

# Aboriginal Community Sentencing and Mediation: Within and Without the Circle

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## I. INTRODUCTION

THE DECISION IN *R. v. Moses*<sup>1</sup> articulated concerns about prevailing Anglo-Canadian sentencing practices and presented a new approach: circle sentencing. This envisaged a sentencing hearing, conducted in circle format, which would include the judge, defense and Crown counsel, the police, the offender, the victim, the probation officer, and assorted community members. All participants would attempt to reach a consensus on an appropriate sentence and, hopefully, would assist through supporting and supervising the offender following court. 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 examine how court procedures and the physical arrangements within court-rooms militate against these new objectives.<sup>2</sup>

The need for sentencing reform within aboriginal communities appeared unquestionable given the product of conventional sentencing. Professor Michael Jackson, in an article entitled "Locking Up Natives in Canada,"<sup>3</sup> detailed the over-representation of aboriginals within Canadian jails<sup>4</sup> and observed that,

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<sup>1</sup> (1992), 71 C.C.C. (3d) 347 (Y. Terr. Ct.) [hereinafter *Moses*].

<sup>2</sup> *Ibid.* at 355-356.

<sup>3</sup> M. Jackson, "Locking Up Natives in Canada" (1988-89)23:2 U.B.C. L. Rev. 215.

<sup>4</sup> *Supra* note 3 at 216. Professor Jackson described the situation in Saskatchewan and Manitoba: "In Manitoba and Saskatchewan, native people, representing 6-7 percent of the population, constitute 46 percent and 60 percent of prison admissions."

"[m]ore than any other group in Canada they are subject to the damaging impacts of the criminal justice system's heaviest sanctions."<sup>5</sup> More recently, the Royal Commission on Aboriginal Peoples confirmed this assessment and commented that the "over-representation of Aboriginal people in Canadian prisons has been the subject of special attention and appropriately so, because the sentence of imprisonment carries with it the deprivation of liberty and represents Canadian society's severest condemnation."<sup>6</sup> The negative impact of jail upon First Nation offenders and communities was described by Lilles J. in *R. v. Gingell*:<sup>7</sup>

Jail has shown not to be effective for First Nation people. Every family in Kwanlin Dun [the Yukon] has members who have gone to jail. *It carries no stigma and therefore is not a deterrent. Nor is it a "safe place" which encourages disclosure, openness, or healing.* The power or authority structures within the jail operate against "openness." An elder noted: "[j]ail doesn't help anyone. A lot of our people could have been healed a long time ago if it weren't for jail. Jail hurts them more and then they come out really bitter. In jail, all they learn is 'hurt and bitter'"[emphasis added].<sup>8</sup>

While concerns over conventional sentencing *practices* cannot be considered the sole cause of aboriginal over-incarceration,<sup>9</sup> new sentencing approaches and philosophies may form part of the solution to this inequity.

The purpose of this study is to identify, describe, and evaluate criminal sentencing and mediation initiatives functioning in Canadian aboriginal communities. These have been characterised by increased participation of victims, offenders, and local community members. Specific initiatives in six aboriginal communities in Manitoba and Saskatchewan were studied in depth: Sandy Bay,<sup>10</sup> Pelican Narrows,<sup>11</sup> and Cumberland House<sup>12</sup> of Saskatchewan, and Hol-

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<sup>5</sup> *Supra* note 3 at 215.

<sup>6</sup> Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996) at 29.

<sup>7</sup> (1996), 50 C.R. (4th) 326 (Y. Terr. Ct.) at 342-43 [hereinafter *Gingell*].

<sup>8</sup> *Ibid.* at para. 63

<sup>9</sup> 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 272-277. Professor Quigley comments that the causes of this inequity are complex and include the poor socio-economic circumstances of many aboriginals, the high percentage of aboriginal youth within the range of age most susceptible to criminal activity, the level of policing in aboriginal communities, the "snowball" effect of a prior criminal record, a greater likelihood of an aboriginal accused being denied bail, and the lack of sentencing alternatives available for sentencing under the *Criminal Code*.

<sup>10</sup> Located 190 kms north-west of Flin Flon, Manitoba.

<sup>11</sup> Located 100 kms north-west of Flin Flon, Manitoba.

<sup>12</sup> Located 85 kms south-east of Flin Flon, Manitoba.

low Water First Nation,<sup>13</sup> Waywayseecappo First Nation,<sup>14</sup> and Mathias Colomb Cree Nation (Pukatawagan) of Manitoba.<sup>15</sup> Reforms were analysed with respect to origin, relationship to systems of local and state control, and future progress and development. Given the short history of these initiatives,<sup>16</sup> conclusions respecting their impact upon offenders, victims, and local community members would have been premature and thus remain preliminary.<sup>17</sup> Nevertheless, analysis and comparison of these initiatives have provided valuable insights into perspectives held by initiative participants respecting justice and sentencing practices. Inter-relationships between these initiatives and local systems of social control have also been identified, facilitating thoughts about the applicability and transferability of community sentencing and mediation approaches to other larger and more ethnically diverse communities.

The six sites chosen for study are, to varying extents, isolated from the large, southern urban centres of Manitoba and Saskatchewan. The communities are serviced by a circuit court which accesses the communities of Sandy Bay, Pelican Narrows, Cumberland House, and Pukatawagan<sup>18</sup> by airplane. Hollow Water does not have a regular court sitting; rather, special sittings have been held in this community to conduct sentencing circles. Waywayseecappo is serviced by a circuit court which travels by road. Police services in each community are provided by the Royal Canadian Mounted Police (RCMP). These communities have experienced, in recent years, a change in the procedure by which some offenders were sentenced in provincial court or diverted to local mediation. However, each community appears to have had a distinct experience respecting the introduction and development of community sentencing or mediation, suggesting interesting bases for comparison and contrast.<sup>19</sup>

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<sup>13</sup> Located 190 kms north-east of Winnipeg, Manitoba on the east shore of Lake Winnipeg.

<sup>14</sup> Located 351 kms northwest of Winnipeg.

<sup>15</sup> Located 819 kms north of Winnipeg

<sup>16</sup> All initiatives studied commenced within the prevailing court structure in or after 1992.

<sup>17</sup> During the course of this study, Judge 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.

<sup>18</sup> At the time research for this study was conducted, court was held regularly at Pukatwagan with the court party flying north from The Pas. As of spring 1997, it was learned that the Mathias Colomb Band had refused entry to the court party resulting in any charges for Pukatawagan residents being dealt with at court in The Pas, approximately 210 kms away.

<sup>19</sup> Judges, Crown and defense counsel, police officers, and local community members were interviewed for their observations of specific sentencing and diversion proceedings. Assorted secondary materials respecting these communities were obtained through local community members, Indian and Northern Affairs Canada (INAC), and the libraries at the University of Manitoba. As an aid to interpretation of data collected from the six communities, case law, commission reports, books, and domestic and international journal articles

## II. COMMUNITY PARTICIPATION MODELS

### A. Searching for New Approaches

In the conventional Anglo-Canadian justice system, Crown prosecutors represent the interests of victims<sup>20</sup> and community members at sentencing. Although evidence of their views may be tendered by defense or Crown counsel, community members and victims are not considered parties to the sentencing hearing.<sup>21</sup> Several Canadian inquiries into the treatment of aboriginal people within the Anglo-Canadian justice system have questioned the lack of direct community input at sentencing. The Aboriginal Justice Inquiry of Manitoba commented:

If non-Aboriginal judges and courts are going to be able to formulate sentences which are appropriate to the needs of Aboriginal offenders, victims and communities, they will need direct input from those communities ... . In particular, communities need to be involved in the sentencing process, since sentences should, in part, reflect the needs and desires of the community.<sup>22</sup>

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were considered. These secondary sources 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.

<sup>20</sup> Not all offenses have a victim who is clearly identifiable. For example, offenses such as Possession of a Narcotic or Impaired Driving (without causing bodily harm to another person) have no identifiable victim other than, perhaps, the public at large. Realistically, no victim would be available for court purposes.

<sup>21</sup> Comments by de Weerd J. in *R v. Cabot-Blanc*, [1987] N.W.T.R. 1 (S.C.) at 11 reflected the prominence of defense and Crown counsel within the conventional sentencing hearing:

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

<sup>22</sup> Manitoba, Public Inquiry into the Administration of Justice and Aboriginal Peoples, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, Vol. 1, (Winnipeg: The Queen's Printers, 1991) at 409.

