987] O.J. No. 1502 [QL] (Ont. Dist. Ct.) where the lack of a local temporary absence program was found to deny the offender her right to equal protection and equal benefit under the law under s. 15 of the *Charter*. As a result, the offender received a fine rather than imprisonment. See also *R. v. Willocks*, [1994] 1 C.N.L.R. 167 (Ont. Ct. Just. Prov. Div.) where the Crown's refusal to divert a non-Aboriginal offender to an alternative measures program for Aboriginal offenders was found not to constitute a breach of the offender's rights under s. 15(1) of the *Charter*. Given the breadth of these cases, it is likely that the constitutional implications of community sentencing will soon be litigated.

colonial literature reviewed in Chapter One demonstrated ways in which indigenous populations around the world have resisted such colonization resulting in accommodations made by the colonial systems. Resistance to the prevailing court system was evidenced within the communities studied, both through perspectives expressed and local actions taken. All communities studied had experienced estrangement from the prevailing court system: the system was viewed by many as external to and separate from their communities. Others interviewed believed local community members were better equipped than the court system to control offender behaviour and should, therefore, be given a greater role in the sentencing and supervision of offenders. Consideration of these viewpoints was essential to an understanding of community sentencing and mediation. Professor Sherry Ortner of the University of California, Berkeley, argued that many ethnographic studies of colonial dominance and resistance have suffered from a lack of indigenous perspectives. She claimed these will facilitate an understanding of community political dynamics, inherent cultural richness and local perceptions about the interaction between colonial and indigenous people.[755]

Active resistance to the prevailing court system was seen in Pukatawagan where, for a period of eight months in 1993, all spousal assault cases had been diverted from court to the local Justice Committee because witnesses refused to testify at trial.[756] Earlier resistance had been seen at Pukatawagan when, during the mid-

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[755] S. Ortner, "Resistance and the Problem of Ethnographic Refusal" (1995) 37:1 Comparative Studies Soc. & Hist. 173 at 190-191.

[756] *Supra* note 662.

1980's and fuelled by local dissatisfaction with the Provincial Court, this First Nation passed a by-law forbidding the court party from entering their reserve. In Pelican Narrows, Sentencing Circle Committee member Cecile Merasty described resistance by offenders who remained passive and refused to participate in conventional sentencing before the court. Such resistance evidenced both a lack of understanding and a mistrust or rejection of the prevailing system.[757]

Given this history of estrangement from and resistance to institutions brought and imposed by European colonizers, it is not surprising that the relationship of many Aboriginal communities to the police and circuit court differs from those in larger non-Aboriginal centres. Police influence in such communities appeared to be limited to a peace-keeping role, their educational aspirations rejected, but their impartiality valued. Corporal Bob MacMillan of Pelican Narrows explained:

> They seem to like the RCMP here, because you know even though they don't really care for us, they know we're impartial. And they trust us in that regard. They don't really like us, but they know we're not going to choose sides based on family .... But that's where it's drawn, it's finished .... [O]utside of arresting people ... we have very little influence in this town. We go to the school and give them a lecture on drugs. Pooh! You might as well play a video, because they have no interest in what we say. None. It's not like in a southern community where the RCMP are involved with the community as such, because here we're not part of the community, we're outsiders. White people as a rule are outsiders in Pelican Narrows.[758]

This passage clearly reflects the "imposed" nature of Anglo-Canadian law in these communities. Judge Fafard repeatedly commented on his court's lack of credibility

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[757] Resistance may also take more subtle forms. See Smandych and Lee, *supra* note 47 at 26-37 who describe the varied and subtle forms of resistance to colonization provided by Amerindian women.

[758] MacMillan interview, *supra* note 548.

among local residents. This was reflected in the comments of several community members who expressed dissatisfaction with judges and probation officers who only attended in their communities one or two days a month and left immediately after court.

Many within these communities felt the prevailing system was guided solely by a focus on punishment through imprisonment. By contrast, local perspectives favoured a focus on offender reconciliation with victim and community and on healing underlying causes of deviant behaviour.[759] Jail was viewed largely as a source of embitterment for offenders who often returned to their home community without treatment and/or resolution of their underlying problems. A focus on achieving overall community welfare, rather than that of a specific individual, was evident. Pukatawagan Justice Committee member Liz Bear reflected this perspective:

> This is our community and it is dysfunctional. You can't deny that. It is dysfunctional because of the alcohol abuse, the lack of our social and economic means and everything like that but it is home. Let's heal here. Let's build a healthier community. And if we can do that, those behaviours are going to stop one way or another ....[760]

This communal focus sometimes appeared at odds with the focus on individual rights within the Anglo-Canadian justice system. At Hollow Water, Berma Bushie said that upon receiving a sexual assault disclosure, the CHCH assessment team was able to determine quickly whether the complaint was true because of their experience with the

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[759] These reflected Aboriginal views of justice, as discussed in Chapter Two, which often contrasted with the punitive focus of the prevailing justice system.

[760] Bear interview, *supra* note 654. Similarly, George Colomb perceived that offenders were empowered to participate more in proceedings before his Justice Committee than before the court. G. Colomb interview, *supra* note 660.

people involved. If they believed the complainant, the accused would immediately be confronted by the assessment team and given a chance to admit the abuse. Although dealing with the question of guilt and not sentencing, this example disclosed a very different conception of rights of the accused and presumptions of innocence than exists within the prevailing system.[761]

Given the wide-spread criticism of the prevailing court and justice systems within these communities, some anomaly existed in the active participation of community members in community sentencing initiatives operating within a system they appeared to reject. This may reflect achievement (either apparent or real) by community sentencing of some of the goals which, it is claimed, ordinary sentencing and incarceration processes do not achieve: reconciliation, healing and community empowerment. Although resistance to established sentencing practices reflected a mistrust of the Anglo-Canadian justice system, community sentencing, in its various forms, empowered many within the communities studied by allowing some local control over formal dispute resolution, a power which had long since been surrendered upon colonial imposition of the prevailing system. As Judge Fafard observed, "It seems that if people have things done for them and for them long enough, they lose

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[761] The issue of individual versus community welfare was raised, in the context of social anthropological research on community justice, by Marshall, *supra* note 732 at 52:

> [T]he reality, even in tribal societies, may not be as most ethnographers have represented it. In an attempt to relate institutions to a social whole and the general culture, ethnographers tend to generalize practices in terms of the ends of the community generally and to neglect the interests of individuals that may be at variance with these. Procedures may also be described on the basis of popular assumptions rather than in terms of their complex and variable reality.

confidence in their own abilities."[762] Development of community sentencing and mediation represented adaptations to conventional sentencing practices. These adaptations reflected sensitivity by judges to local concerns about inadequacies of prevailing sentencing practices and, most significantly, the power of local communities to facilitate change through resistance to the prevailing system.[763]

7.5 Relationship of Community Sentencing and Mediation to Anglo-Canadian Justice System

In Chapter One legal pluralism was defined as a "situation in which two or more legal systems co-exist[ed] in the same social field."[764] This analytical framework was applied by Sally Merry to the analysis of community-based justice initiatives, which she described as a move towards "popular justice". She observed that popular justice was "best conceived as a legal institution located on the boundary between state law and indigenous or local law". It was "distinct from each side but linked to each."[765] The local initiatives studied were a form of popular justice. They were based in the formal justice system but intersected with local systems of social control and dispute resolution.

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[762] Fafard, *Progress report*, *supra* note 23.

[763] This judicial creativity was reminiscent of the creation of "customary law" by European colonial authority in Asia and Africa, *supra* notes 51 & 52. In the end, whether community sentencing and mediation was judicially introduced not as significant as whether the reforms were accepted and supported by local residents.

[764] *Supra* note 56.

[765] *Supra* note 67.

The literature on legal pluralism is a valuable starting point for analyzing the relationship of state and local systems of social control that exist in Aboriginal communities. Judge Murray Sinclair highlighted an important aspect of this relationship in the distinction he made between "community", "offender" and "judge" driven sentencing approaches.[766] Although judges may be considered by some Aboriginal people as agents of "state control," several judges presiding in the communities studied asserted their judicial independence in response to local community wishes and their own recognition of problems existing within the prevailing system. Judge Fafard was clearly conscious of the need for countering his court's lack of local credibility. He did this partly through his introduction of circle sentencing into the Aboriginal communities of northern Saskatchewan.

In Sally Merry's study of "popular justice", she distinguished between "communitarian" approaches, which operated "entirely outside the state and its institutions," and "reformist" approaches, which sought to "increase the efficiency of the formal legal system by streamlining it and making it more efficient."[767] The community sentencing and mediation initiatives studied evidenced a conjunctive relationship between local Aboriginal communities and the Anglo-Canadian justice system and therefore were more closely aligned with reformist, rather than communitarian, approaches. Several findings of this study illustrate this inter-relationship. At Hollow Water, the threat of being charged under the *Criminal Code*

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[766] *Supra* note 73.

[767] Merry, *supra* note 68.

with breach of probation (or undertaking) was an inducement for offenders to actively continue their treatment within CHCH. At Waywayseecappo, offenders were regularly ordered by the judge, or a justice of the peace, to attend a meeting of the Elders' Council as a term of their release. At Pelican Narrows, Pukatawagan and Cumberland House, all local committees limited the number of opportunities for an offender to appear before them before "turning them back" to the conventional court system.

Despite this conjunctive relationship, many Aboriginal people envisage breaking from the prevailing system and establishing an independent justice and dispute resolution system. When spoken to February 22, 1995 at Hollow Water, CHCH assessment team member Marcel Hardesty expressed the conviction that eventually his community would break from the prevailing justice system and operate independently. He said control and reform of offender behaviour will be achieved through public awareness of specific offenders and offenses and through education and treatment of offenders, suggesting an evolution of dispute resolution and social control dependant on local rather state authority. Evolution of the community sentencing and mediation approaches considered in this study towards total local autonomy, on the one hand, or simply towards increased local participation and control on the other, will depend on resolution of the issues raised earlier in this chapter. These included the court's role in supervising community sentencing approaches, the interplay of community opinion and judicial independence, the tension between voluntary and financial support of these initiatives and the potential effect of statutory reform and appellate sentencing review. In addressing these issues, the following courses of action

will enhance the development and credibility of community sentencing and mediation.

1. Recognition of approaches by appellate authority:

No appellate court has yet commented on the community sentencing approaches identified and analyzed in this thesis. As a result, some confusion has been apparent within lower courts regarding the propriety of their application. Although specific appellate guidelines are not required, and perhaps are undesirable, appellate recognition and support of these approaches will be crucial to the continued evolution of community sentencing.

2. Government support through provision of personnel and treatment facilities:

Although voluntary participation and support of community members is vital to the development of these initiatives, expansion of government-funded resources, specifically providing trained personnel and treatment facilities, will be essential to the development and expansion of these approaches. Availability of these resources will increase the community-based sentencing options open for repeat offenders and will facilitate offender rehabilitation through community-based treatment and supervision.

3. A focus on victim participation and support:

Despite an apparent concern by local community participants on victim involvement and support within the initiatives, a greater emphasis on voluntary participation by and organized support for victims, both through formal justice

channels and through local community involvement, will facilitate initiative development. This support and voluntary participation will reduce the chances of victim alienation from the system as well as promoting healing by victims and reconciliation among victims, offenders and local communities.

4. Protocol negotiation between local communities and justice system representatives:

Crown support is essential to the continuation and development of community sentencing and mediation. Although this support can be expressed in various forms, one way of ensuring ongoing support and consistency within these initiatives will be through negotiation of protocols between local communities and representatives of the justice system. These will establish the conditions precedent to and the procedures to be followed within such community sentencing approaches.[768] Establishment of protocols will also ensure continuity of approach within each initiative and help to reduce the dependence upon and the influence of any one individual in initiative development.[769]

5. Development and expansion of criminal mediation:

Mediation was the only model studied which transferred full decision-making power from the prevailing system to local community members. Expansion of this

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[768] An example was the protocol signed between Hollow Water and the Manitoba Department of Justice in 1991.

