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

By Ross Gordon Green

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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.

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

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

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

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

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

1.2 Methodology

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[25] *Ibid.*

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

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

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

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

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

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

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

[30] Of the Provincial Court of Manitoba.

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

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

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

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

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

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requires permission from a key local player.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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