The Saskatchewan Indian Justice Review Committee reached a similar conclusion.<sup>23</sup> Support for direct consultation with the community has also come from the judiciary. Lilles J. of the Yukon Territorial Court stated in *R v. J.A.P.*:<sup>24</sup>

There are many benefits to be gained from citizen and community participation in sentencing and dispositions. Such participation reinforces the socialising effect of the criminal law upon many persons in the community. It strengthens the community focus tending to reduce crime and enhance[s] community interest in the administration of justice. The educative impact of community dispositions cannot be overstated.<sup>25</sup>

Stuart J., of the same court, echoed these sentiments when he commented, “[t]he formal, professional justice system must acquire greater confidence and trust in community knowledge, judgment and instincts.”<sup>26</sup>

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

Well, one of the biggest things I believe in with the sentencing circle is the community knows the person that has committed whatever kind of crime or whatever it was. We ... know the accused and we know the victim. We know him I think far more than the court system, the judge or the lawyers ... probation officers or social services [employees] that come in. We know him more than anybody else. I think we can better deal with these people.<sup>27</sup>

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

Well with promising to the probation officer or the magistrate or anything, you only see him once a month, you don't care, you know, “Oh I'll get away with this, I'll get away with that, they're not going to know.” Well of course nobody knows because they're gone, you don't see them until the next court date. Here, he knows the people that are involved, and he knows the people that care and they keep an eye, and they

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<sup>23</sup> Saskatchewan, Saskatchewan Indian Justice Review Committee, *Report of the Saskatchewan Indian Justice Review Committee* (Regina: Queen's Printers, 1992). At 41, the Committee stated:

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

<sup>24</sup> (1991), (Y. Terr. Ct.) [unreported].

<sup>25</sup> *Ibid.* at 12.

<sup>26</sup> *R v. D.N.*, [1993] Y.J. No. 195 (Q.L.) (Y. Terr. Ct.).

<sup>27</sup> Interview with Donald McKay Jr. (13 December 1994) Cumberland House, Saskatchewan.

tell him that right in the circle. If you ever need any help, if you need somebody to talk to, if something is troubling you, we're available. And if you don't have a phone, you know, and a lot of times the probation officers won't accept a collect call, what do you do? When the pressure gets so tough. Do you just say, to hell with it? Well basically that's what the system is doing. Here, you have your community of people, you know who is there, you know who you can talk to. If something is bothering you, you go.<sup>28</sup>

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

Well that's what I'm hoping for and I'm sure I'm not the only person hoping for that. At least that might help our community and looking at these people coming to the sentencing circle [committee], they respond to the people that are in that circle, and I'm sure that ... in the future there's more people ... being involved in the circle. Because that's the only way we can keep our community a little stronger and keep it going.<sup>29</sup>

Given this clear interest in enhancing community participation, how might it be facilitated?

A number of community sentencing approaches have been employed in aboriginal communities across Canada. At the Workshop on the Role of Crown Counsel in an Aboriginal Context conducted during September 1994 in Vancouver, prosecutors from across Canada<sup>30</sup> reported on community sentencing initiatives within their jurisdictions.<sup>31</sup> Circle sentencing was being used extensively in the Yukon and to a lesser extent in Quebec, Manitoba, and Saskatchewan. Allowing local elders or other community representatives to advise judges on sentencing is common in the Yukon and the Northwest Territories. A

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<sup>28</sup> Interview with Harry Morin (19 October 1994) Sandy Bay, Saskatchewan. This sense of estrangement between court personnel and community members was also evident in the comments of Greg Bragstad, a Sandy Bay resident and sentencing circle participant: "... because here especially the judge flies in from La Ronge. He's here at 8:00 [a.m.] and he's gone [later that day]. The community members are saying: we don't want this kind of [offender] action in our community, so it puts more onus on the person than the judge saying it." Interview with Greg Bragstad (19 October 1994) Sandy Bay, Saskatchewan.

<sup>29</sup> Interview with Cyril Roy (12 December 1994) Cumberland House, Saskatchewan.

<sup>30</sup> These included Rodney Garson of the Yukon, Pierre Rousseau of the Northwest Territories, Pierre Desrosiers of Quebec, Robin Ritter of Saskatchewan, George de Moissac of Manitoba, and Jim Langston of Alberta.

<sup>31</sup> J. Bowers & P. Rousseau, "Workshop on the Role of Crown Counsel in an Aboriginal Context Draft Report," (Vancouver, B.C., 1994)[unpublished] at 3-7.

community-based model of mediation/diversion is considered to be developing in Saskatchewan and Alberta.<sup>32</sup>

In the six communities studied, several community sentencing and mediation projects were discovered. Sandy Bay is the first community in Saskatchewan to use formal sentencing circles; these began to be used in the summer of 1992 and continue to be developed and refined. A committee was also formed to make sentencing recommendations on cases referred by the court. Pelican Narrows, Saskatchewan held its first sentencing circle in the spring of 1994. Apparently, the local band's initiative led to the establishment of a sentencing circle committee. Several cases have been referred to the committee, which then conducted a sentencing circle in Cree in the absence of the judge. This process resulted in sentencing recommendations to the court.

Cumberland House, Saskatchewan has experienced the introduction of circle sentencing at the Provincial Court and has formed a sentencing circle committee. It functions both as a sentence advisory committee, providing the court with community recommendations on sentencing for cases referred by the court, and as a mediation committee, dealing with adult and young offender cases referred by the RCMP or the court. At Hollow Water, Manitoba, Community Holistic Circle Healing (CHCH) provides holistic treatment for sexual assault victims and victimisers. This process intersects with the provincial court system, initially through CHCH assessment team members providing sentencing reports to the court sitting in Pine Falls (located 100 kilometres south of Hollow Water); and then, aided by a protocol with the provincial Department of Justice, through the introduction of circle sentencing at Hollow Water in 1993. Waywayseecappo, Manitoba has experienced introduction of the Elders' Advisory Panel in 1994. Local elders sit beside the presiding judge and advise on sentences. At Pukatawagan, Manitoba, the local Justice Committee conducts mediation of cases referred from the RCMP, the court, and local community members. They also sit with the presiding judge in court and advise on sentences.

In an effort to facilitate analysis of the various initiatives across Canada, these approaches are grouped into the following models:

- (i) Circle sentencing;
- (ii) The Elders' or community sentencing panel;
- (iii) The sentence advisory committee; and
- (iv) The community mediation committee.

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<sup>32</sup> Although the draft report represents only a summary of the personal experiences of prosecutors from some of Canada's provincial and territorial jurisdictions, these comments serve as a guide to the range of sentencing approaches being used within aboriginal communities.

These models will be considered individually. Of the four, circle sentencing has received the most judicial, academic, and media attention.

## B. Circle Sentencing

### I. Altering Conventional Court Setting and Practice

The conventional sentencing hearing involves interaction between defense, Crown counsel, and judge. Positioned in the front portion of the courtroom, these participants are physically separated from lay members of the community (often by a bar dividing the court room), as well as symbolically separated, by their manner of dress and familiarity with legal process and language. In contrast, Stuart J. described in *Moses*<sup>33</sup> the physical setting of that sentencing circle:

For court, a circle to seat 30 people was arranged as tightly as numbers allowed. When all seats were occupied, additional seating was provided in an outer circle for persons arriving after the "hearing" had commenced.

Defense sat beside the accused and his family. The Crown sat immediately across the circle from defense counsel to the right of the judge. Officials and members from the First Nation, the RCMP officers, the probation officer and others were left to find their own "comfortable" place within the circle.<sup>34</sup>

Although the physical setting of circles might vary between judges, communities, and jurisdictions, commonality exists between the circles examined. All of the circles featured the offender, judge, a Crown representative, and a number of influential and respected local community members. Other participants usually included the victim, defense counsel, and family members of the offender and victim. Most of the circles observed during this study had between 20 and 30 participants.

The circle setting promotes a sense of informality and equality among participants.<sup>35</sup> During a Saskatchewan sentencing circle<sup>36</sup> at the Kinistin Reserve Community Hall in September 1993, participants were observed drinking cof-

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<sup>33</sup> *Supra* note 1.

<sup>34</sup> *Ibid.* at 356.

<sup>35</sup> Judge Stuart in *Moses*, *supra* note 1 at 357, described the egalitarian effect of the circle setting on participants:

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

<sup>36</sup> *R. v. Thomas* (3 December 1993), Kinistin Reserve (Sask. Prov. Ct.) [hereinafter *Thomas*], 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.



fee, smoking, and keeping their hats on—*practices* forbidden in conventional court. This informality facilitated an interchange of opinions and information within the circle.<sup>37</sup>

Robin Ritter of La Ronge, Saskatchewan,<sup>38</sup> one of the first defense counsel in Saskatchewan to be involved in circle sentencing, described the evolving *practice* of circle sentencing in northern Saskatchewan:

The people take their places in the circle and the judge, or the person organising the circle, will usually ask one of the elders to say a prayer or to perform the sacred Sweet Grass Ceremony. All religious beliefs are tolerated and welcomed. Everyone in the circle has the chance to talk or to remain silent. The members of the circle discuss the offender and his crime until they all agree on what his sentence should be. The judge then imposes that sentence according to law.<sup>39</sup>

This “consensus-building” approach can be contrasted with the approach which was used by presiding judges at Pukatawagan, Manitoba. According to lawyer

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<sup>37</sup> This sense of equality may be hindered by changing the physical setting. *R. v. C.S.* (9 January 1995), Winnipeg (Man. Q.B.) [unreported] [hereinafter Winnipeg circle] provided an interesting insight. The chairs had initially been set in a circle with no other furniture in place. Shortly before the commencement of the circle, apparently at the request of the judge, a table was moved in front of the chair designated for the judge. Some in attendance commented on the effect of special arrangements for the judge. Indeed, the added table gave the impression of setting the judge apart from the rest of the circle. Although one of the reasons for the presence of the table may have been to allow the judge to make notes, this difference in treatment was noticed by those in attendance.