[769] One of the reasons the community of Hollow Water sought to negotiate a protocol with the department of justice was that Crown attorneys responsible for this community frequently changed forcing the CHCH assessment to re-educate each successive attorney.

approach, by diverting more offenders from the court system, will increase the amount of court time available for consideration of more serious charges and will return to these Aboriginal communities some measure of control over criminal dispute resolution. For expansion of mediation to be effective, training in mediation and facilitation skills should be provided for local committee members.

7.6 Epilogue

Community sentencing and mediation in Canadian Aboriginal communities is still in the initial stages of development. Judge Claude Fafard, my major non-Aboriginal informant during this study, repeatedly told me that it was too early to draw any firm conclusions about the impact of the community sentencing initiatives. Despite this limitation, I feel fortunate to have been able to study this topic at such a crucial stage in the development of these community-based approaches. As Rupert Ross commented "[t]he cries for local control over community justice are growing."[770] The need for sentencing reform in Canadian Aboriginal communities is undeniable. I hope my study has provided insight into the functioning and evolution of community sentencing and mediation in Aboriginal communities. Hopefully, it will also generate discussion and debate on the appropriate path for future sentencing reform.

My study has traced the history, albeit brief, of sentencing and mediation initiatives operating in six Aboriginal communities of Manitoba and Saskatchewan. Each initiative has experienced a unique evolution reflecting the distinctiveness of

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[770] *Supra* note 63.

each community. Despite this diversity, I was able to identify and analyze four models currently being employed to facilitate community sentencing and mediation in Aboriginal communities. These models are not intended to represent all community sentencing and mediation approaches operating in Aboriginal communities across Canada. I expect many local and regional variations exist. However, I believe these models accurately represent the current initiatives operating in the communities studied and, further represent approaches being employed in many Aboriginal communities across Canada.

A framework combining legal pluralism and post-colonialism was employed to facilitate analysis of study data. Legal pluralism literature postulated a plurality of local and state systems of law and social control operating within each community. By identifying and analyzing these systems in each community studied, insight was gained into the advantages and dis-advantages of community sentencing and mediation. Post-colonialism literature focussed on the historical relationship of domination and resistance between prevailing and indigenous societies and postulated that this relationship could best be understood through the "eyes of the colonized," which in my study represented the Aboriginal residents of these communities. I conducted as many local interviews as possible and believe I gained considerable insight into Aboriginal perspectives about the development of community sentencing and mediation.

My research revealed local feelings of estrangement and separation from the Anglo-Canadian justice system among Aboriginal people. These feelings had recently come to co-exist with feelings of empowerment among local participants in community

sentencing and mediation. In an apparent contradiction, these participants were prepared to devote considerable time and energy towards initiatives operating within a system they had frequently criticized. Although I do not presume to understand fully the motivation of these local participants, their active involvement does suggest these initiatives are having a positive impact on these communities. The breath of discretion existing within the prevailing justice system has allowed judges and justice officials to adapt significantly the process and substance of sentencing in Aboriginal communities. Although these reforms have not achieved an autonomous justice system for Aboriginal people, they do highlight the flexibility available within the conventional system to allow for a recognition of Aboriginal practices and processes and to involve local community members in a sentencing process previously dominated solely by lawyers and judges.

I expect my study will be frustrating to lawyers who are searching for a concise set of rules and guidelines governing when community sentencing and mediation approaches are to be used. As a lawyer, I initially felt this same frustration. However, simply put, no system-wide criteria or guidelines are available given the infancy, and perhaps novelty, of these approaches. Although appellate comment may soon impose a set of criteria governing application of community sentencing, I believe the imposition of inflexible jurisdiction-wide rules will be harmful to the evolution of these approaches. All initiatives studied reflected the unique circumstances and dynamics existing in each community. Imposing inflexible rules upon these initiatives will restrict the ability of courts to adapt sentencing practices to recognize local

concerns and needs. This is not to suggest that a statement of guidelines is undesirable at the local level. Communities may benefit from the negotiation of protocols with court and justice officials, setting out the scope and application of these approaches. Judges appearing within these communities may wish to, and have in northern Saskatchewan, set out guideline governing community sentencing. However, the strength of the prevailing system is in its discretion. Inflexible rules will only serve to limit constructive adaptation of current sentencing practices.

My discussion of community sentencing and mediation will, I expect, be deeply distressing to those who believe strongly in province-wide sentencing uniformity. Many of the sentences resulting from these approaches are outside of established appellate sentencing ranges. Although I recognize that sentencing uniformity is a concept innate to Anglo-Canadian law, blind adherence to this principle neglects the current reality in Aboriginal communities. The punitive focus of the prevailing justice system has not been successful in changing offender behaviour and increasing public safety in these communities. Local resources, such as informal systems of social control, were previously ignored by the conventional court system but are now being accessed by judges with a view towards promoting changed offender behaviour and increased public safety. These local systems can achieve the broader Canadian sentencing goals of deterrence, denunciation and rehabilitation.[771] I cannot improve on Judge Barry Stuart's analysis of the tension existing between community sentencing and principles of sentence uniformity:

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[771] See *supra* note 255.

> To fit the sentence to the circumstances not only of the offence and offender, but also to the needs of the victim and the community, and do so within available time and resources requires significant information and time. The temptation is to impose standard sentences must be overcome for the sentencing process to avoid squandering scarce resources, and to be used to its full potential in achieving its objectives.[772]

Most would agree that the ultimate goal of any criminal justice system is protection of the public. Given the dismal track record of the prevailing justice system in Aboriginal communities, even the possibility of these approaches succeeding by changing offender behaviour and deterring crime makes their continued development important if not crucial to Aboriginal people and to Canadian society as a whole.

My support for continued development of community sentencing and mediation should not be taken as suggesting no problems exist within these approaches. I recognize a significant danger if such processes become forums for political interference and the persecution of unpopular or marginalized offenders or victims. Vigilance both by judges and community participants will be required to avoid this result. If victims are to be directly involved in these approaches, care must be taken to ensure their support and protection both during and after adjudication. Although the goal of public protection is laudable, these words are hollow if the developing processes lead to the alienation and re-victimization of victims.

The continuing evolution of these community-based approaches depends on a broad spectrum of support and participation including local community members, judges, Crown and defence counsel and probation. According to Associate Chief Judge

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[772] *D.N.*, *supra* note 319 at 29.

Brian Giesbrecht of the Provincial Court of Manitoba, the past two decades has seen other sentencing projects come and go in Aboriginal communities. Their demise was usually brought about by the departure of a key participant. It is essential that the evolving initiatives not come to be controlled by anyone individual or lobby group. A major strength of the approaches studied was that they enjoyed broad-based support both within local circles and the broader justice system.

In understanding the development of these approaches, more research is required in Aboriginal communities. I am a non-Aboriginal person. I encountered restricted access to the communities studied both because of my unfamiliarity with local custom and language and because of the distance of these communities from my residence in Winnipeg. Future qualitative studies by Aboriginal researchers who are able to speak the local language and spend more time residing in these communities will enhance understanding of Aboriginal perspectives on community sentencing and mediation. Such additional research can be interpreted through the post-colonial and legal pluralist frameworks adopted in this thesis which will, in turn, facilitate understanding of local dynamics and their relationship to the evolution of community sentencing. Funding for travel was another crucial factor limiting my access to the communities. Future studies will require significant funding if, as suggested, more extensive local research is conducted within Aboriginal communities.

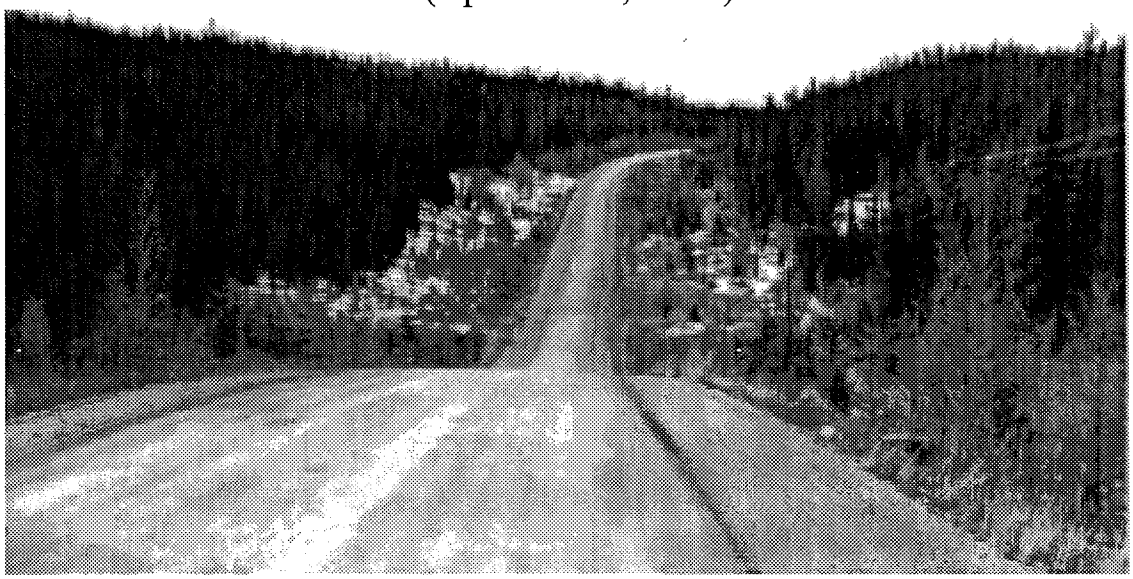
One of the photographs displayed in Appendix B pictures the road North to Sandy Bay. In many ways the future of community sentencing and mediation resembles this image, with the journey's destination still out of sight but not far over

the next hill. I expect that, five years from now, many answers will have been provided to the questions I have raised in this thesis. Hopefully, many of these answers will have been articulated by Aboriginal voices. Other questions will not have been answered and, indeed, may never be. If my study has accomplished anything, I hope it has provided some insight into the current reality of sentencing reform in Aboriginal communities and some guidance for our journey, over the next hill.

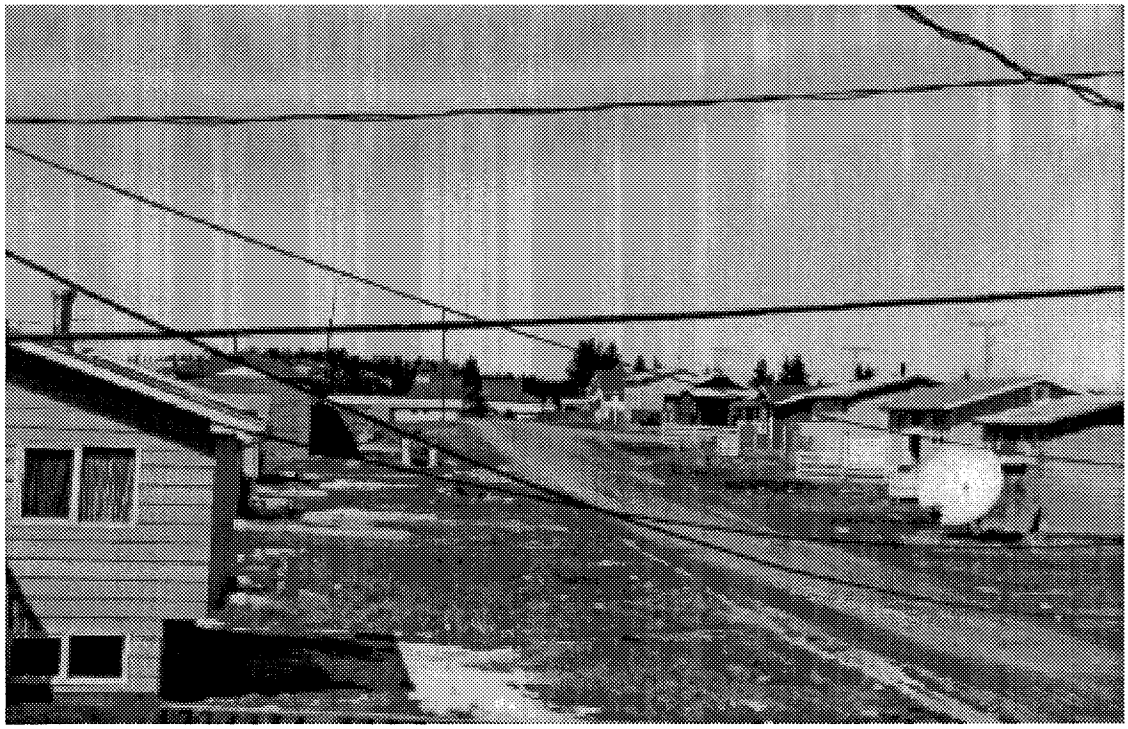
Appendix A: Location of Communities Studied (with larger urban centres noted for reference).

