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

By Ross Gordon Green

67

A Thesis
Submitted to the Faculty of Graduate Studies
in Partial Fulfilment of the Requirement
for the degree of

MASTER OF LAWS

Faculty of Law
University of Manitoba
Winnipeg, Manitoba

(c) August, 1995

National Library of Canada

Bibliothèque nationale du Canada

Acquisitions and Bibliographic Services Branch

Direction des acquisitions et des services bibliographiques

395 Wellington Street
Ottawa, Ontario
K1A 0N4

395, rue Wellington
Ottawa (Ontario)
K1A 0N4

Your file *Votre référence*

Our file *Notre référence*

The author has granted an irrevocable non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of his/her thesis by any means and in any form or format, making this thesis available to interested persons.

L'auteur a accordé une licence irrévocable et non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de sa thèse de quelque manière et sous quelque forme que ce soit pour mettre des exemplaires de cette thèse à la disposition des personnes intéressées.

The author retains ownership of the copyright in his/her thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without his/her permission.

L'auteur conserve la propriété du droit d'auteur qui protège sa thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

ISBN 0-612-13154-8

Canada

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

BY

ROSS GORDON GREEN

A Thesis submitted to the Faculty of Graduate Studies of the University of Manitoba in partial fulfillment of the requirements of the degree of

MASTER OF LAWS

© 1995

Permission has been granted to the LIBRARY OF THE UNIVERSITY OF MANITOBA to lend or sell copies of this thesis, to the NATIONAL LIBRARY OF CANADA to microfilm this thesis and to lend or sell copies of the film, and LIBRARY MICROFILMS to publish an abstract of this thesis.

The author reserves other publication rights, and neither the thesis nor extensive extracts from it may be printed or other-wise reproduced without the author's written permission.

Table of Contents

Table of contents i
Abstract v
Acknowledgements vii

PART ONE: PROBLEMS WITH ESTABLISHED SENTENCING PRACTICES IN ABORIGINAL COMMUNITIES 1

1. **Introduction** 2

1.1 Choice of topic and purpose of study 2
1.2 Methodology 4
1.3 Theoretical frameworks of analysis: post-colonialism and legal pluralism 12

2. **Aboriginal Dispute Resolution Traditions and Perspectives** 23

2.1 Traditional methods of social control and dispute resolution 23
2.1.1 The pre-contact era 25
2.1.2 The fur trade era 32
2.1.3 The post-confederation era 35
2.2 Aboriginal perspectives on justice 38

3. **Problems Associated With Established Sentencing Practice in Aboriginal Communities** 42

3.1 The circuit court: an absentee justice system? 42
3.2 Misinterpretation of Aboriginal offenders information and behaviour at sentencing 48
3.3 Appellate review: limiting sentencing discretion while promoting provincial uniformity 52
3.4 Adaptability of offender sentences within Anglo-Canadian system to Aboriginal traditions and perspectives 57

PART TWO: CHANGES TO ESTABLISHED SENTENCING PRACTICES IN ABORIGINAL COMMUNITIES: COMMUNITY/LAY PARTICIPATION 62

4. Community and Victim Participation in Sentencing within the Anglo-Canadian Justice System 63

4.1 The conventional criminal law sentencing hearing 63
4.2 The history and development of sentencing law and practice 68
4.3 Jury sentencing in non-capital cases: The U.S. experience 75
4.4 Opportunities for community and victim participation within the conventional sentencing hearing 78
4.5 Community and victim participation in disposition of criminal acts through mediation/diversion 83

5. The Sentencing Circle and Other Aboriginal Community Participation Models 87

5.1 Identifying the models 87
5.2 Circle Sentencing 93
5.2.1 Physical setting 93
5.2.2 Procedure followed 95
5.2.3 Status of circle recommendations within prevailing *Criminal Code* system 97
5.2.4 Criteria for circle sentencing 104
5.2.5 Appropriateness of circle sentencing for offenses involving domestic violence 108
5.2.6 Deterrence in circle sentencing 112
5.3 The Elders' or community sentencing panel 115
5.4 The sentence advisory committee 118
5.5 The community mediation committee 121

PART THREE: CASE STUDIES: COMMUNITY SENTENCING INITIATIVES IN SIX ABORIGINAL COMMUNITIES OF CENTRAL AND NORTHERN MANITOBA AND SASKATCHEWAN 126

6. Case Studies of Six Aboriginal Communities 127

6.1 Sandy Bay, Saskatchewan 127
6.1.1 Community overview 127
6.1.2 Introduction and development of community sentencing 129
6.1.3 Perspectives on community sentencing 133
6.2 Cumberland House, Saskatchewan 142