<sup>38</sup> Employed by the Saskatchewan Legal Aid Commission in La Ronge until February, 1994, Ritter is now employed by the Saskatchewan Department of Justice as Regional Crown Prosecutor for north-east Saskatchewan.

<sup>39</sup> R. Ritter, “Sentencing Circles” (La Ronge, Saskatchewan, 1993)[unpublished] at 2. Also see S. Davies, “Experiences with Circle Court” (Paper presented to the Northern Justice Society Conference in Kenora, Ontario, 1993) where the author, a probation officer with extensive involvement in circle sentencing, summarised the *practice* followed in the Yukon:

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

Joyce Dalmy,<sup>40</sup> the *practice* of Manitoba judges is to listen to sentence recommendations from circle participants and then indicate their decision. These judges took a less active role in facilitating the circle and seeking a consensus. Such differences suggest that the influence of local circumstances on circle sentencing development led to unique *practices* in each community.<sup>41</sup> Judicial flexibility and accommodation of local customs and *practices* have proved to be crucial in the development of circle sentencing within specific communities. As stated by Bayda C.J.S. in his dissenting judgment in *R. v. Morin*:<sup>42</sup>

The actual conduct of the circle should be in the control of the judge. But in exercising that control he or she should be sensitive to the cultural tenets and customs of the community in question. It is good sense to make whatever accommodations are necessary, within reason, to make the circle as effective as it possibly can be.<sup>43</sup>

Although much interest has been expressed over the physical changes to court procedure brought about by circle sentencing, the legal status and effect of recommendations produced by sentencing circle participants need to be examined.

## 2. Status of Circle Recommendations in the Criminal Code

Judicial analysis of the role of circle sentencing has been varied. In *R. v. Rich (S.) (No. 1)*,<sup>44</sup> O'Regan J. of the Newfoundland Supreme Court (Trial Division) viewed its role within the existing system as "a form of diversion in the sentencing process [which] strongly suggest[ed] alternatives to incarceration."<sup>45</sup> Desjardins J. of the New Brunswick Provincial Court described the sentencing circle in *R. v. Nicholas*<sup>46</sup> as "embracing the trappings of a conventional sentencing hearing and the sacred teaching of the native way of life" and commented that this process was "a small but tangible beginning of a bridge across

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<sup>40</sup> Interview with Joyce Dalmy (28 January 1995) Winnipeg, Manitoba. Dalmy was employed as Director of Manitoba Legal Aid in The Pas and had been active in the development of sentencing initiatives at Pukatawagan.

<sup>41</sup> See B. Stuart, "Circles into Square Systems: Can Community Processes be Partnered with the Formal Justice System?" (Whitehorse, 1995) [unpublished] at 2 where Stuart J. explained:

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

<sup>42</sup> [1995] 4 C.N.L.R. 37 (Sask. C.A.) [hereinafter *Morin*].

<sup>43</sup> *Ibid.* at 74.

<sup>44</sup> (1994), 116 Nfld. & P.E.I.R. 293.

<sup>45</sup> *Ibid.* at 297.

<sup>46</sup> (1996), (N.B. Prov. Ct.) [unreported] [hereinafter *Nicholas*].

the cultural divide.<sup>47</sup> In *Morin*,<sup>48</sup> Milliken J. of Saskatchewan's Court of Queen's Bench likened a sentencing circle to a pre-sentence report:

A pre-sentence report is usually done by a probation officer who interviews the persons necessary to give him or her the information covered in the report. It appears to me that the same type of information is obtainable at a sentencing circle, where the persons who would give the information to the probation officer for a pre-sentence report are present in the circle. If a pre-sentence report can be used by a judge to gain information about the offender, then why can't a sentencing circle be used for the same reason? I am not aware of any restrictions imposed upon a judge when he or she decides to request a pre-sentence report, so why should there be restrictions on judges about ordering a sentencing circle?<sup>49</sup>

In *Moses*,<sup>50</sup> Stuart J. described the role of circle sentencing as enhancing sentencing options, affording greater concern for victims, shifting the focus from punishment to rehabilitation, and meaningfully engaging communities in shared responsibility for sentencing decisions.

Despite these general comments on the role and advantages of circle sentencing, there has been little judicial consideration of the legal impact and significance of sentencing circle recommendations within the sentencing framework of the *Criminal Code*. In an interview, Dutil J. of the Court of Quebec (Criminal and Penal Division)<sup>51</sup> viewed circle sentencing as an adapted sentencing hearing within the *Criminal Code* system:

This is an experiment. It's a way to help me make sentences much like I use pre-sentencing reports prepared by probation officers. As such, the use of sentencing circles did not require any legislative change. A judge can use any normal and legal means to find acceptable sentences.<sup>52</sup>

Available judicial comment suggests circle sentencing is grounded in the court's broad sentencing discretion which retains for the judge ultimate decision-making power. Sherstobitoff J.A. of the Saskatchewan Court of Appeal stated in *Morin*.<sup>53</sup>

Since there is no provision in the *Criminal Code* for the use of sentencing circles, it is implicit in their use ... that when sentencing circles are used, the power and duty to

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<sup>47</sup> *Supra* note 46 at para. 1.

<sup>48</sup> [1994] 1 C.N.L.R. 150 (Sask. Q.B.).

<sup>49</sup> *Ibid.* at 153.

<sup>50</sup> *Supra* note 1 at 356.

<sup>51</sup> Judge Dutil was the first judge to introduce sentencing circles into northern Quebec and the presiding judge in two reported sentencing circle cases, *R. v. Aluka* (1993), D.L.R. (4d) 732 [hereinafter *Aluka*] and *Naappaluk*, [1994] 2 C.N.L.R. 143 [hereinafter *Naappaluk*].

<sup>52</sup> M. Nemeth, "Circle of Justice: Northern Villagers Take Part in Sentencing" *Macleans* (19 September 1994) at 52.

<sup>53</sup> *Supra* note 42.

impose a fit sentence remains vested exclusively in the trial judge. If a sentencing circle is used, and it recommends a sentence which is not a fit sentence, the judge is duty bound to ignore the recommendation to the extent that it varies from what is not a fit sentence.<sup>54</sup>

Despite the judge's ultimate sentencing discretion, a prominent goal of circle sentencing is to promote both community involvement in conducting the circle and consensus among participants during the circle. The interplay between community involvement and decision-making on the one hand and judicial sentencing discretion on the other was described by Desjardins P.C.J. in *Nicholas*:<sup>55</sup>

It is very important that the judge be willing not only to convene the circle but to allow the development of the circle to originate primarily from the community. He or she must be prepared to relinquish his or her mantle of power and control with only one exception: the ultimate decision, and he or she should be prepared to adopt the decision of the circle so long as it falls within the scope of a fit and proper sentence. If I had retained control of who participated and the form of the process, the community participation would have been perfunctory.<sup>56</sup>

However, given the judge's ultimate sentencing power, confusion might arise among circle participants asked to shape an offender's sentence without final authority to impose it. Mary Crnkovich reported such confusion at the sentencing circle in *R. v. Naappaluk*:<sup>57</sup>

Judge Dutil attempted to clarify what his role and the roles of the other participants would be. He explained that everyone in the circle was "on the same level" and "equal." There was no doubt some confusion was caused when after stressing this equality, he explained that he was "not obliged to follow advice" given by the circle members.

On one hand the judge was inviting the community to participate with him in constructing a sentence for the accused, but on the other hand, he retained the ultimate authority by stating that he was not obliged to follow the "advice" of the circle when deciding the sentence for Jusipi Naappaluk.

The idea of the circle is to "break down the dominance that traditional court rooms accord lawyers and judges." By referring to the group's work as "advice" yet

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<sup>54</sup> *Supra* note 42 at 48. An interesting contrast can be found in *R. v. John* (1995), (Alta. C.A.) [unreported] at 6 where Cote J.A. stressed the effect of appellate sentencing guidelines both on a judge and on a sentencing circle: "[w]hat binds a sentencing judge binds him or her with or without such community involvement. We think that if one wants to regard the sentencing circle or some similar body as a being the sentencing body, it also is bound." It is not clear whether the court meant to raise the possibility of decision-making power by a sentencing circle or simply was unaware of the process followed.

<sup>55</sup> *Supra* note 46.

<sup>56</sup> *Ibid.* at para. 19.