Appendix B: Photographs of Communities Studied

Sandy Bay, Saskatchewan
(April 18-19, 1995)



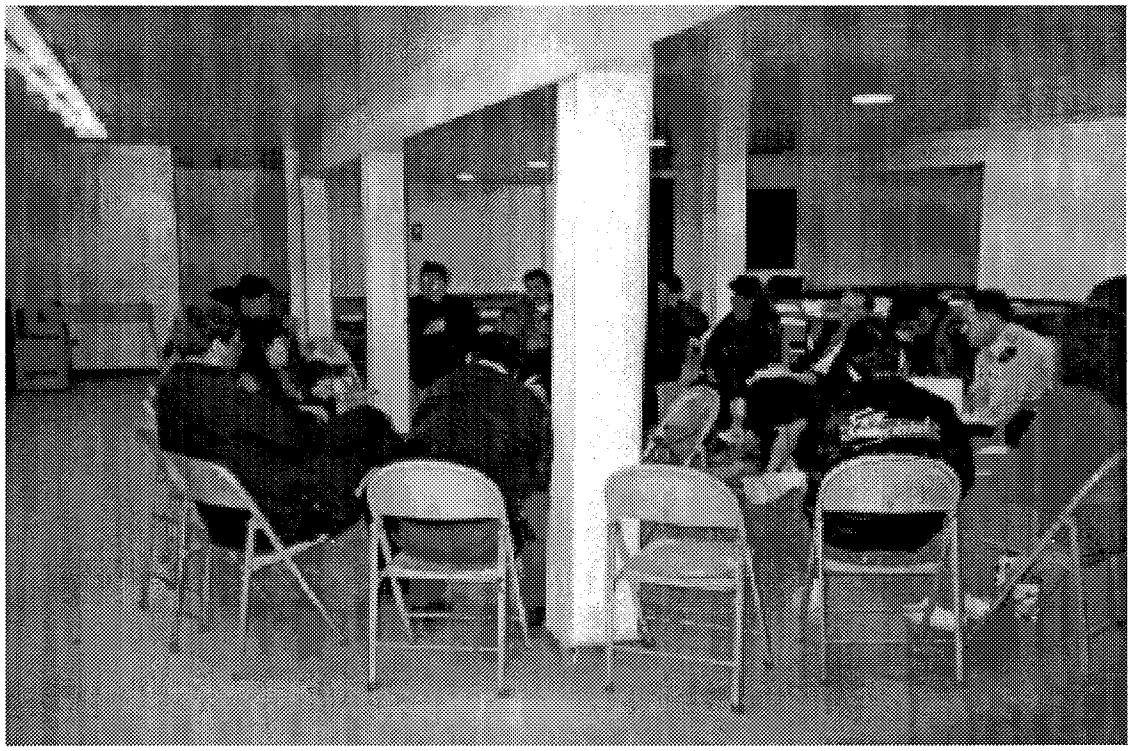
The road North to Sandy Bay.



Main street at 9:00 am.

Court is held in the basement of this church.

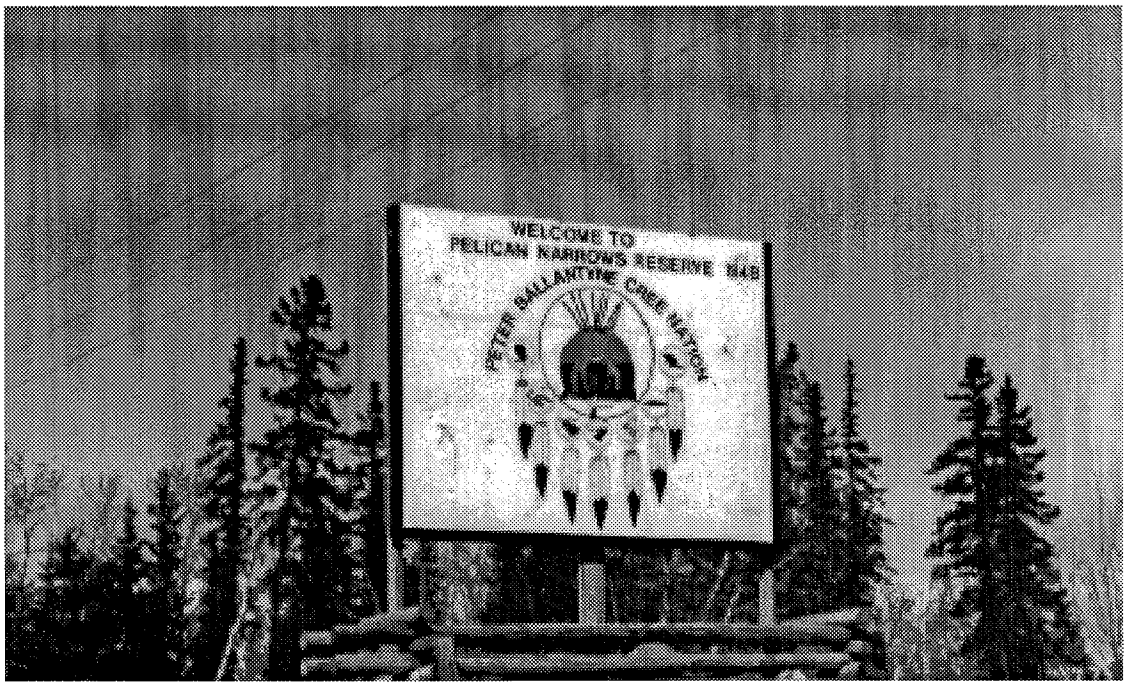
Accused appears before Judge Fafard during regular court.



Later, a sentencing circle is conducted for an offender who has pleaded guilty.

5:00 p.m. Judge Fafard and members of the court party depart Sandy Bay.

Pelican Narrows, Saskatchewan
(April 18-19, 1995)

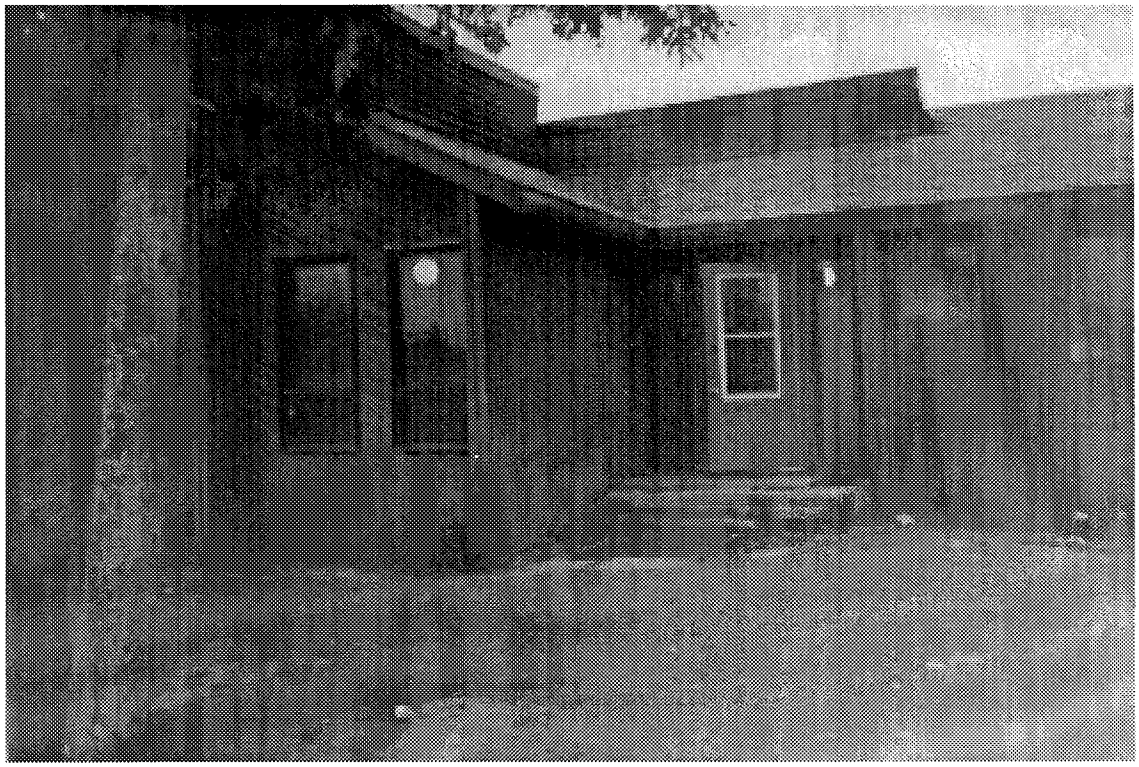


Arriving at Pelican Narrows.

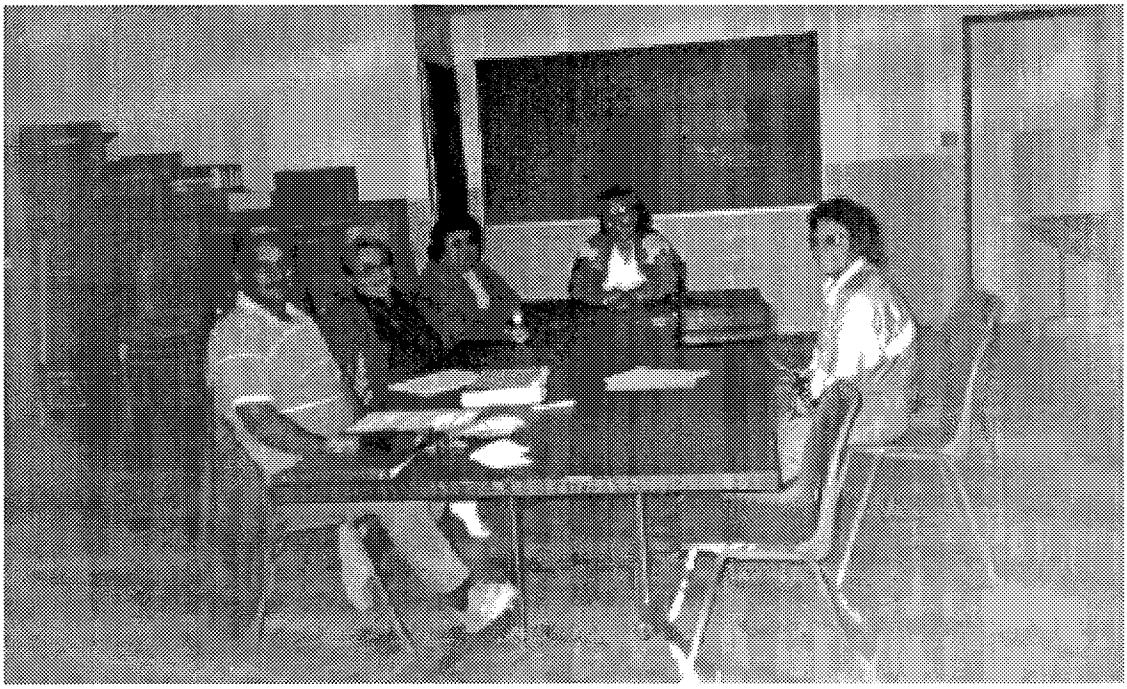
Court is held in a wing of the Peter Balantyne Cree Nation Band Hall.

Cumberland House, Saskatchewan

(June 29, 1995)



The Sentencing Circle Committee met at the Pine Island Outpatient Centre.