6.2.1 Community overview 142
6.2.2 Introduction and development of community sentencing 143
6.2.3 Perspectives on community sentencing 148

6.3 Pelican Narrows, Saskatchewan 155
6.3.1 Community overview 155
6.3.2 Introduction and development of community sentencing 155
6.3.3 Perspectives on community sentencing 159

6.4 Hollow Water First Nation, Manitoba 164
6.4.1 Community overview 164
6.4.2 Introduction and development of community sentencing 165
6.4.3 Perspectives on community sentencing 173

6.5 Waywayseecappo First Nation, Manitoba 179
6.5.1 Community overview 179
6.5.2 Introduction and development of community sentencing 180
6.5.3 Perspectives on community sentencing 183

6.6 Mathias Colomb Cree Nation (Pukatawagan), Manitoba 187
6.6.1 Community overview 187
6.6.2 Introduction and development of community sentencing 190
6.6.3 Perspectives on community sentencing 197

6.7 Conclusion 201

PART FOUR: FINDINGS AND CONCLUSION 203

7. Summary and conclusions 204

7.1 Development and functioning of community sentencing and mediation . . . 204
7.2 Impact of community sentencing and mediation on offenders, victims and communities 211
7.3 Justice issues raised by community sentencing and mediation 218
7.3.1 The court's supervisory role in community sentencing approaches 219
7.3.2 Political influence and judicial independence 221
7.3.3 Financial infrastructure or volunteer support? 225
7.3.4 Expansion of community sentencing approaches 226
7.3.5 The potential effect of statutory reform and appellate review on community sentencing participation 229
7.4 Aboriginal justice perspectives: Post-colonialism as a way of understanding resistance to the formal justice system 232
7.5 Relationship of community sentencing and mediation to Anglo-Canadian justice system 237
7.6 Epilogue 242

Appendix A: Map of Saskatchewan and Manitoba identifying the communities studied 249
Appendix B: Photographs of communities studied 250
Appendix C: Protocol of the Katapamisuak Society 259
Appendix D: Protocol for Manitoba Department of Justice Support for the Community Approach of the Hollow Water Community Holistic Circle Healing 264

References 267
Case list 267
Articles 269
Books and monographs 275
Interviews 283

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.

Acknowledgements

I am grateful for the financial assistance of the Law Society of Saskatchewan (through the Culliton Scholarship) and the University of Manitoba Faculty of Law (through the Freedman Graduate Fellowship) and for research grants from the University of Manitoba Legal Research Institute and the Government of Canada Northern Scientific Training Program. I wish to thank many people for their assistance in making my year in the Master of Laws program both exciting and rewarding. At the outset, I am grateful to Judge Eric Diehl of Melfort, Saskatchewan and Dean Peter MacKinnon and Professor Beth Bilson both of the College of Law at the University of Saskatchewan for acting as referees on my application to the LL.M. program.

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.

Elsewhere at the University of Manitoba, I am indebted to my external reader Professor Russell Smandych of the Department of Sociology for his insight and kindness and his significant contribution to my project. I also appreciate the assistance received from Allan Patterson and Prabir Mitra of Communication Systems.

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.

On a personal level, I thank Tetsuya Aman and Ian Malkin for their support, advice and companionship during this year. My warmest thanks are reserved for my spouse Brenda, my daughter Margaret, my mother Margaret and my brother Keith whose love, support and understanding made this year possible.

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

---

[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

[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,

---

[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

---

[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

---

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

---

[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

---

[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

---

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.

---

[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

---

[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]

---

[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

---

'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*

---

[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

---

[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

---

[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

---

[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

---

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

---

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

---

[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

[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

---

[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

---

[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

---

[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

---

[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]

---

[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

---

[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

---

[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]

---

[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

---

[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:

---

[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.

---

[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

---

[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:

---

[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.

---

[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

---

[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

---

[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]

---

[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.

---

[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

---

[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,

---

[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

---

[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

---

[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

---

[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.

---

[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

---

[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,

---

[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

---

[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.

---

[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

---

[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]

---

[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

---

[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:

---

[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

---

[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]

---

[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

---

[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

---

[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.

---

[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

---

[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

---

[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

> 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

---

[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.

---

[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,

---

[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

---

[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

---

[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

---

[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

---

[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]

---

[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

---

[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

---

[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.

---

[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

---

[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

---

[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

---

[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

---

[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

---

[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

---

[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

---

[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