<sup>57</sup> *Supra* note 51.

telling them they are equal to the judge, presented a mixed message and questioned how "equal" the members really were.<sup>58</sup>

Practically, however, the sentencing decision has not always been "made" by the judge. Of the 60 to 70 sentencing circles conducted by Judge Fafard in northern Saskatchewan, he claimed to have never rejected a circle consensus. He believed that, as a result, community members were enjoying a significant role in decision-making at court.<sup>59</sup>

Confusion existed over the extent of agreement required to constitute a circle "consensus." Ritter, in summarising the *practice* of circle sentencing in northern Saskatchewan, equates consensus with unanimity.<sup>60</sup> However, the circle in *Morin*<sup>61</sup> showed a "consensus without unanimity" as the Crown prosecutor actively opposed the proposed sentence.<sup>62</sup> Saskatchewan field work conducted at Sandy Bay, Cumberland House, and Pelican Narrows failed to identify a sentencing circle in which the Crown (represented by a prosecutor or the RCMP) opposed the consensus reached by other circle members.<sup>63</sup> This was partly the result of a reluctance by judges in conducting circles against Crown opposition.<sup>64</sup> To require unanimity within a circle in all cases, however, appeared unrealistic, given the potential of a lone recalcitrant participant ob-

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<sup>58</sup> M. Crnkovich, "Report on the Sentencing Circle in Kangiqsujuaq" (Ottawa, 1993) [unpublished] at 6.

<sup>59</sup> Interview by telephone with Judge Claude Fafard (16 December 1994). Judge Fafard explained:

[The community] may not have the final say because I can't give it to them, but I'm giving them a role in the decision-making process and they're genuinely getting to believe that, if it's within reason, I won't interfere with it because I never have interfered with it. I've never had reason to disagree with a recommendation.

<sup>60</sup> Ritter, *supra* note 39 at 2.

<sup>61</sup> *Supra* note 48.

<sup>62</sup> *Ibid.* at 156. In delivering sentence, Milliken J. stated, "[f]inally, a consensus was reached with everyone agreeing except the crown prosecutor who would not consider anything less than seven to nine years imprisonment."

<sup>63</sup> Constable Murray Bartley of Cumberland House advised that he was unhappy with the result of one sentencing circle held for a young offender. However, it was not clear whether he verbally opposed the circle consensus at the sentencing circle. [Interview with Cst. Murray Bartley (14 December 1994) Cumberland House.]

<sup>64</sup> Interview with Constable Brian Brennan (15 November 1994) Sandy Bay, Saskatchewan. In the Yukon, the agreement of the crown also appears to be important as Hudson J. commented in *R. v. Lucas* (1994), (Y. Terr. Ct.) [unreported] at 3 that "this was not a sentencing circle in the cultural sense that has been adopted in other courts; but those are achieved [with] some preparation and the agreement of the prosecuting authorities, which was not the case here."

structuring an otherwise acceptable and workable recommendation.<sup>65</sup> Whether unanimous or not,<sup>66</sup> a viable consensus appeared to depend on the active support of community representatives, including the victim, the Crown, the police, the offender, and the judge. The importance of Crown support, whether for individual sentencing circle decisions or for overall community sentencing decisions, was obvious. Judge Kopstein of the Manitoba Provincial Court, who facilitated the involvement of local elders in the sentencing process in Rousseau River, Manitoba during the 1970's, recognised the importance of Crown support for such an initiative.<sup>67</sup> Constable Brian Brennan of Sandy Bay also viewed Crown support for specific sentencing circles as essential.<sup>68</sup>

### 3. Criteria for Circle Sentencing

Circle sentencing requires considerable expenditure of court time and resources. In *R. v. Johnson*,<sup>69</sup> Finch J.A. of the Yukon Court of Appeal expressed concern over an absence of criteria guiding the selection of circle sentencing cases:

Sentencing circles [as] employed in this case took far longer than the sentencing process prescribed in the Criminal Code and it was apparent that this process could not be used in every case ... . If judges proposed to use sentencing circles, they should establish and publish rules so that the Crown and the accused would know the kinds of cases to be tried in that way and what to expect ... . It would be wrong if judges of the court should follow different procedures on such a common question as sentencing.<sup>70</sup>

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<sup>65</sup> In *Morin*, *supra* note 42 at 41, Bayda C.J.S. wrote in dissent:

The need for a consensus is, of course, in the tradition of the healing circle, the progenitor of the sentencing circle. But a rule that renders a sentencing circle result nugatory in the absence of a consensus is much too harsh. A recalcitrant or intransigent participant who, it turns out, may have motives inconsistent with the success of a circle should not be effectively given a veto over the proceedings.

<sup>66</sup> All sentencing circles were open to the public. As a result, people with no interest in the specific cases or knowledge of the offenders or victims involved would not be prevented from participating. It was doubtful that solitary opposition by such a community member would nullify a consensus of all other circle participants.

<sup>67</sup> Interview with Judge Robert Kopstein (31 May 1995) Winnipeg, Manitoba.

<sup>68</sup> Brennan interview, *supra* note 64.

<sup>69</sup> (1994), 31 C.R. (4<sup>th</sup>) 262 (Y. Terr. C.A.).

<sup>70</sup> *Ibid.* at 294. More recently, Prowse J.A. of the same court echoed these concerns in *R. v. Johns*, [1995] Y.J. No. 132 (Q.L.) (Y. Terr. C.A.) [unreported] at para. 24:

In my view, however, circle sentencing is no longer in its embryonic stages, particularly in the Yukon and in the northern parts of this province. That being so, further heed must be paid to the recommendation of [this court] in the *R. v. Johnson* decision... that rules or alternatively, well-publicized guidelines for circle

Time limitations might be a significant obstacle to increased use of circle sentencing. During the circles considered in this study, no sentencing circle took less than two hours. With heavy court schedules in many rural and northern court points,<sup>71</sup> time requirements will necessitate selective use of circle sentencing.<sup>72</sup>

In an effort to narrow the range of cases to be heard by circle sentencing, Fafard J. in *R. v. Joseyounen*<sup>73</sup> set out the following criteria:<sup>74</sup>

- (i) The accused must agree to be referred to the sentencing circle.
- (ii) The accused must have deep roots in the community in which the circle is held and from which the participants are drawn.
- (iii) There are elders or respected non-political community leaders willing to participate.
- (iv) The victim is willing to participate and has been subjected to no coercion or pressure in so agreeing.
- (v) The court should try to determine before hand, as best it can, if the victim is subject to battered woman's syndrome. If she is, then she should have counseling and be accompanied by a support team in the circle.
- (vi) Disputed facts have been resolved in advance.
- (vii) The case is one which a court would be willing to take a calculated risk and depart from the usual range of sentencing.<sup>75</sup>

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sentencing, should be established by Territorial Court judges, with the assistance of those with expertise in the process.

<sup>71</sup> Bartley interview, *supra* note 63. Constable Bartley described a recent court docket day at Cumberland House, Saskatchewan that included twenty-two accused persons appearing before the court on a total of 35 charges. He considered this to be moderate. On trial days, he said as many as 5 to 6 trials have been set.

<sup>72</sup> This assumes no substantial increase in court resources and available court time.

<sup>73</sup> [1995] 6 W.W.R. 438 (Sask. Prov. Ct.).

<sup>74</sup> In *Joseyounen* at 439, he explained his motivation for formalising these guidelines:

In deciding whether or not to hold a sentencing circle the court is exercising a judicial function. That means that the decision must not be made arbitrarily; it must be made with reference to certain criteria. Those criteria must be such that the public can be made aware of them. A democratic society cannot suffer a situation where a reasonably well-informed person with the application of due diligence cannot discover what rule [what law] is being applied ... . These criteria are not carved in stone, but they provide guidelines sufficiently simple for the lay public to understand, and are also capable of application so that our decisions are not being made arbitrarily. It is imperative that the public, aboriginal and others, be able to know and understand what is happening in the development of sentencing circles: the credibility of the administration of justice depends on it.

<sup>75</sup> *Supra* note 73 at 442–446.

Although not limiting the application of circle sentencing to this extent, Desjardins J. in Nicholas,<sup>76</sup> Milliken J. in *Morin*,<sup>77</sup> and Dutil J. in *R. v. Aluka*,<sup>78</sup> viewed as prerequisites a desire for rehabilitation by the offender and a community prepared to provide offender assistance and support both during and after sentencing. In the appeal judgment of *Morin*,<sup>79</sup> Sherstobitoff J.A. refused to lay down specific guidelines governing the decision to form a sentencing circle; however, he commented that the criteria employed by Milliken J. at trial level sentencing "could apply to almost any case."<sup>80</sup>

An alternative to court-directed selection criteria is protocol negotiation, between communities and provincial departments of justice. An example of this is the Protocol of the Katapamisuk Society at the Poundmaker Cree Nation in Saskatchewan,<sup>81</sup> which appears to incorporate the criteria later set out by Fafard J. in *Joseyounen*.<sup>82</sup> It established a local justice committee to screen sentencing circle requests from offenders, police, Crown prosecutors, and judges. Another example is the Protocol for Manitoba Department of Justice Support for the Community Approach of the Hollow Water Community Holistic Circle Healing in Manitoba.<sup>83</sup> Although not specifically dealing with circle sentencing criteria, this protocol established guidelines for Crown consideration of community-based sentences for sex abusers. Further, it facilitated the introduction of circle sentencing at Hollow Water.

#### **4. Appropriateness of Circle Sentencing for Offenses Involving Domestic Violence**

Sentencing circles have considered a wide range of serious offenses including aggravated assault,<sup>84</sup> assault causing bodily harm,<sup>85</sup> robbery with violence,<sup>86</sup> sex-

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<sup>76</sup> *Supra* note 46.