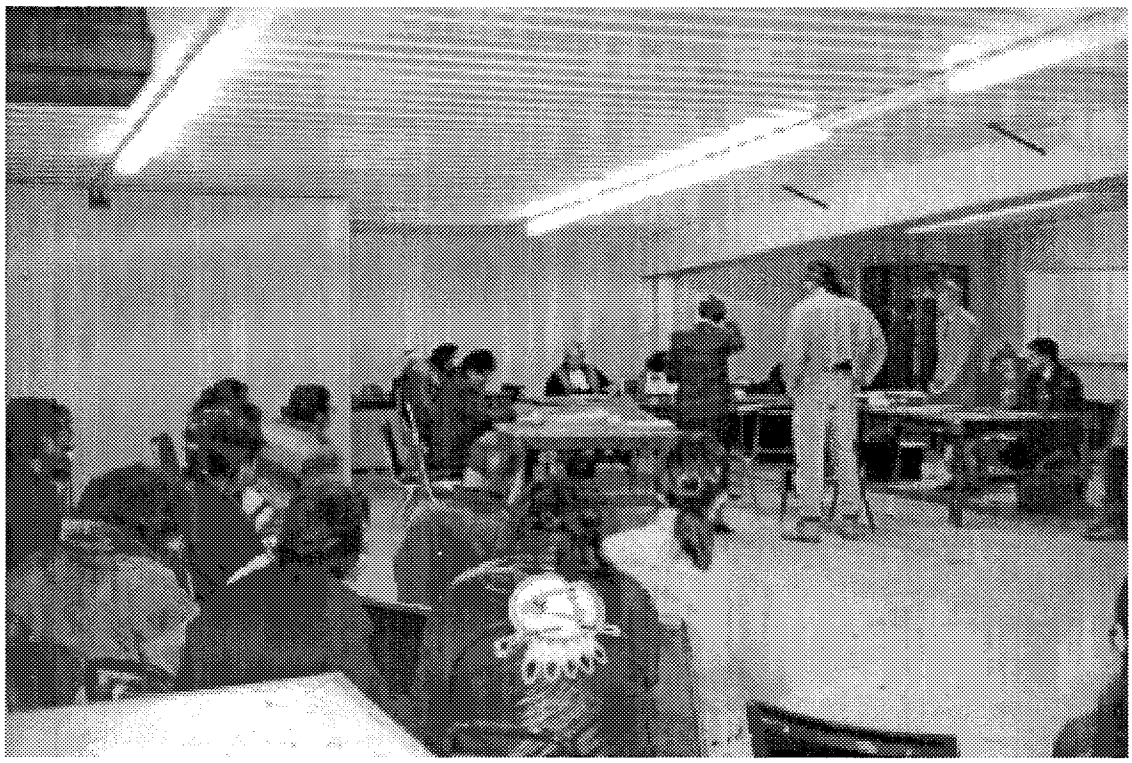


Members of the Sentencing Circle Committee. (Photographs by community member)

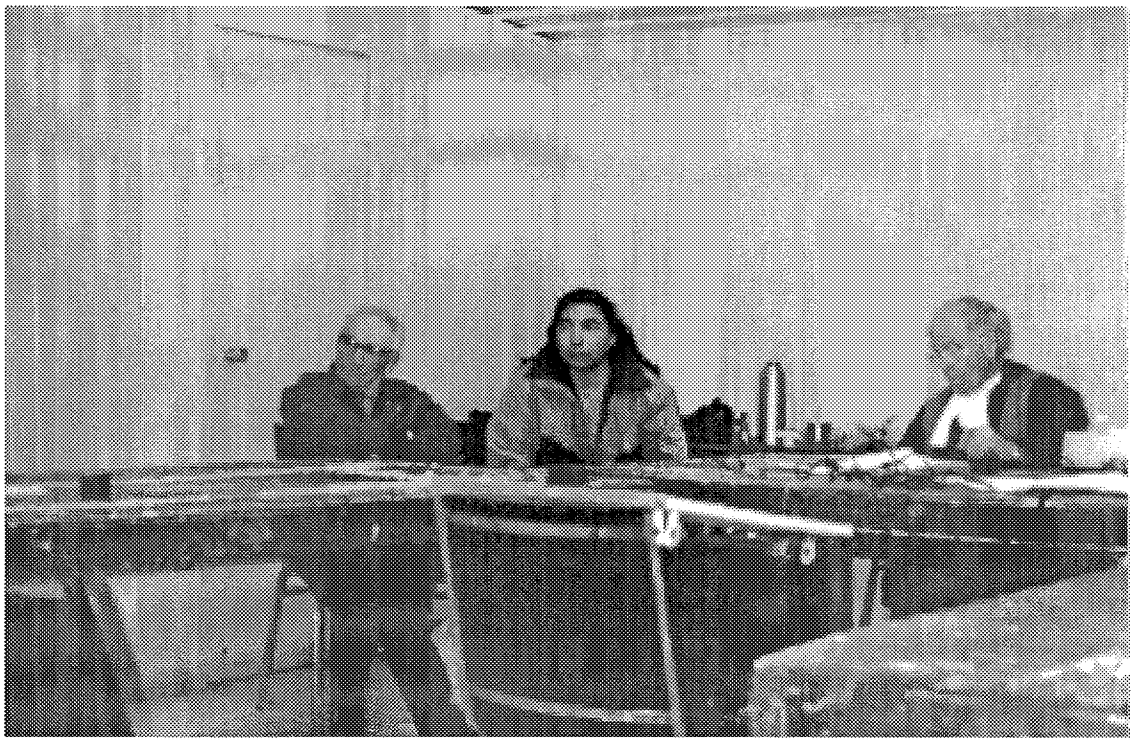
Mathias Colomb Cree Nation (Pukatawagan), Manitoba
(April 10-11, 1995)

Lawyer Joyce Dalmyn and Paralegal Jack Robinson arrive in Pukatawagan.

Looking out over the community from the local recreation hall where court is held.



Community members look on as accused appears before court.



Members of the Justice Committee sit with Judge Martin in order to provide sentencing advice.

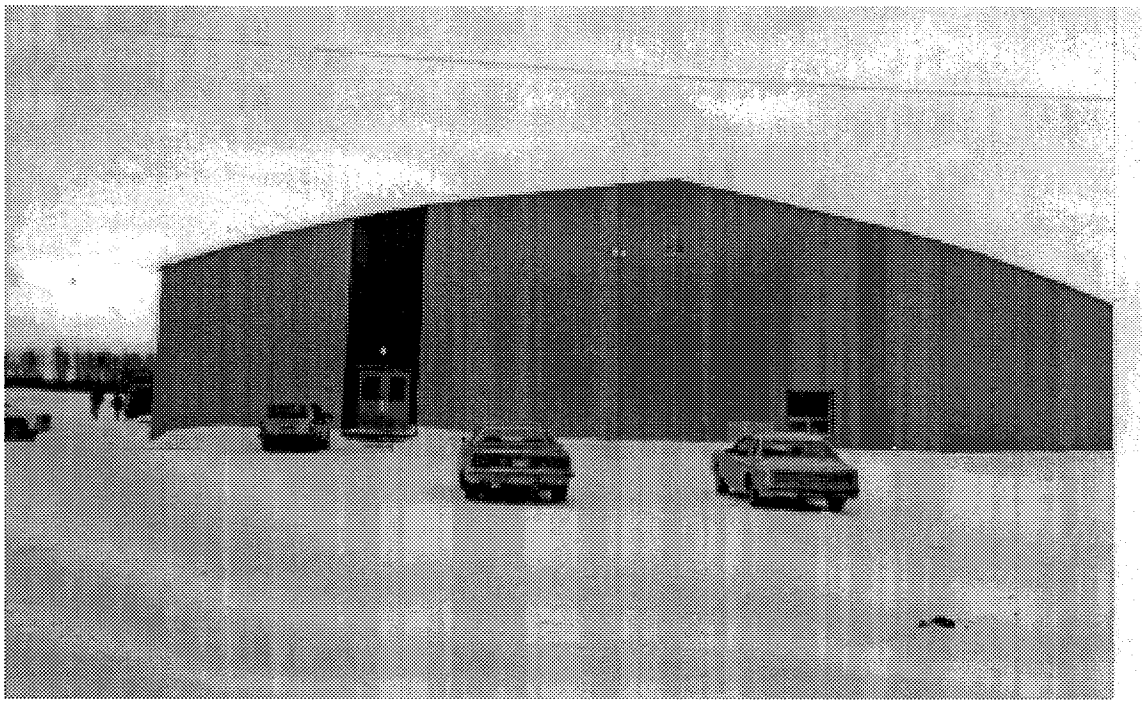
Hollow Water First Nation, Manitoba

Marcel Hardesty and Berma Bushie members of Community Holistic Circle Healing. (Photograph by Peter Moon of the Globe and Mail - Reprinted with permission).

Sentencing Circle held in December 9,1993 at Hollow Water Community Hall. (Photograph by Kevin Rollason of the Winnipeg Free Press - Reprinted with permission).

Waywayseecappo First Nation, Manitoba

(March 2, 1995)



Court is held in this local hall.

Members of the Elders' Advisory Council.

Appendix C: Protocol of the Katapamisuak Society

DECEMBER 06, 1993
MEETING - PROVINCIAL COURT BUILDING, NORTH BATTLEFORD

KATAPAMISUAK SOCIETY

POUNDMAKER CREE NATION

SENTENCING CIRCLES
HEALING CIRCLES

THE PROCESS

A. SENTENCING CIRCLES

The current consensus is that the Poundmaker Band will form a "Community Justice Committee." The makeup of the Community Justice Committee will be determined by the community at the Poundmaker Cree Nation. It is envisaged that it will have between five and twelve people, and will represent a broad-based spectrum of the community.

The first purpose of the committee will be to determine if an individual or case situation is appropriate for sentencing circle or healing circle.

Any person or agency may refer a matter to the Community Justice Committee for their consideration. That is, the accused, the R.C.M.P., the crown, the defence, and the judge.

If the Community Justice Committee determines that an individual and the case situation is appropriate for a sentencing circle, then that recommendation will be presented to the judge in court..

Similarly, if the Community Justice Committee determines that the individual or the case situation is not appropriate for a sentencing circle, then that recommendation will be presented to the judge in court.

There are two places in this process where judicial discretion will be paramount and will rule the issue. The first is the judge must be in agreement to conducting the sentencing circle. If he or she does agree, the judge will choose a date, time and place for the sentencing circle to occur. If not, the judge will sentence the accused in the ordinary fashion without the benefit of the advice of the community through the sentencing circle process.

The second purpose of the Community Justice Committee is to assist in the conduct of the sentencing circle and to provide advice and guidance to the community and the judge in respect to the accused and the alternatives available to the court in sentencing.

The sentencing circle process could begin with a prayer or a sweetgrass ceremony or some other culturally appropriate ceremony, depending on the wishes of the Poundmaker community.

The judge will act as a moderator or a chair. The crown will present the facts and speak to sentence. The defence will speak to sentence. The judge will usually indicate what range of sentence he or she would normally impose without the assistance of the sentencing circle. Then the sentencing circle will commence with input from the community. If there is a victim, the victim will likely be asked if they wish to speak first.

The goal of the sentencing circle is to arrive at a more effective intervention or the most effective intervention having in mind the accused and the community. The challenge is for the community to assist the court in finding or providing community based resources for the most effective sentence. There will be a debate and comment in the circle by the participants with a view to eventually reaching a consensus, if possible.

The judge will then determine the sentence. This is the second place where judicial discretion comes into play and will rule the issue. The judge may not accept the recommendation of the community through the sentencing circle process, and may impose 2 sentence which he or she is appropriate but may not necessarily be what was recommended by the sentencing circle.

B . HEALING CIRCLES

The healing circle is envisaged as a DIVERSION from the ordinary court process. If the police and the accused agree, the police may refer a matter directly to the Community Justice Committee to conduct a healing circle. This could be pre-charge or postcharge, and would likely work in the same manner or fashion as the Battlefords Adult Diversion Project or the Young Offender Diversion Program in the Battlefords. The Community Justice Committee would determine the manner and the conduct of the healing circle. It is envisaged that healing circles could occur at any time, but it is likely that this process w-ll evolve once the project is at a stage where there is confidence, trust, and mutual respect between all parties concerned in this process.

C. CRITERIA

The consensus is that the following criteria would~ be appropriate, and this is arrived at through consultation with the judges who are conducting sentencing circles in northern

Saskatchewan.

The criteria are as follows:

1) that the accused is willing to participate;

2) that the accused is from the community and has deep roots in the community;

3) that the Community Justice Committee is willing to participate, that there are elders available, and that there is community leadership which is respected willing to participate in the circle; (This may not be elected political officials.)

4) that the victim is willing;

5) that all disputed facts have been resolved;

6) that the case is one where a court would be willing to take a calculated risk and impose a sentence outside the usual range, emphasizing rehabilitation rather than punishment. The case must be one which would not affect the guidelines in the Saskatchewan Court of Appeal.

D. CONCERNS & COMMENTS

We recognize that incarceration may not be the most effective sentencing tool in every case. Sometimes incarceration reinforces criminal behaviour and does nothing to encourage law abiding behaviour.

We know that 65% of individuals in provincial jails and 43% of individuals in the federal penitentiary are aboriginal. We recognize that there is a concern that the existing model of sentencing and incarceration may not be working.

The most effective project will be one which has the support of the community, the elected leadership, and respected individuals and elders. These individuals must play a key role in forming and guiding the process.

We must be very vigilant to not allow favouritism or political influence to be a factor in the sentencing circle. Safeguards to make sure that the sentencing is not controlled by or influenced by a clique or political dynamics in the community must exist.

The circle must reflect a broad spectrum of the community, including particularly strong representation from women in the community.

We must have adequate resources and support groups in the community so that the sentencing circle has available to it the most realistic options it may consider.

E. ATTENDEES

The above consensus was reached at the meeting which was attended by the following persons:

Brian Tootoosis, Councillor, Poundmaker Band,
Justice Portfolio

2. Art Kasokeo, Poundmaker Band, Elder

3. Edwin Tootoosis, Poundmaker Band, NADAP Coordinator

4. Rim Tootoosis, Poundmaker Band,
Counsellor, Chief Poundmaker School

5. Sgt. Commer, RCMP, Cut Knife Detachment

6. Staff Sgt. Graham, RCMP, North Battleford Detachment, Battleford Justice Advisory Council

7. Ben Weenie, Sweetgrass, Katapamisuak society Director

8. Jim Taylor, Senior Crown Prosecutor, Battlefords Region

9. Maureen Jickling, Legal Aid, North Battleford

10. Antonia Gossner, Youth Worker, North Battleford

11. Keith Bell, Adult Corrections, North Battleford,
Katapamisuak Society Director

12. Judge Deshaye

13. Sharon Baptiste, Poundmaker Band, Social worker

14. Judge Arnot

F. MEMBERS OF THE POUNDMAKER COMMUNITY Justice COMMITTEE ARE As FOLLOWS:

1. Lucie Favel

2. Tim Tootoosis

3. Pearl Baptiste

4. Kim Tootoosis

5. Garnet Tootoosis

6. Fernard Checkosis

7. Alec Tootoosis

8. Marie Tootoosis-Bear

9. Edwin Tootoosis

10. Sharon Baptiste

Appendix D: Protocol for Manitoba Department of Justice Support for the Community Approach of the Hollow Water Community Holistic Circle Healing

1. The Department of Justice recognizes the Community Approach established by the Hollow Water Community Holistic Circle Healing as a valid alternative to the sentencing approach traditionally employed by Canadian courts of criminal law. Accordingly, Crown Attorneys will, in all cases, give serious consideration to the participation of the victimizer in the Community Approach as a key factor in determining the position the Crown will take on sentence.

2. The Community Approach has developed out of concern for gaps which are inherent in existing systems for the delivery of services to victims and victimizers involved in sexual assault offenses, resources geared towards the rehabilitation of sexual victimizers and the healing process for victims of sexual assault have not adequately fulfilled the community needs. While lengthy jail sentences can serve to immunize the community from the victimizer for a period of time, the reintroduction into the community of a victimizer whose jail sentence has not served any significant rehabilitative function leaves the community in a vulnerable position. The Community Approach is a culturally based response to these difficulties, and has as its objective the healing of all parties to the victimization; the victim, the victim's family, the victimizer and the victimizer's family and the community at large.

3. For victimizers to be eligible for participation in the Community Approach they must be resident in Manigotogan, Aghaming, Seymourville or Hollow Water. A period of assessment is essential to determine whether the victimizer is a suitable candidate for immediate involvement in the Community Approach. A remand period may be required for the Assessment Team to determine the suitability of a victimizer for participation in the Community Approach. In most cases, such assessments should be completed and a recommendation made by the Assessment Team to the Crown Attorney, within thirty days from the date of disclosure.

4. Three kinds of sentences are available for victimizers. These are, a disposition not involving jail, jail followed by probation or a jail sentence standing alone. The Community Approach can become involved with victimizers who have received any of the three types of sentences. In all cases, the Crown Attorney should assist in attempting to have a sentence imposed which will facilitate the involvement of the Community Approach at the appropriate time. (See paragraph 9)

5. Crown Attorneys must recognize that the Community Approach is an alternative to the traditional sentencing approach, not simply an addition to it. Those responsible for the operation of the Community Approach are in a much better position to determine

the suitability of the Community Approach to an individual victimizer than are Crown Attorneys whose experience is restricted to our traditional approaches to addressing the problem of sexual assault. Where a victimizer is assessed as being suitable to participate in the Community Approach as an alternative to jail, the Crown Attorney should accept that assessment unless exceptional and compelling reasons exist for not doing so. For example, where the accused is a repeat offender, having previously been through the Community Approach, or where the accused poses a risk of serious physical harm to other members of the community, then, in some cases, the Crown Attorney may feel it appropriate to seek a jail sentence despite the assessment recommendation to the contrary. However, in concluding that exceptional and compelling reasons exist, the Crown Attorney must not lose sight of the fact that those responsible for the Community Approach have an even greater interest in the safety of the community than does the Crown Attorney, and are usually in a better position to assess the necessity of protecting the community from a given victimizer. In no case should the Crown Attorney reject the recommendation of the Assessment Team without first obtaining the approval of the Senior Crown Attorney for the Southern Region.

6. Where a victimizer is assessed as suitable for the Community Approach as an alternate to jail and indicates his willingness to participate in the Community Approach (which requires the entering of a guilty plea), the position of the Crown Attorney must be made clear to the victimizer before any such guilty plea is entered. As the entering of a guilty plea may well be based on an understanding that the Crown will not seek a jail sentence, it is essential that the Crown's position be clarified before this step is taken. Accordingly, in any case in which the Assessment Team recommends a non-custodial disposition, the responsible Crown Attorney must review the file as early as possible to determine whether such a disposition is acceptable. The responsible Crown Attorney must convey that determination as soon as possible, and in any event, within one week of receipt of the assessment, to the case manager or, if unavailable, to any other member of the management circle at ph. 363-7426 or 363-7428. If the victimizer has a previous criminal record, the Crown Attorney should supply this to the Assessment Team as soon as possible. The Crown's position should also be conveyed to defence counsel at the same time the case manager is informed.

7. At this point, if there is agreement as to a non-custodial disposition, a guilty plea will be entered and sentencing will be delayed for a period of time so the victimizer can commence his participation in the Community Approach. After a suitable period of time during which the victimizer commences his participation in the Community Approach an assessment will be prepared and provided to the court. This will usually involve a delay in sentencing for a period of thirty to ninety days. If the guilty plea was entered on the basis of a non-custodial disposition, and if at the end of this period of time the victimizer is assessed as appropriate for a non-custodial disposition, then the Crown Attorney will not seek a jail sentence. If, on the other hand, the report indicates unsatisfactory compliance with treatment on the part of the victimizer, then

the Crown will not be bound by its undertaking as to sentence, given that the victimizer has failed to comply with his obligations, the Assessment Team should ensure the Crown Attorney is notified as soon as possible. The failure of the victimizer to comply with his obligations will not necessarily require revocation of the agreement not to seek a custodial disposition. The Assessment Team may make recommendations as to how to address the failure to comply which will not involve revocation. Again, the Crown Attorney should notify the Assessment Team as soon as possible as to the position which the Crown will take as a result of the victimizer's failure to comply with his obligations. As always, in making this decision the Crown Attorney should give serious consideration to the recommendation of the Assessment Team.

8. In any case in which the victimizer is bound by a probation condition, after sentencing, requiring his participation in the Community Approach, the RCMP or the Crown Attorney should be notified by the Assessment Team of the victimizer's failure to comply with the conditions of the probation order. Such notification should contain a recommendation as to the appropriate response to the failure to comply.

9. It is recognized that some cases will be so serious that a non-custodial disposition is simply unacceptable. In these cases, however, the voluntary participation of the victimizer in the Community Approach will still be desirable. In such cases, the Crown Attorney may indicate, prior to a guilty plea being entered, that the agreement for participation in the Community Approach may help mitigate an otherwise lengthy jail sentence. This can be accomplished by a period of probation following a jail sentence with probation conditions including a requirement for participation in the Community Approach. Any recommendations for probation following a period of incarceration are limited by s. 737(1)(b) of the Criminal Code which provides that a Probation Order cannot be imposed in addition to a jail sentence which exceeds two years.

10. It is essential that all participants in the justice system recognize the validity of the efforts of the Hollow Water Community Holistic Circle Healing in this area. Traditional criminal justice responses to sexual assaults are an inadequate answer to this complex problem. Recidivism on the part of some individuals who have proceeded through the Community Approach does not negate the legitimacy of the Community Approach. Recidivism on the part of such individuals may, however, negate their entitlement to further consideration for involvement in the Community Approach. The Department of Justice will continue to support the Community Approach and to assess its function as an alternative to the traditional criminal justice response to sexual assault offenses.

References

Case List

R v. A.B.C. (1991), 120 A.R. 106 (Alta. C.A.).

R. v. A.(G.), [1994] 3 C.N.L.R. 77 (Nfld. C.A.).

R. v. Ayalik (1960), 33 W.W.R. 377 (N.W.T.C.A.).

R. v. Aluka (1993), 112 D.L.R. (4d) 732 (Que. Ct. Crim. Pen. Div.).

R. v. Bear (19 April 1995), Sandy Bay (Sask. Prov. Ct.) [unreported].

R. v. Bunt (1788), 100 Eng. Rep. 368 (K.B.).

Bushels Case (1670), 6 State Trials 999.

R. v. Cabot-Blanc, [1987] N.W.T.R. 1 (N.W.T.S.C.).

R. v. Cheekinew (1993), 80 C.C.C. (3d) 143 (Sask.Q.B.).

R. v. C.S. (9 January, 1995), Winnipeg (Man.Q.B.) [unreported].

R. v. D.N., [1993] Y.J . No.193 (QL) (Yuk .Ter. Ct.).

R. v. Dusomme (1993) Winnipeg (Man. Prov. Ct.) [unreported].

R. v. Equash (13 December 1994), Regina (Sask. Q.B.) [unreported].

R. v. Fireman (1971), 4 C.C.C. (2d) 82 (Ont. C.A.).

R v. Gardiner (1982), 68 C.C.C. (2d) 477 (S.C.C.).