<sup>77</sup> *Supra* note 48 at 152.

<sup>78</sup> *Supra* note 51 at 735-738.

<sup>79</sup> *Supra* note 42 at 7.

<sup>80</sup> *Ibid.* at 46.

<sup>81</sup> Protocol of the Katapamisuk Society at the Poundmaker Cree Nation in Saskatchewan. North Battleford, 1993 [unpublished].

<sup>82</sup> *Supra* note 73.

<sup>83</sup> Protocol for Manitoba Department of Justice Support for the Community Approach of the Hollow Water Community Holistic Circle Healing. Brandon, Manitoba, 1991 [unpublished].

<sup>84</sup> *R. v. Manyfingers* (1996), 191 A.R. 342 (Alta. Prov. Ct.) [unreported].

<sup>85</sup> *R. v. Webb*, [1993] 1 C.N.L.R. 148 (Y. Terr. Ct.), *R. v. Charlebois*, [1993] B.C.D. Crim. Sent. 7100-06 (B.C. Prov. Ct.) and *R. v. C.P.* (1995), (Y. Terr. Ct.) [unreported].

<sup>86</sup> *Morin*, *supra* note 48.



ual assault,<sup>87</sup> spousal assault,<sup>88</sup> criminal harassment,<sup>89</sup> impaired driving causing death,<sup>90</sup> break and enter,<sup>91</sup> theft over \$1000,<sup>92</sup> and arson<sup>93</sup>. Although personal circumstances of an offender have been an element considered in sentencing, appellate guidelines may restrict the range of offenses referred to sentencing circles. As Sherstobitoff J.A. stated in *Morin*<sup>94</sup>: “[i]t would be futile to use a sentencing circle for those cases where it is clear that the circumstances require, at a minimum, a penitentiary term.”<sup>95</sup> Judicial adherence to “starting point sentences” for such offenses as sexual assault<sup>96</sup> might hinder circle sentencing usage.<sup>97</sup> As Stuart J. in *Moses*<sup>98</sup> recognised, the “circle may not be appropriate for all crimes ...”<sup>99</sup> However, in response to the suggestion that some cases may not be suitable for circle sentencing simply due to established sentencing tariffs,<sup>100</sup> Professor Quigley argues that, except in obvious cases such as homicide,

<sup>87</sup> *D.N.*, *supra* note 21, *C.S.*, *supra* note 33 (although, in this case the judge did not accept the recommendation from the Winnipeg circle), and *R. v. Taylor*, [1996] 2 C.N.L.R. 208 (Sask. C.A.).

<sup>88</sup> *Naappaluk*, *supra* note 51.

<sup>89</sup> *Gingell*, *supra* note 7.

<sup>90</sup> *R. v. Rope*, [1995] 2 C.N.L.R. 209 (Sask. Q.B.). The sentence resulting from this circle was upheld on appeal at [1995] 4 C.N.L.R. 98 (Sask. C.A.).

<sup>91</sup> *Nicholas*, *supra* note 46.

<sup>92</sup> *Thomas*, *supra* note 36.

<sup>93</sup> *Aluka*, *supra* note 51.

<sup>94</sup> *Supra* note 42.

<sup>95</sup> *Ibid.* at 46.

<sup>96</sup> An approach established by the Alberta Court of Appeal in *R. v. Sandercock* (1985), 22 C.C.C. (3d) 79 (Alta. C.A.).

<sup>97</sup> The effect of Court of Appeal “starting point sentences” on lower courts was reviewed at length by the Supreme Court of Canada in *R. v. McDonnell*, [1997] 1 S.C.R. 948 [unreported], a sexual assault case from Alberta. Although acknowledging the propriety of appellate “starting point sentences” for specific offences, Sopinka J. speaking for the majority, held that an appellate court should not interfere with a lower court’s sentence unless that sentence was demonstrably unfit. Deviation from an appellate “starting point” was said to be a factor in this determination but, failing a finding of demonstrable unfitness, such deviation would not result in appellate intervention.

<sup>98</sup> *Supra* note 1.

<sup>99</sup> *Ibid.* at 370.

<sup>100</sup> This position was taken by Grotzky J. in *R. v. Cheekinew* (1993), 80 C.C.C. (3d) 143 (Sask. Q.B.) at 149–150 :

Clearly: If the trial judge is, following conviction of the accused, of the view, on the whole of the evidence, that the offender must receive a punitive term of imprisonment of two years or more, then, as such a sentence cannot, by virtue of the

the broad discretion open to a sentencing judge makes pre-determination of sentence length difficult:

[T]hese restrictions [on circle sentencing] put the cart before the horse. It is only during the process itself that it can be learned whether the offender is remorseful and motivated to change, whether the community is willing to provide the necessary support and, perhaps most fundamentally, what is the appropriate sentence for this offender.<sup>101</sup>

Similarly, Desjardin J. in *Nicholas*<sup>102</sup> rejected the notion that sentencing circles be restricted to certain offenses where the normal range of sentence would be less than two years. He viewed "the nature of [an] offence and possible range of sentence" as factors to be considered in, but not determinative of, a sentencing circle application.<sup>103</sup>

Regardless of the impact of appellate sentencing tariffs, caution may be required before selecting cases involving domestic violence for circle sentencing. Such offenses have been characterised as involving historic power imbalances between offenders and victims. Feminist scholars, in particular, have questioned the application of mediation to cases involving wife abuse and, given the prevalence of domestic violence, mediation in criminal offenses may also be problematic. Martha Shaffer argues that historical power imbalances are not easily overcome:

Since experts estimate that one in three women is battered by her spouse, the problem of mediating domestic violence cases is not insignificant. It is difficult to imagine a situation in which the power imbalance between the spouses is more pronounced and the potential consequences of mediation more disastrous. It is grossly unrealistic to assume that women who have been subjected to a pattern of repeated abuse will suddenly be able to face their abuser.<sup>104</sup>

In addressing the application of such power imbalances to circle sentencing, Rupert Ross suggests it might be inappropriate to conduct a sentencing circle without first identifying and addressing these imbalances.<sup>105</sup> Such an approach

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provisions of s. 737 of the Criminal Code, be coupled with a probation order, a submission should not, in these circumstances, be heard for the establishment of a sentencing ... circle.

<sup>101</sup> *Supra* note 9 at 290.

<sup>102</sup> *Supra* note 46.

<sup>103</sup> *Ibid.* at para. 21.

<sup>104</sup> See M. Shaffer, "Divorce Mediation: A Feminist Perspective" (1988) 46:1 U. T. Fac. L. Rev. 162 at 182.

<sup>105</sup> Interview by telephone with Rupert Ross (4 January 1995). Also see Crnkovich, *supra* note 58 where the author described power imbalances which occurred during an Inuit sentencing circle in northern Quebec:

to victim support was practiced at Hollow Water by CHCH in serious child sexual abuse cases. The offender and victim were assigned separate support teams and were not brought together until such time as they could face each other on an equal footing.<sup>106</sup> When a sentencing circle was held the victim was encouraged, but not required, to attend. If the victim chose to attend the circle, a specific worker was provided for support.<sup>107</sup> The Hollow Water approach brought into question the appropriateness of circle sentencing for cases involving domestic violence without prior intervention.<sup>108</sup>

In contrast to domestic assault cases, a sentencing circle might be more beneficial—and potentially less threatening—to a victim who is not well acquainted with the offender.<sup>109</sup> In *Morin*,<sup>110</sup> the victim and offender were strangers prior to the offence. The sentencing circle appeared to have allowed the victim to confront her assailant while “putting a human face” to him.<sup>111</sup> She also

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

<sup>106</sup> Ross interview, *supra* note 105.

<sup>107</sup> Interview with Associate Chief Judge Murray Sinclair (17 January 1995) Winnipeg, Manitoba.

<sup>108</sup> The approach at Hollow Water was predicated on lengthy adjournments of sentencing by the trial court. There was a protocol in effect between the Manitoba Department of Justice and Hollow Water that recognised the propriety of such adjournments for completion of the healing program. However, the Alberta Court of Appeal in *R v. A.B.C.* (1991), 120 A.R. 106 (Alta. C.A.) had rejected the *practice* of lengthy adjournments for treatment making the Hollow Water approach unlikely to be accepted in Alberta. The Saskatchewan Court of Appeal in *Taylor*, *supra* note 87, also rejected the trial judge's decision, following a sentencing circle, to adjourn sentencing for one year and to banish the offender to an isolated island under the terms of an undertaking.

<sup>109</sup> Ross interview, *supra* note 105.

<sup>110</sup> *Supra* note 42.

<sup>111</sup> At the circle, she directly challenged the offender Ivan Morin. As reported by J. Campbell, “Morin Says Sentence Was Just” (May 1993) *New Breed Magazine* 3 at 4:

Morin's victim, [a] university student ... , said she didn't hate Morin and didn't appear looking for revenge. “I did not come here out of vindictiveness and I have no anger towards you. I came here to challenge you in your actions.” [The victim] said what she and the rest of the community wanted was a commitment from

attained insight into the offender's personal situation and problems.<sup>112</sup> Although reconciliation between parties to an offence might occur during a sentencing circle, offenses involving historical power imbalances will continue to necessitate vigilance by judges in ensuring, to the greatest extent possible, protections of victim within the process.<sup>113</sup> Unfortunately, such "judicial" protection might be short-lived for victims in isolated communities since the court party routinely leaves upon adjournment, making community-based support for such victims essential.

### 5. Deterrence through Circle Sentencing

A central goal of sentencing in Anglo-Canadian law is deterrence, both specific and general.<sup>114</sup> Although incarceration has been perceived as a predominant means of achieving deterrence within the prevailing system, Stuart J. in *R v. Washpan*<sup>115</sup> commented that community-based options also deter crime:

A severe sentence is not the only punitive sanction that serves to achieve general deterrence. Other forms of punishment, either in lieu of jail or in addition to jail, depending upon the crime, offender, and community, may be as effective in achieving general deterrence and at the same time be less disruptive of other sentencing objectives.<sup>116</sup>

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Morin to break his cycle of crime. "I need a commitment from you to better yourself. It can't come from anyone else here," [the victim] said.

<sup>112</sup> M. Miller, "Forgiveness Replaces Blame: Sentencing Circle Experiment in Saskatoon" (1993) 13:1 *St. Thomas More College Newsletter* 4 at 5.

<sup>113</sup> Caution respecting offender/victim power imbalances, in the context of a request for a community-based sentencing hearing, was also expressed by Stach J. of the Ontario Court of Justice (General Division) in *R v. A.F.*, [1994] O.J. No. 2865 (QL) at 3. The victim had become an outcast from her community and had moved to southern Ontario following her disclosure, leading His Lordship to comment:

The success of a community-based sentencing approach depends very much upon the active participation of and sincere commitment of each participant. ... So too, where the nature of the crime bespeaks an imbalance of power as between the victim and the offender, great care ought to be taken ... . The perspective of the accused, the convenience of witnesses and the perspective of the community are not the only considerations. The rights of the public, the perspective of the victim, and the Court's duty to ascertain the truth are all competing and sometime competing considerations. In cases of sexual assault, for example, an imbalance of power as between the offender and the victim is commonplace. Where the imbalance is not offset by some other visible community support for the victim, the logic of a community-based sentencing hearing is dissipated.

<sup>114</sup> *R. v. Morrisette* (1970), 1 C.C.C. (2d) 307 (Sask. C.A.) at 310-311.

<sup>115</sup> (1994), (Y. Terr. Ct.) [unreported].

<sup>116</sup> *Supra* note 115 at 3.

Community members at Hollow Water argued that deterrence of sexual offenses could be accomplished without jail as this form of punishment reinforced silence and promoted the cycle of violence by reducing disclosures of abuse.<sup>117</sup>

The impact of the mere presence of community members on offenders also promotes deterrence.<sup>118</sup> In *D.N.*,<sup>119</sup> Stuart J. commented, "As any offender who has been through a [Sentencing] Circle and community rehabilitation sentence will attest, jail is a shorter, less demanding, and less traumatic sentence."<sup>120</sup> The deterrent effect of circle sentencing was described by Greg Bragstad, a Sandy Bay man who had participated in a number of sentencing circles:

That was the decision of the sentencing circle, and that was the community that decided that. And so it has stopped two people from doing crime because of it ... . They [the two young offenders sentenced in the circle] haven't been in court since so that tells me they're not doing anything ... . I think [the sentencing circle] gave them time to think about what they did and it gave them the message that the community is not going to tolerate it and, again, that gives the community some ownership—rather than just having a judge fly in and you go to jail, you do this, you do that.<sup>121</sup>

Shaming has been a key element in the success of the circle as deterrent. Professor John Braithwaite argues that the most effective way to deter crime in a community is through an organised form of shaming by the local community while at the same time reintegrating offenders into that community.<sup>122</sup> Constable Brian Brennan, an RCMP officer stationed in Sandy Bay who has been involved in a number of sentencing circles, agrees with this deterrent effect:

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<sup>117</sup> Community Holistic Circle Healing Assessment Team, *CHCH. Position on Incarceration* (Hollow Water, Manitoba, 1993) [unpublished]. The Assessment Team expressed their frustration at 2–4:

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

<sup>118</sup> See *R. v. Genaille* (1982), 8 W.C.B. 197 (Sask. C.A.) where the court, although not considering a sentence arrived at through a sentencing circle, commented that the offender would be returning to his Indian community which would continue to remind him of the offence.

<sup>119</sup> *Supra* note 26.

<sup>120</sup> *Ibid.* at 30.

<sup>121</sup> Bragstad interview, *supra* note 28.

<sup>122</sup> J. Braithwaite, *Crime, Shame and Reintegration* (Cambridge: University Press, 1989) at 54–68.

[I]t really confronts the accused a lot more ... before his community and admit[ing] he was wrong and explain[ing] why he did it than to stand before a stranger. It's easier to stand before a stranger for four or five minutes while the judge sentences you and be done with it than to sit for an hour or two or maybe three and have a number of people criticize your character and your actions and you have to try and defend yourself.<sup>123</sup>

Although judicial disagreement exists on how specific and general deterrence might best be accomplished, judges such as Stuart in the Yukon and Fard in Saskatchewan have recognised the power of local aboriginal communities to deter criminal behaviour. Working within the prevailing legal system, these judges have used judicial discretion in sentencing to "tap into" local systems of social control, thereby assessing additional resources in their attempt to change offender behaviour.

### C. The Elders' or Community Sentencing Panel

Direct consultation with community members at sentencing was advocated by the Law Reform Commission of Canada in 1974.<sup>124</sup> In 1991, the Commission developed this theme in an aboriginal context:

[L]ay assessors (Elders or other respected members of the community) ought to be permitted by express statutory provision to sit with a judge to advise on appropriate sentences ... . Their duties would include consulting those involved and recommending an appropriate disposition to the judge. Similar programs already exist or are being created in some communities. The advisors' recommendations may differ from the range of sentences established by case law, or may be contrary to general court of appeal jurisprudence. We see no real difficulty in this: indeed, it is because such guidelines are on occasion inappropriate to Aboriginal communities that we make this recommendation.<sup>125</sup>

The Commission could conceive of no legal impediment to community consultation during sentencing.<sup>126</sup>

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<sup>123</sup> Brennan interview, *supra* note 64.

<sup>124</sup> Law Reform Commission of Canada, *The Principles of Sentencing and Dispositions Working Paper No. 3* (Ottawa: Queen's Printers, 1974) at 29 as cited in S. Zimmerman, "The Revolving Door of Despair: Aboriginal Involvement in the Criminal Justice System," (1992) U.B.C. L Rev. 367. At 386 the Commission is quoted as saying:

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

<sup>125</sup> Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Queen's Printers, 1991) at 36-37.

<sup>126</sup> Also see Zimmerman, *supra* note 124 at 386 where the author observed:

Rupert Ross describes the role of elders in the sentencing process at the Sandy Lake reserve in northwestern Ontario:

Those three Elders have been sitting with the court since June of 1991. As I mentioned earlier, we place a long trestle tables in such a way that they form a large square. The judge, his clerk and his reporter occupy one side of the square. To his right are the Elders and an interpreter. Directly across from the judge is where the defense lawyers, offenders and their families sit, together with probation officers and others who may wish to address the court. The fourth part of the square is occupied by the Crown Attorney and those police officers involved in the cases at hand ... . If a conviction is entered, the next question is the sentence thought to be most appropriate. It is at this point that the Elders have an opportunity to speak to the accused and family members, and to make recommendations about the sentence they believe will be most productive from a community perspective. The Elders bring to the court their knowledge of the accused and his or her family circumstances, and their appreciation of the specific events that might have contributed to the commission of the offence.<sup>127</sup>

This approach was introduced in 1994 in court in Waywayseecappo, Manitoba. The Elders' Advisory Council sat with the judge in court and provided advice during sentencing. Court was conducted in a circle format with other participants including police, defense and Crown counsel, and the local probation officer. The elders provided the judge with information on each offender, as well as advice on sentence.

Sentencing *practices* at Pukatawagan, Manitoba observed during this study were similar to the elders' panel, although they involved members of the local justice committee rather than elders.<sup>128</sup> Judges sitting in Pukatawagan court had developed a *practice* of consulting directly with these members. This provided more information to the court about both offender and offence than was usually obtained through counsel. Judges also attempted to verify defense counsel claims about purported offender rehabilitation by consulting justice committee members. This approach, while allowing the court to access more information, may impede attempts at reconciliation among the offender, victim, and community by stressing the role of justice committee members as witnesses to of-

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While no policy or law allows for lay assessors, none forbids them either, and certain judges have taken the initiative of instituting such *practices* themselves. The formal use of lay assessors is itself not without precedent.

The use of Aboriginal Elders or other community members presents no legal obstacle, would greatly assist non-Aboriginal judges in determining appropriate sentences and would go at least some way toward alleviating the perception widely held in Aboriginal communities that judges are ignorant of and insensitive to the circumstances and needs of Aboriginal offenders.