R. v. Genaille (1982), 8 W.C.B. 197 (Sask. C.A.).

R. v. Howard (1991), 15 W.C.B. (2d) 28 (B.C.C.A.).

R. v. Jackson, [1993] S.J. No. 642 (Sask. C.A.).

R. v. J.A.P. (28 May 1991), Teslin No. T.C. 90-04222 & 90-07328 (Yuk. Ter. Ct.) [unreported].

R. v. John, [1995] A.J. No. 98 (QL) (Alta. C.A.).

R. v. Johnson (1994), 24 W.C.B. (2d) 114 (Y.T.C.A.).

R. v. Joseyounen (March 15, 1995), Wollaston Lake (Sask. Prov. Ct.) [unreported].

R. v. Jules, [1993] Y.J. No. 236 (QL) (Yuk. Ter.Ct.).

R. v. Lucas, [1994] Y.J. No. 107 (QL) (Y.T.S.C.).

R. v. McGrath (1962), 133 C.C.C. 57 (S.C.C.).

R. v. McLeod (1993), 81 C.C.C.(3d) 83 (Sask. C.A.).

R. v. Moosenose [1992] N.W.T.R. 394 (N.W.T.Ter.Ct.).

R. v. Morin, [1994] 1 C.N.L.R. 150 (Sask. Q.B.).

R. v. Morrissette (1970), 1 C.C.C. (2d) 307 (Sask. C.A.).

R. v. Moses (1992), 71 C.C.C. (3d) 347 (Yuk. Ter. Ct.).

R. v. Naappaluk, [1994] 2 C.N.L.R. 143 (Que. Ct. Cr. & Pen. Div.).

R. v. Naqitarvik (1986), 26 C.C.C.193 (N.W.T.C.A.).

R. v. Nukon (1988), 5 W.C.B. (2d) 395 (Y.T.C.A.).

R. v. Rich #1 (1994), 116 Nfld. & P.E.I.R. 293 (Nfld.S.C.).

R. v. Rope, (11 January 1995), Regina Q.B.C.N.J. 10/94 (Sask. Q.B.) [unreported].

R. v. Sandercock(1985), 22 C.C.C.(3d)79 (Alta.C.A.).

R. v. Smith (1987), 34 C.C.C. (3d) 97 (S.C.C.).

R. v. Taylor (29 May 1995), La Ronge (Sask. Q.B.) [unreported].

R. v. Thomas (3 December 1993), Kinistin Reserve (Sask. Prov. Ct.) [unreported].

R. v. Washpan, [1994] Y.J. No. 47 (QL) (Yuk. Ter. Ct.).

R. v. Waskahat (1987), 1 W.C.B. (2d) 210 (Alta.C.A.).

R. v. *Webb* (22 July 1992), Whitehorse T.C. 91-03332 (Yuk. Ter. Ct.) [unreported].

R. v. Wilson (1791), 100 Eng. Rep. 1134 (K.B.).

R. v. Zoe, [1987] N.W.T.J No. 157 (QL) (N.W.T. Ter. Ct.).

Articles

Allahr, A. "When Black First Became Worth Less." *Int'l J. Comp. Soc.* 34:1 (1993): 39.

Archibald, B. *Sentencing Visible Minorities: Equal and Affirmative Action in the Criminal Justice System. Dalhousie L J* 12 (1989): 377.

Arnot, D. "Sentencing Circles Permit Community Healing." *National: The Canadian Bar Association* (October, 1994): 14.

Astor, H. "Swimming Against the Tide: Keeping Violent Men Out of Mediation." In *Women, Mail Violence and the Law*. 147 Sydney: Institute of Criminology, 1994.

Avison, D. "Clearing Space: Diversion Projects Sentencing Circles and Restorative Justice." In *Continuing Poundmaker's & Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*, edited by Gosse, R., Youngblood Henderson, J. & Carter, R, 238. Saskatoon: Purich, 1994.

Barfknecht, D., "Concerns of Canada's Victim's Rights Movement." *Can. Com. Law Journal* 8 (1985): 83.

Betts, C. "Jury Sentencing." *N.P.P.A.J.* 2 (1956): 369.

Bhabha, H. "Signs Taken for Wonders: Questions of Ambivalence and Authority under a Tree Outside Delhi." *Critical Inquiry* 12 (1985): 144.

Brogden, M. "Law and Criminal Labels: The Case of the French Metis in Western Canada" *J.Human Just.* 1:2 (1990): 13.

Campbell, J. "Morin Says Sentence Was Just." *New Breed Magazine* (May 1993) 3.

Coyle, M. "Traditional Indian Justice in Ontario: A Role for the Present?" *Osgoode Hall L. J.* 24 (1986): 605.

Dickey, A. "The Jury and Trial by One's Peers." *U. West. Aust. L. Rev.* 11 (1973-74): 205.

Dickson-Gilmore, E.J. "Finding the Ways of the Ancestors: Cultural Change and the Invention of Tradition in the Development of Separate Legal Systems." *Can. J. Crim.* 34 (1992): 479.

Dombek, C. & Chitra, W. "The Pre-Sentence Report: An Update." *C.L.Q.* 23 (1980-81): 216.

Donlevy, B. "Innovation in the Justice System- Sentencing Circles." *C.B.A. Bar Notes*, Vol. 1X (October, 1994): 4.

Fafard, C. (Address to the Fifth Northern Conference, Sitka, Alaska, April 1991). In *Self-Sufficiency in Northern Justice Issues*, 267. Vancouver: Simon Fraser University, 1992.

----. "On Being a Northern Judge." In *Continuing Poundmaker's & Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*, edited by Gosse, R., Youngblood Henderson, J. & Carter, R, 403. Saskatoon: Purich, 1994.

Fischer, D. & Jeune, R. "Juvenile Diversion: A Process Analysis." *Can. Psych.* 28:1 (1987) 60.

Fitzpatrick, P. "Crime as Resistance: The Colonial Situation." *Howard J.* 28:4 (1989): 272.

----. "The Impossibility of Popular Justice." In *The Possibility of Popular Justice: A Case Study of Community Justice in the United States*, edited by Merry, S. & Milner N., 453. Michigan: University of Michigan Press, 1993.

Gordon, R. "The White Man's Burden: Ersatz Customary Law and Internal Pacification in South Africa." *J. Hist. Soc.* 2:1 (1989): 41.

Goulding, W. "Sentencing Circle used Previously by Suspect." *The Saskatoon Star Phoenix* (6 June 1995): A6.

Grant, P. "Role of Traditional Law in Contemporary Cases." *Can. Legal Aid Bul.* 5 (1982): 107.

Griffiths, C. & Patenaude, A. "Aboriginal Peoples and the Criminal Law." In *Aboriginal People and Canadian Criminal Justice*, edited by Silverman, R & Neilsen, M, 69. Toronto: Butterworths, 1992.

Hall, E. "Sentencing the Individual." In *New Directions in Sentencing*, edited by Grossman, B., 302. Toronto: Butterworths, 1980.

Henry, S. "The Construction and Deconstruction of Social Control: Thoughts on the Discursive Production of State Law and Private Justice." In *Transcarceration: Essays in the Sociology of Social Control*, edited by Lowman, J., Menzies, R. & Palys,T., 89. England: Gower Publishing, 1987.

Jackson, Margaret. "Unequal Justice Before the Law: Traditional Versus Customary Law: An Issues Paper." Address to Canadian Law and Society Annual Meeting, 2 June 1985 [unpublished].

Jackson, Michael. "In Search of Pathways to Justice: Alternative Dispute Resolutions in Aboriginal Communities." *U.B.C. L. Rev.* Special Edition (1992): 147.

----. "Locking Up Natives in Canada." *U.B.C. L. Rev.* 23:2 (1988-89): 215.

Jones, W. "Our Changing Jury System." *Notre Dame Lawyer* 6 (1931): 395.

Kerr, C. "A Needed *Reform in Criminal Procedure". Ky. L.J.* 6 (1918): 107.

Kidder R., "Toward an Integrated Theory of Imposed Law." In *The Imposition of Law*, edited by Burman, S. & Harrell-Bond, B, 289. New York: Academic Press, 1979.

LaFont, H. "Assessment of Punishment - A Judge or Jury Function?" *Texas Law Rev.* 38 (1960): 835.

Lilles, H. *Tribal Justice: A New Beginning*. Whitehorse, 1991 [unpublished].

Longclaws, L., Barkwell, L. & Rosebush, P. "Research Note: Report of the Waywayseecappo First Nation Domestic Violence Project" *Can. J. Nat. Studies.* XIV:2 (1994): 341.

Lowery, B. "Local Native Officials Tame North's Dodge City" *The Winnipeg Free Press* (16 November 1992): B3.

MacAskill, S. & Andrews, H. "Role of the Youth Court Judge at the Disposition Hearing." (1985) 47 *C.R.*(3d) 60.

Mandamim, L. et al. "The Criminal Code and Aboriginal People." *U.B.C. L. Rev.* Special Edition (1992): 5.

Maron, A. "The juvenile diversion system in action: Some recommendations for change." *Crime & Delinquency* 22 (1976): 461 in Fischer, D. & Jeune, R. "Juvenile Diversion: A Process Analysis." *Can. Psych.* 28:1 (1987): 60.

McDonnell, R. "Contextualizing the investigation of Customary Law in Contemporary Native Communities". *Can. J. Crim.* 34 (1992): 299.

McKillop, J. "Oral History: The Spoken Record" *Dawson & Hind* (summer, 1987).

Mellon, F. "The Promise and Dilemma of Subaltern Studies: Perspectives from Latin America History." *Am. Hist. Rev.* (1994): 1491.

Merry, S. "Legal Pluralism" *Law & Soc. Rev.* 22 (1988): 869.

----. "Sorting Out Popular Justice" in *The Possibility of Popular Justice: A Case Study of Community Justice in the United States*, edited by Merry, S. & Milner, N, 31. Michigan: University of Michigan Press, 1993.

----. "Law and Colonialism." *Law & Soc. Rev.* 25:4 (1991): 889.

Miller M. "Forgiveness Replaces Blame: Sentencing Circle Experiment in Saskatoon." *St. Thomas More College Newsletter* 13:1 (1993): 4.

Moon, P. "Cree Offender to be Banished: Judge Accepts Community Verdict" *The Globe and Mail* (30 May 1995): A1.

----. "Native Healing Helps Abusers: Offenders Admit Guilt, Avoid Jail Terms" *The Globe and Mail* (8 April 1995): A1 & A5.

Nader, L. "When is Popular Justice Popular." In *The Possibility of Popular Justice: A Case Study of Community Justice in the United States*, edited by Merry, S. & Milner, N., 435. Michigan: University of Michigan Press, 1993.

National Advisory Commission on Criminal Justice Standards and Goals. "The Courts: Task Force Report." (1973). In *Sanctions, Sentencing and Corrections,* edited by N. Kittrie & E. Zenoff, 65. New York: Foundation Press, 1981.

Nemeth, M. "Circle of Justice: Northern Villagers Take Part in Sentencing." *Macleans* (19 September 1994): 52.

Nielson, M. "Native People and the Criminal Justice System: The Role of the Native Courtworker." *Can. Legal Aid R.* 5 (1982): 55.

Note: "Statutory Structures for Sentencing Felons to Prison." *Colum. L. Rev.* 60 (1960): 1134.

Note: "Jury Sentencing in Virginia". *Va. L. Rev.* 53 (1967): 968.

Olah, J. "Sentencing: The Last Frontier of the Criminal Law." (1980) 16 *C.R.* (3d) 97.

Ortner, S. "Resistance and the Problem of Ethnographic Refusal." Comparative Studies Soc. & Hist. 37:1 (1995) 173.

Parker, G. "Commentary on Criminal Law and Use of Pre-Sentence Report." *Can. Bar Rev.* 42 (1964): 621.

Pate, K. & Peachey, D. "Face to Face Mediation Under the Young Offenders Act." In *Justice and the Young Offender in Canada.* edited by Hudson, J., Hornick, J. & Burrows, B, 105. Toronto: Wall and Thompson, 1988.

Prakash, G. "Postcolonial Criticism and Indian Historiography." *Social Text* 31-32 (1992): 8.

Quigley T. "Issues in Sentencing of Aboriginal Offenders." In *Continuing Poundmaker & Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*, edited by Gosse, R., Youngblood Henderson, J. & Carter, R, 267. Saskatoon: Purich Publishing, 1994.

Raz, J. Lecture given at the University of Toronto, September 1987. Referred to in McGillivray, A. & Ish, D. *Co-operatives in Principle and Practice*, 30. Saskatoon: Centre for Study of Co-operatives, 1992.

Reese, C. "Jury Sentencing in Texas: Time for a Change?" *South Texas L. Rev.* 31 (1990): 323.

Request for Native Tribunal Turned Down." *Saskatoon Star Phoenix* (13 December 1994).

Rollason, K. "Ceremony Heralds Healing: Ancient, Modern Ways Meet in Native Justice Venture." *Winnipeg Free Press* (11 December 1993): A15.

----. "Court Rejects Healing Circle Proposal." *The Winnipeg Free Press* (11 January 1995): B2.

Rosenfeldt, S. & Sullivan, S. "Victims Rights: Discussion Paper." In *DNA Testing and the Law [and] Victims Rights.* Ottawa: Victims of Violence, 1994.