<sup>127</sup> R. Ross, *Dancing With a Ghost: Exploring Indian Reality* (Toronto: Octopus Publishing, 1992) at 167.

<sup>128</sup> Dalmyn interview, *supra* note 40. The justice committee involved a mixture of elders and younger community members.

fender behaviour, rather than as resources for the healing and support of the offender.

Although the *practices* of community sentencing consultation in court have varied between jurisdictions,<sup>129</sup> judges, and courts, all approaches appear to bestow a distinct status upon elders or other community representatives within the sentencing process. When acting in an advisory capacity to the court, the elders assume a quasi-judicial role similar to that of the lay assessor.<sup>130</sup>

#### D. The Sentence Advisory Committee

In *Rich*,<sup>131</sup> O'Regan J. commented that information available through a sentencing circle involving a judge could also be obtained by "hearing the results of the consensus of the community from their own sentencing circle with the accused and without the complainant and the judge."<sup>132</sup> This *practice* is employed at Cumberland House, Sandy Bay, and Pelican Narrows. Presiding judges refer cases to a local committee seeking a recommendation on sentence. This committee,<sup>133</sup> in turn, meets with the offender (and sometimes the victim) before formulating a recommendation. At Pelican Narrows, Judge Fafard began referring cases to the local sentence advisory committee in the spring of 1994. The Peter Balantyne Band actively supports community participation by appointing members to this committee.<sup>134</sup> This advisory process was described by committee Co-ordinator Derek Custer:

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

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<sup>129</sup> See S. Yaeger, "Circle Sentencing Programs Give Yukon Indian Bands an Alternative to Traditional Legal System," *The Lawyers Weekly* (1 October 1993) 12 which described a similar approach to the Elders Sentencing Panel being used in some Yukon communities. Lilles J. of the Territorial Court of Yukon, in *R. v. J.A.P.* *supra* note 24 at 2 stated that one of the submissions he considered in arriving at an appropriate sentence included "evidence and representations by Chief David Keenan, Chief of Teslin Tlingits, representing the five clan leaders, the Tlingit Council and the community recommending a community-based disposition instead of incarceration."

<sup>130</sup> These were used in British admiralty courts. See Zimmerman, *supra* note 124 at 386.

<sup>131</sup> *Supra* note 44 at 298. In this case, the court rejected the request for a sentencing circle on the basis that the victim did not feel she could participate as she had not yet healed.

<sup>132</sup> *Ibid.* at 299.

<sup>133</sup> Described by its participants as the "sentencing circle committee" in all three locations.

<sup>134</sup> Fafard J. December interview, *supra* note 59.



them and approves them. Once they're approved then the accused will have to follow what we recommended.<sup>135</sup>

He explained the specific procedure followed when meeting with offenders:

The procedure we follow is, we start off, I start off with giving the date when we're supposed to meet and I talk to the committee and they agree, that's prior to the court date. And we meet at a certain date, maybe a couple days before the court date, or a week, depending on who's available in the committee. And then when we proceed with that, with the circle, we start out with a prayer and then everything is read aloud to the committee, what the offence is. And as well we ask the offender, if he really fully understands the reasoning for the sentencing circle. Some do and some don't. But during our meeting, when we get together, we explain to the offender what happens in the circle. See this is their opportunity to turn their lives around instead of getting into trouble all the time, this is the time to, you know, reflect back on what's happened to their lives and people are caring and they're trying to help. And we explain this to every offender that comes to the circle, and then we proceed to give proper recommendations for that offender, and to follow through, and as well make sure they agree with what we've recommended, if they're willing to do it. And once they agree, then everything is typed up, the recommendations, and then the judge will look at them.<sup>136</sup>

The sentence advisory process is in its infancy in the Saskatchewan communities studied. Despite his warning that it may be premature to draw any conclusions from the community sentencing initiatives,<sup>137</sup> Judge Fafard suggested that belief in the effectiveness of process itself was a deterrent:

[Y]ou could say that in Pelican Narrows, ... because our case load there diminished fairly dramatically since we've started doing sentencing circles maybe you could conclude from that that its having an impact on actual crime. Because it may be, ... if people believe that the system of administration of justice that supervises them ... is functioning for them and by them in their own best interests, that they're less likely to go against it.<sup>138</sup>

According to Judge Fafard, the committee at Pelican Narrows tended to be more demanding, and stricter in its recommendations respecting probation orders, than he himself would be.<sup>139</sup> Conclusions on overall impact of this process

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<sup>135</sup> Interview with Derek Custer (16 November 1995) Pelican Narrows, Saskatchewan.

<sup>136</sup> *Ibid.*

<sup>137</sup> Discussion with Fafard J. (14 November 1994) Pelican Narrows, Saskatchewan.

<sup>138</sup> Fafard J., December interview, *supra* note 59.

<sup>139</sup> Interview by telephone with Fafard J. (19 September 1994). The "sentencing circle committee" at Cumberland House served two functions: sentence advisory and mediation/diversion. During a field trip to Cumberland House 12 December 1994, two cases were considered by the committee in its sentencing advisory capacity. In each case, the committee met with the offenders and attempted to reach a consensus on a sentence recommendation. One case involved an 18 year old offender charged with assault. Prior to the offender entering the meeting room, the committee considered the circumstances of the assault provided by the police (a drunken assault on one of her friends at a party) and developed a tentative recommendation. As the offender had no criminal record, the police had

would have been overly hasty. However, the committee initially appeared to have alleviated time pressures on the court, in contrast to lengthy sentencing circles, while at the same time facilitating community sentencing input.

Although time saved for the court party may be viewed as a benefit, arguably the most telling lesson to be taken from the development of sentence advisory committees is the significant role that can be played by local community members without direct supervision by the court. This lay involvement may enhance feelings of community "ownership" over the process while simultaneously providing additional resources to the court. In the context of circle sentencing, the strength of local participation and initiative were evident in the operation of the Kwanlin Dun Circle process in the Yukon<sup>140</sup> and the Blood Tribe Alternative Sentencing Program (Aissimohkl) in Alberta.<sup>141</sup> Both initiatives involve local community members in planning, organising, and supervising the circle sentencing process. The logical extension of this level of community involvement is complete diversion of offenders from the court system through community mediation committees.

### E. The Community Mediation Committee

Although not concerned with the imposition of a criminal sentence, mediation does provide for the disposition and resolution of criminal actions by adults and youths diverted from the court system.<sup>142</sup> The goals of mediation are varied. Professor Jackson described the objectives of an aboriginal mediation program operating in High Level, Alberta in 1981 as including:

- (i) short circuiting the law breaking-incarceration cycles of Native offenders;
- (ii) giving Native people a better understanding of the criminal justice system;

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recommended a suspended sentence with probation. The committee decided on a one year probation order requiring her to abstain from alcohol consumption, take alcohol counseling and apologise to the victim. The offender did not agree. She emphasised that her friend had received only six months probation for a similar offence. A struggle ensued back and forth as the committee attempted to convince the offender she should agree with the recommendation while the offender tried to convince the committee to reduce the recommended probationary period to six months. Eventually, the committee members came to the unanimous conclusion that the offender could either agree with their recommendation or have the charge referred back to the court without recommendation (in which case the offender could "take her chances with the judge"). The offender then agreed with the recommendations and the matter was finalised pending appearance before the judge on the next court date.

<sup>140</sup> This is described in detail by Lilles J. in *Gingell supra* note 7.

<sup>141</sup> This is also described in detail by Jacobson J. in *Manyfingers, supra* note 84.

<sup>142</sup> This process is sanctioned for young persons by s. 4 of the *Young Offenders Act* and for adults by ss. 717-717.4 of the *Criminal Code*. At the time of field work for this study, these *Code* sections had yet to be proclaimed. However, the Crown still exercised its discretion in diverting both adult and young offenders within the mediation initiatives studied.

- (iii) increasing community participation in and “ownership” of the criminal justice system and;
- (iv) minimising the penetration of Native people into the criminal justice system.<sup>143</sup>

With these objectives in mind, advocates of criminal mediation have suggested local communities are well equipped to achieve resolution of many disputes previously handled by the court system. In 1975, the Law Reform Commission of Canada discussed the advantages of community participation in mediation:

The continuing interest in diversion is fed by many sources. There is a growing disappointment with an over-reliance on the criminal law as a means of dealing with a multitude of social problems. At the same time we realise [that] rehabilitation does not provide a full answer to the problem of crime. Increasingly, it has recognised that crime has social roots and sentencing policies must take into account not only the offender but the community and the victim as well ... .

The general peace of the community may be strengthened more through a reconciliation of the offender and victim [than] through their polarization in an adversary trial.