Ross, R. "Leaving Our White Eyes Behind Us." [1989] 3 *C.N.L.R.* 1.

----. "Duelling Paradigms? Western Criminal Justice Versus Aboriginal Community Healing." In *Continuing Poundmakers Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice,* edited by Gosse, R., Youngblood Henderson, J. &

Carter, R, 241. Saskatoon: Purich Publishing, 1994.

Saskatchewan Justice. *Mediation/Diversion Program Policy Draft*. March, 1994.

Sebeston, N. "Intercultural Communication and the Administration of Justice." Presentation at convention of The Northern Conference in March, 1994. In *Circuit Court and Rural Court Justice in the North: A Resource Publication* 1-6. Vancouver: Simon Fraser University, 1985.

Shaffer, M. "Divorce Mediation: A Feminist Perspective" *U.T Fac. L. Rev.* 46:1 (1988): 162.

Sinclair, M. "Aboriginal Peoples, Justice and the Law." in *Continuing Poundmaker's & Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*, edited by Gosse, R., Youngblood Henderson, J. & Carter, R., 173. Saskatoon: Purich, 1994.

Skinner, A. "Notes on the Plains Cree". *Am. Anthr.* 16 (1914): 68.

Smandych, R. & Linden, R. "Co-existing Forms of Aboriginal and Private Justice: An Historical Study of the Canadian West". In *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia and New Zealand*, edited by Hazelhurst, K, 1. Aldershot: Avebury, 1995.

Smandych, R. & Lee, G. "Women, Colonization and Resistance: Elements of an Amerindian Autohistorical Approach to the Study of Law and Colonialism." *Native Studies Rev.* 10:1 (1995): 21.

Snyder, F. "Colonization and Legal Form: The Creation of 'Customary Law' in Senegal." *J. Legal Pluralism* 19 (1981): 49.

Spivak, G. "Three Women's Texts and a Critique of Imperialism" *Critical Inquiry* 12 (1985): 243.

Stimpson, M. "Sentencing Circles Way of Future: Judge." *Star Phoenix* (2 April 1994).

"Trial by Healing Circle" *Canadian Lawyer* (March, 1994): 7.

Van Ness, D. "Restorative Justice." in *Criminal Justice, Restitution and Reconciliation,* edited by Galaway, B. & Hudson, J, 7. New York: Criminal Justice Press, 1990.

Weninger, R. "Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas." *Wash. U. J. Urban Cont. L.* 45 (1994): 3.

Yaeger, S. "Circle Sentencing Programs Give Yukon Indian Bands an Alternative to Traditional Legal System." *The Lawyers Weekly* (1 October 1993): 12.

Zimmerman, S. "The Revolving Door of Despair: Aboriginal Involvement in the Criminal Justice System." *U.B.C. Law Rev.* Special Edition (1992): 367.

Books and Monographs

Aboriginal Legal Services of Toronto's Community Council Project. Toronto: 1992 [unpublished].

American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Sentencing Alternatives and Procedures.* New York: American Bar Assoc., 1968.

Baker, J.H. *An Introduction to the History of English Common Law*. 3d ed. London: Butterworths, 1990.

----. *The Legal Profession and the Common Law: Historical Essays.* London: Hambeldon, 1986.

Baraga, F. *Chippewa Indians.* New York: League of Slovenian Americans, 1976.

Batten, J. *Lawyers.* Toronto: MacMillan, 1980.

Berg, B. *Qualitative Research Methods for the Social Sciences.* Boston: Allyn & Bacon, 1989.

Bianchi H. *Justice as Sanctuary: Toward of New System of Crime Control.* Indianapolis:Indiana University Press, 1994.

Black, D. *The Behaviour of Law*. New York: Academic Press, 1976.

Bowers, J. & Rousseau P. *Workshop on the Role of Crown Counsel in an Aboriginal Context Draft Report.* 1994 [unpublished].

Braithwaite, J. *Crime Shame and Reintegration.* Cambridge: University Press, 1989.

Brown, D. The Genesis of the Canadian Criminal Code of 1892. Toronto: Osgoode Society, 1989.

Canadian Association of Provincial Court Judges, *Canadian Sentencing Handbook.* 1982.

Christensen D., *Cumberland House Historic Park*. Regina: Department of Tourism and Renewable Resources, 1974.

Clark, S. *Aboriginal Customary Law Review*. 1990 (prepared for the Public Inquiry into the Administration of Justice and Aboriginal People).

Cohen, S. *Visions of Social Control: Crime, Punishment and Classification.* Cambridge: Policy Press, 1985.

Community Holistic Circle Healing, *CHCH Position on Healing*. Hollow Water, Manitoba, 1993 [unpublished].

----. *The Sentencing Circle*. Hollow Water, Manitoba, 1993 [unpublished].

----. *CHCH Position on Incarceration*. Hollow Water, Manitoba, 1993 [unpublished].

Community Tribunals: A Community Sentencing Model (Final Draft Proposal). Toronto: Operation Springboard, undated [unpublished].

Crnkovich, M. *Report on the Sentencing Circle in Kangiqsujuaq*. Ottawa: Pauktuutit, 1993 [unpublished].

Cumming, P. & Mickenberg, N. *Native rights in Canada*. 2d ed. Toronto: General Publishing Co., 1972.

Daniels, C. & Christiansen, R. *The White Man's Laws*. Edmonton: Hurtig Publishers, 1970.

Danzinger, E. *The Chippewas of Lake Superior*. Oklahoma: University of Oklahoma, 1979.

Davies, S. *Experiences With Circle Court*. Paper presented to the Northern Justice Society Conference in Kenora, Ontario, 1993 [unpublished].

Denzin, N. & Lincoln, Y. *Handbook of Qualitative Research*. London: Sage Publications, 1994.

Department of Justice of Quebec, *Cree and Justice Symposium: Problematics on Justice in the Cree Milieu*. Montreal, 1988.

Dion, J. *My Tribe the Cree*. Calgary: Glenbow Museum, 1979.

Ellickson, R. *Order Without Law: How Neighbors Settle Disputes*. Massachusetts: Harvard University Press, 1991.

Fafard, C. *Sentencing Circle: A Progress Report.* La Ronge, Saskatchewan, undated, [unpublished].

Final Report: Safety Net; A National Conference on Crime Prevention, Public Safety and Justice Reform. Burlington: CAVEAT, 1994.

Fine Day, *My Cree People.* Invermere, B.C.: Good Medicine Books, 1973.

Frideres, J. *Native People in Canada: Contemporary Conflicts*. 2d ed. Scarborough: Prentice-Hall, 1983.

Galaway, B. & Hudson, J. *Criminal Justice, Restitution and Reconciliation.* New York: Criminal Justice, 1990.

Gaylin, W. *Partial Justice: A Study of Bias in Sentencing* (New York: Alfred Knopf, 1974)

Giesbrecht, Brian, J. *The Fatal Inquiries Act: Report by Provincial Court Judge into the Death of Lester Norman Desjarlais*. Brandon, Manitoba, 1992.

Gleisser, M. *Juries and Justice*. New Jersey: A.S. Barnes, 1968.

Gordon, R. & Meggitt, M. *Law and Order in New Guinea Highlands: Encounters with Enga.* Hanover, New Hampshire: University of New England, 1985.

Gosse, R., Youngblood, J. & Carter, R., editors. *Continuing Poundmaker & Riel's Quest (Presentations Made at a Conference on Aboriginal Peoples and Justice).* Saskatoon: Purich Publishing, 1994.

Goulet, K. *Oral History as an Authentic and Credible Research Base for Curriculum: The Cree of Sandy Bay and Hydroelectric Power Development 1927-67.* M.Ed. thesis, University of Regina, 1986.

Griffiths, C. & Verdun-Jones, S. *Canadian Criminal Justice.* Toronto: Butterworths, 1989.

Grinnell, R. & Williams, M. *Research in Social Work: A Primer.* Illinois: Peacock, 1990.

Hallowell, I. *Culture and Experience.* Illinois: Waveland Press, 1955.

Hammersley, M. *The Dilemma of Qualitative Method: Herbert Blumer and the Chicago Tradition*. London: Routledge, 1989.

Hammersley, M. & Atkinson P. *Ethnography Principles in Practice*. London: Routledge, 1983.

Harding, C. & Koffman, L. *Sentencing and the Penal System: Text and Materials*. London: Sweet and Maxwell, 1988.

Hennepin, L. *A New Discovery of a Vast Country in America*. Vol. 1. Toronto: Coles, 1974.

Henry, S. *Private Justice: Towards Integrated Theorising in the Sociology of Law*. London: Routledge & Kegan Paul, 1983.

Hickerson, H. *The Chippewa and Their Neighbours: A Study in Ethnohistory*. Illinois: Waveland Press, 1987.

Hines, V.G. *Judicial Discretion in Sentencing by Judges and Magistrates*. England: Barry Rose, 1982.

Hudson, J., Hornick, J. & Burrows, B. *Justice and the Young Offender in Canada*. Toronto: Wall and Thompson, 1988.

Indian and Northern Affairs Canada. *The Canadian Indian*. Ottawa: Supply and Services Canada, 1986.

Jaffary, S. *Sentencing of Adults in Canada*. Toronto: University of Toronto Press, 1963.

Jenness, D. *The Indians of Canada*. Bulletin 65 - Anthropology Series No. 15. Ottawa: Department of Mines, 1934.

Jennings, F. *The Invasion of America*. New York: Norton & Co., 1975.

Johnson, B. *Ojibway Heritage*. Toronto: McLelland & Stewart, 1987.

Kelly, N. & W. *The Royal Canadian Mounted Police: A Century of History: 1873-1973*. Edmonton: Hurtig, 1973.

Kew J., *Cumberland House in 1960* Report #2 Economic and Social Survey of Northern Saskatchewan (Saskatoon: Centre for Community Studies, University of Saskatchewan, 1962).

Kittrie, N. & Zenoff, E. *Sanctions, Sentencing and Corrections*. New York: Foundation, 1981.

Klein, A. *Alternative Sentencing: A Practitioner's Guide*. Cincinatti: Anderson, 1988.

Lajeunesse, T. *Community Holistic Circle Healing: Hollow Water First Nation*. Ottawa: Solicitor General Canada, 1993.

Law Reform Commission of Canada. *Studies on Diversion (working paper no. 7)*. Cited in Jackson, M. "In Search of Pathways to Justice: Alternative Dispute Resolutions in Aboriginal Communities." *U.B.C. L. Rev.* Special Edition (1992): 147 at 178.

----. *The Principles of Sentencing and Dispositions* (Working Paper No. 3) (1974) at 29 in Zimmerman, S. "The Revolving Door of Despair: Aboriginal Involvement in the Criminal Justice System." U.B.C. Law Rev. Special Edition (1992): 367 at 386.

----. *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice*. Minister's Reference, Report 34. Ottawa, 1991.

----. *The Jury in Criminal Trials*. Working Paper #27. Ottawa: Minister of Supply and Services, 1980.

Law Reform Commission of Victoria, *Appendices: The Role of the Jury in Criminal Trials*. Background paper #1. 1985.

Mandelbaum, D. *The Plains Cree: An Ethnographic, Historical and Comparative Study*. Regina: Canadian Plains Research Centre, 1979.

----. "The Plains Cree Remembered" (Proceedings of the Plains Cree Conference, 24 October 1979) Canadian Plains Research Centre, University of Regina, 1979.

Marshall, T. *Alternatives to Criminal Courts: The Potential for Non-Judicial Dispute Settlement*. Aldershot: Gower, 1985.

Marquis, G. *Policing Canada'a Century: A History of the Canadian Association of Chiefs of Police*. Toronto: University of Toronto, 1993.

McGillis, D. *The American Resolution Dispute Movement* in *Mediation in the Justice System: Dispute Resolution Papers Series #2*. American Bar Association, 1983.

McGillivray, A. *Therapies of Freedom: The Colonization of Aboriginal Childhood*. Faculty of Law, University of Manitoba, January, 1995 [unpublished].

McGillivray, A. & Ish, D. *Co-operatives in Principle and Practice*. Saskatoon: Centre for Study of Co-operatives, 1992.

McMillan, A. *Native People and Cultures of Canada.* Vancouver: Douglas & McIntyre, 1988.

Merry, S. & Milner, N., editors. *The Possibility of Popular Justice: A Case Study of Community Justice in the United States* (Michigan: University of Michigan, 1993)

Metis Association of Alberta. *The White Man's Laws.* Edmonton: Hurtig Publishing, 1970.

Mewett, A. & Manning, M. *Mewett and Manning on Criminal Law*. 3d ed. Toronto: Butterworths, 1994.

Milloy, J. *The Plains Cree: Trade Diplomacy and War: 1790 to 1870.* Winnipeg: University of Manitoba Press, 1988.

Milsom, S., *Historical Foundations of the Common Law*. 2d ed. Toronto: Butterworths, 1981.

Morin, L. *The People of Wasawakasik.* Papyrus Printing, 1992.

Nadin-Davis, P. *Sentencing in Canada.* Toronto: Carswell, 1982.

New South Wales Law Reform Commission. *The Jury in a Criminal Trial: Discussion Paper.* Sydney, 1985.

Oral History Package. Manitoba Provincial Archives, 1994.

President's Task Force on Victims of Crime. "Final Report VI." (1982) in Klein, A., *Alternative Sentencing: A Practitioner's Guide*. Cincinatti: Anderson Publishing, 1988: 137.

Proposal to the B.C. Minister of the Attorney General. "Unlocking Aboriginal Justice: Alternate Dispute Resolution for the Gitksan and Wet'suwet'en People" as cited in Jackson, M. "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities." *U.B.C. L. Rev.* Special Edition (1992) 147 at 210.

Protocol for Manitoba Department of Justice Support for the Community Approach of the Hollow Water Community Holistic Circle Healing. Brandon, Manitoba, 1991.

Protocol of the Katapamisuk Society at the Poundmaker Cree Nation in Saskatchewan. North Battleford, 1993.

Public Inquiry into the Administration of Justice and Aboriginal People. *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People.*

Vol. 1. Winnipeg, 1991.

Radzinowicz, L. *A History of the English Criminal Law and its Administration From 1750: The Movement for Reform 1750-1833.* New York: MacMillan, 1948.

Radzinowicz, L. and Hood, R. *History of English Common Law.* Vol 5 London: Stevens and Sons, 1986.

Ray, A. *Indians in the Fur Trade: Their Role as Trappers, Hunters and Middlemen in the Lands Southwest of Hudson Bay: 1660-1870.* Toronto: University of Toronto, 1974.

Report of the Canadian Sentencing Commission: Sentencing Reform; A Canadian Approach. Ottawa: Supply and Services Canada, February 1987.

Report of the Canadian Federal-Provincial Task Force on Justice for Victims of Crime" (1983) in Barfknecht, D. "Concerns of Canada's Victim's Rights Movement." *Can. Com. L.J.* 8 (1985): 83.

Ritter R. *Sentencing Circles.* La Ronge, Saskatchewan, 1993 [unpublished].

Roberts, T. *Assessment of the Victim Impact Statement in British Columbia (Working Document).* Ottawa: Department of Justice, 1992.

Robertson, R. *The Law Moves West: The Northwest Mounted Police: 1873-1878.* Canada: Burns & MacEachern, 1970.

Ross, R. "Cultural Blindness and the Justice System in Remote Native Communities." A paper presented to the Sharing Common Ground Conference on Aboriginal Policing Services. Edmonton, May 1990 at 11-12 as cited in Jackson, M. "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities." *U.B.C. L. Rev. Special Edition* (1992): 147 at 208-209.

----. *Dancing With a Ghost: Exploring Indian Reality.* Toronto: Octopus Publishing, 1992.

Royal Commission on Aboriginal Peoples, *Aboriginal Peoples, Self-Government, and the Constitution.* Ottawa: Minister of Supply and Services Canada, 1993.

Ruby, C. *Sentencing.* 4th ed. Toronto: Butterworths, 1994.

Saskatchewan Indian Justice Review Committee, *Report of the Indian Justice Review Committee.* Regina, 1992.

Silverman, R. & Neilsen, M., editors. *Aboriginal People and Canadian Criminal Justice.* Toronto: Butterworths, 1992.

Scissons, J. *Judge of the Far North: The Memoirs of Jack Scissons.* Toronto: McLelland & Stuart, 1968.

Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections. *Taking Responsibility.* Ottawa: Queens Printer, 1988.

Stephen, J.F. *A General View of the Criminal Law of England.* 1890; reprint, Colorado: Fred Rothman, 1985.

Stevens, S. *Report on the Effectiveness of Circle Sentencing.* Yellowknife, 1994 [unpublished].

Stonechild, A. *Survival of a People.* Saskatchewan Indian Federated College, 1986.

Stuart, B. *Circles into Square Systems: Can Community Processes be Partnered with the Formal Justice System?* Whitehorse, 1995 [unpublished].

Sturtevant, W. *Handbook of North American Indians.* Vol. 6. Washington: Smithonian Institute, 1981.

Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta.* Volume 1, Main Report. Edmonton, 1991.

Taylor, S. & Bogdan, R. *Introduction to Qualitative Research Methods: The Search for Meanings.* 2d ed. New York: John Wiley & Sons, 1984.

Thistle, P. *Indian-European Trade Relations in the Lower Saskatchewan River Region to 1840.* Winnipeg: University of Manitoba, 1986.

Thomas, D. *Constraints on Judgement The Search for Structured Discretion in Sentencing 1860-1910.* Occasional Series No. 4. Cambridge: Institute of Criminology, 1979.

----. *Principles of Sentencing.* 2d ed. London: Heinemann, 1982.

Thompson, P. *The Voice of the Past: Oral History.* Oxford: University Press, 1978.

Trudeau, J. *Culture Change Among the Swampy Cree Indians of Winsk, Ontario.*

(Ph.D. Thesis) Catholic University of America, 1966.

Turner, J. *The North-west Mounted Police: 1873-1893.* Ottawa: Kings Printer, 1950.

Vanstone, J. *The Simms Collection of Plains Cree Material Culture from Southeastern Saskatchewan.* U.S.A.: Field Museum of Natural History, 1983.

Warren, W. *History of the Ojibway People.* St. Paul: Minnesota Historical Society Press, 1984.

Yin, R. *Case Study Research: Design and Methods.* 2d ed. California: Sage Publications, 1994.

York, G. *The Dispossessed: Life and Death in Native Canada.* Toronto: Lester & Orpen Dennys, 1989.

Interviews

Bartley, M. 1994. Interview. Tape recording. Cumberland House, Saskatchewan, 14 December.

Bear, L. 1995. Interview. Tape recording. Pukatawagan, Manitoba, 10 April.

Bighetty, G. 1995. Interview. Tape recording. Pukatawagan, Manitoba, 10 April.

Bighetty, T. 1995. Interview. Tape recording. Pukatawagan, Manitoba, 10 April.

Bohachik, C. 1995. Telephone interview. June 28.

Bragstad, G. 1994. Interview. Tape recording. Sandy Bay, Saskatchewan. 19 October.

Brennan, B. 1994. Interview. Tape recording.Sandy Bay, Saskatchewan, 15 November.

Brossart, R. 1995. Interview. Tape recording. Pukatawagan, Manitoba, 11 April.

Bushie, B. 1995. Radio interview. Afternoon Edition. Canadian Broadcasting Corporation, 12 January.

----. 1995. Interview. Tape recording. Hollow Water, Manitoba, 6 February.

Chaboyer, S. 1994. Interview. Cumberland House, Saskatchewan, 13 December.

Christianson, D. 1994. Telephone interview. 21 October.

Cloud, T. 1995. Telephone discussion. 9 March.

Colomb, G. 1995. Interview. Tape recording.Pukatawagan, Manitoba, 10 April.

Colomb, H. 1995. Interview. Tape recording. Pukatawagan, Manitoba, 10 April.

Comeault, G. 1994. Interview. Winnipeg, Manitoba, 30 September.

Custer, D. 1994. Interview. Tape recording. Pelican Narrows, Saskatchewan, 16 November.

Custer, D. & Merasty, C. 1994. Interview. Pelican Narrows, Saskatchewan, 20 October.

Dalmyn, J. 1993. Discussion. Northern Justice Conference. Kenora, Ontario, June.

----. 1995. Interview. Tape recording. Winnipeg, Manitoba, 27 January.

Daunt, F. 1994. Telephone interview. 28 September.

----. 1995. Interview. Tape recording. Sandy Bay, Saskatchewan, 19 April.

deMoissac, G. 1995. Interview. Winnipeg, Manitoba, 29 June.

Dussion, M. 1994. Interview. Tape recording. Cumberland House, Saskatchewan, 13 December.

Fafard, C. 1994. Telephone interview. 19 September.

----. 1994. Discussion. Pelican Narrows, Saskatchewan, 14 November.

----. 1994. Telephone interview. Tape recording. 16 December.

----. 1995. Discussion. Sandy Bay, Saskatchewan, 19 April.

----. 1995. Interview by Joan Melanson. CBC Radio, *Sunday Morning*, 16 July.

Flett, A. 1994. Interview. Cumberland House, Saskatchewan, 13 December.

Giesbrecht, B. 1995. Telephone interview. 24 February.

----. 1995. Interview. Waywayseecappo First Nation, Manitoba, 2 March.

Hagel, L. 1995. Interview. Winnipeg, Manitoba, 23 January.

Hardesty, M. 1995. Discussion. Hollow Water, Manitoba, 22 February.

Hart, M. 1995. Telephone interview. 8 June.

Hopkins, K. 1995. Interview. Pelican Narrows, Saskatchewan, 18 April.

Huculak, B. 1994. Telephone interview. 12 October.

----. 1994. Telephone interview. 7 December.

Kopstein, R. 1995. Interview. Winnipeg, Manitoba, 31 May.

MacKenzie, M. 1994. Interview. Cumberland House, Saskatchewan, 13 December.

MacMillan, B. 1994. Interview. Tape recording. Pelican Narrows, Saskatchewan, 16 November.

Mantuck, H. 1995. Interview. Waywayseecappo First Nation, Manitoba, 2 March.

Martin, W. 1995. Interview. Tape recording. The Pas, Manitoba, 11 April.

Mcdonald, J. 1994. Interview. Sandy Bay, Saskatchewan, 16 November.

McInnes, L. 1995. Telephone interview. 14 March.

McKay, D. Jr. 1994. Interview. Tape recording. Cumberland House, Saskatchewan, 13 December.

Melanchuk, S. 1994. Telephone interview. 19 September.

Merasty, V. 1994. Interview. Tape recording. Sandy Bay, Saskatchewan, 20 October.

Morin, A. 1994. Interview. Tape recording. Sandy Bay, Saskatchewan, 15 November.

Morin, H. 1994. Telephone interview. 19 September.

----. 1994. Interview. Tape recording. Sandy Bay, Saskatchewan, 19 October.

----. 1995. Interview. Sandy Bay, Saskatchewan, 18 April.

Morin, J. 1994. Interview. Tape recording. Sandy Bay, Saskatchewan, 19 October.

Nini, M. 1994. Interview. Cumberland House, Saskatchewan, 13 December.

Ray, I. 1994. Interview. Tape recording. Sandy Bay, Saskatchewan, 15 November.

Ritter, R. 1994. Telephone interview. 6 December.

Robinson, S. 1994. Telephone interview. 17 September.

----. 1995. Telephone interview. 17 February.

----. 1995. Telephone discussion. 21 July.

Ross, R. 1995. Telephone interview. 4 January.

Roy, C. 1994. Interview. Tape recording. Cumberland House, Saskatchewan, 12 December.

----. 1995. Telephone discussion. 21 June.

Roy, Sergeant. 1995. Interview. Rossburn, Manitoba, 2 March.

Sinclair, M. 1995. Interview. Winnipeg, Manitoba, 17 January.

----. 1995. Interview in *Family Violence Research Centre Bulletin* 1(4): 5.

Stuart, A. 1994. Interview. Tape recording. Sandy Bay, Saskatchewan, 16 November.

Stuart, B. 1994. Telephone interview. 30 September.