Diversion encourages the community to participate in supporting the criminal justice system to the degree that was not always possible under the trial model. Professionals, para-professionals, ex-offenders and ordinary citizens are encouraged to join the delivery of services to the criminal justice system, for the diversion program rests upon a community base.<sup>144</sup>

In an aboriginal context, the relationship between the community, victim, and offender within the mediation process was explained by Donald McKay Jr. of Cumberland House:

So we bring these two people face to face and ask them why'd you do it, for what reason, and then we get them started talking to each other and say, the accused can say well how can I pay you back, what can I do for you, you know? Maybe I can work for you for if it's 100 hours, right now in winter time, shovelling snow or chopping wood, or any kind of little chores around the house, you know, just as a kind of form of restitution, instead of paying back money all the time? Sometimes people bust a window or kick a door down or something like that. Well maybe that person can, you know, put some money in by replacing a window or door and that type of thing, but that's the biggest thing I have with these community circles. We know the people that's been victimized and we also know the people charged, and I just think it's a whole community healing process. We know them better than the court systems.<sup>145</sup>

In addition to promoting offender/victim reconciliation and compensation, local mediation committees also focused on changing offender behaviour. Cyril Roy,

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<sup>143</sup> Jackson, *supra* note 3 at 277.

<sup>144</sup> Law Reform Commission of Canada, *Studies on Diversion, Working Paper No. 7* (Ottawa: Queen's Printers, 1975) as cited in M. Jackson, "In Search of Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities" (1992) U.B.C. L. Rev. 147 at 178.

<sup>145</sup> McKay interview, *supra* note 27.

Chairperson of the Cumberland House Sentencing Circle Committee, believes interaction between his committee and offenders promotes such a change.<sup>146</sup>

Mediation is the only model of community participation considered in this article which allows local community members the final decision on disposition.<sup>147</sup> Despite this ultimate decision-making power, the breadth of mediation had been limited by the range of offenses referred to the local community by the police and courts.<sup>148</sup> Constable Murray Bartley, stationed in Cumberland House, suggested that mediation should only be made available for minor property offenses and not for more serious crimes of violence, which he doubted the committee would be able to handle.<sup>149</sup> However, Donald McKay Jr. felt that his committee could deal with more serious referrals:

I guess I questioned the judge a couple of times on what kind of cases we could deal with, I guess the far more serious cases, say assault and stuff like that, are too serious for us, according to the judge or court system, to deal with. But we've been dealing with say breaking and enter, mischief, damage of property and cases like that. Assault charges maybe between two young people, stuff like that we've been dealing with. But far more serious assault charges where a weapon was used, those ones we haven't been able to deal with ... . [However], I keep saying this. I've probably said it ten times, but we are the ones that live here in this community. We are the ones that have to live with these people that commit crimes. And I think we as a community should be dealing with them.<sup>150</sup>

Further experience with this process appears likely to increase the confidence of local community members in dealing with more difficult and challenging cases. According to Fafard J., speaking in the context of the development of sentenc-

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<sup>146</sup> Roy interview, *supra* note 29. Similarly, RCMP Constable Murray Bartley of Cumberland House, when interviewed 14 December 1994, commented on the deterrent effects of the mediation process on offenders (although he questioned whether victim restitution was always possible):

[M]any of these offenses are so minor, there's really no victim. And to order [monetary] restitution is impossible and I think it's a lot more difficult to face a group of people in your community such as elders, ... and, if there is a victim, people you've actually victimized, and to have to actually personally apologize to them, [it is harder] than to just receive a fine and walk away in a courtroom.

<sup>147</sup> Interview by telephone with Judge Brian Huculak (7 December 1994). Judge Huculak stressed the empowering impact on communities of this final decision-making power.

<sup>148</sup> During the course of field work for this study (September 1994–August 1995) diversion referrals were solely in the discretion of the local police, Crown prosecutor, or judge. Effective 3 September 1996, the *Criminal Code* was amended to recognise adult alternative measures programs. Provinces were delegated the responsibility of defining the criteria for such programs, including the classification of offenders and offences which could be diverted.

<sup>149</sup> Bartley interview, *supra* note 63.

<sup>150</sup> McKay interview, *supra* note 27.

ing circles, "It seems that if people have things done for them and long enough, they lose confidence in their own abilities."<sup>151</sup>

### III. THE EVOLUTION OF COMMUNITY SENTENCING AND MEDIATION

#### A. Development and Impact

Data from the communities specifically studied yielded four community participation approaches: circle sentencing,<sup>152</sup> the sentence advisory committee,<sup>153</sup> the elders' or community sentencing panel,<sup>154</sup> and the community mediation com-

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<sup>151</sup> Fafard J., "Sentencing Circle: A Progress Report" (La Ronge, Saskatchewan, undated) [unpublished]. Recognition of community decision-making experience and confidence was reflected in his comments, during a telephone interview 16 December 1994, regarding community perceptions of punishment:

I think that to a large extent people haven't made up their minds about this, well, because they've never been called upon to think about it. We've done all the thinking and dictating, and now we're asking people to make decisions, we're presenting them the opportunity to think about it and the motivation to give it some thought. They're motivated to think about it because they have some responsibility to decide, you know, so now people really have to seriously address their minds to it.

During a telephone interview with Judge Huculak on 7 December 1994, she indicated that, during her attempts to establish the mediation/diversion program in Pelican Narrows, she sensed the local community lacked the confidence to proceed on their own and wanted to start the mediation process with her direct input.

<sup>152</sup> This was practiced at the Provincial Court sitting in Sandy Bay, Pelican Narrows and Cumberland House, Saskatchewan, and in Hollow Water and Pukatawagan, Manitoba.

<sup>153</sup> This was functioning through the "Sentencing Circle Committee" at Sandy Bay, Pelican Narrows, Cumberland House, and the "Justice Committee" at Pukatawagan.

<sup>154</sup> It was referred to as the Elders' Justice Advisory Council at Waywayseecappo First Nation and as the Justice Committee at Mathias Colomb Cree Nation (Pukatawagan).

mittee.<sup>155</sup> Case selection in all models was controlled by judges, with the exception of mediation at Cumberland House and Pukatawagan.<sup>156</sup>

A wide variety of offenses were disposed of through the community sentencing and mediation approaches studied. In northern Saskatchewan, the criterion requiring that a case be one "which the court would be willing to take a calculated risk and depart from the usual range of sentencing" appears to have had the effect of restricting circle sentencing to offenses and offenders for which a period of incarceration considerably less than two years would have been the norm. Other than *Taylor*,<sup>157</sup> no Saskatchewan circle sentencing case has involved a sexual assault, an offence which usually results in a penitentiary term according to appellate sentencing guidelines. The sentencing circles conducted at Hollow Water were, by contrast, sexual assault cases. Although the local dynamics at Hollow Water were complex, the protocol negotiated with the Department of Justice appears to have been a major factor in allowing community sentencing for an offence which previously resulted in an automatic penitentiary term. An unanswered question was whether certain offenses, especially those involving domestic violence, were suitable for circle sentencing. Feminist scholarship has argued that the historical power imbalances existing in abusive relationships makes violent men poor candidates for mediation.<sup>158</sup> Yet cases of spousal assault have been considered within sentencing circles in northern Saskatchewan. The consideration of such cases by circle sentencing, other community sentencing, or mediation approaches, will require great caution in ensuring the victim has significant support and that she has not been coerced into participating.

The sentencing and mediation approaches studied evinced varied recognition of aboriginal traditions and *practices*. A prayer was offered in Cree by an

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<sup>155</sup> This was functioning through the Sentencing Circle Committee at Cumberland House and the Justice Committee at Pukatawagan. Although not yet functioning in the spring of 1995, a mediation committee similar to that operating in Cumberland House was being formed in Pelican Narrows and Sandy Bay. Mediation for young offenders and adults was already being conducted in these communities on an informal basis by representatives of the Departments of Justice and Social Services. When considering mediation/diversion, it should be recognised that police often find themselves in the role of mediator. Corporal Kirke Hopkins of Pelican advised, when interviewed 18 April 1995, that the significant discretion available to police officers in laying charges often places them in a position of working out a solution between aggrieved parties without laying a charge.

<sup>156</sup> In these communities, the police primarily control case referral, although some cases had been referred to mediation by the court at Cumberland House and by local community members at Pukatawagan.

<sup>157</sup> *Supra* note 87.

<sup>158</sup> See H. Astor, "Swimming Against the Tide: Keeping Violent Men Out of Mediation" in J. Stubbs, ed., *Women, Male Violence and the Law* (Sydney: Institute of Criminology, 1994) 147.

elder at both Pukatawagan court 11 April 1995 and a sentencing circle conducted 14 November 1994 at Pelican Narrows.<sup>159</sup> An Ojibway prayer was offered at Waywaysecappo court 2 March 1995, as well as at the Winnipeg circle. No prayer or traditional ceremony preceded the Cumberland House Sentencing Circle Committee meeting 13 December 1994. Sweetgrass and pipe ceremonies have been used during court at Hollow Water and Pukatawagan and were used during the Winnipeg circle. Offenders and other circle participants were allowed to speak their Native language in all court and mediation hearings observed. The "aboriginal *practices*" incorporated into community sentencing and mediation included both spirituality (signified by prayers, sweetgrass burning, or pipe ceremonies) and process (such as grassroots consultation, community consensus, and sharing). The circle itself has been viewed by aboriginal people as having traditional significance.<sup>160</sup> Whether or not such a specific historical link exists for the First Nations in this study, the circle format employed in court and mediation represents a more egalitarian process of adjudication,<sup>161</sup> reflecting the communal traditions and aspirations of aboriginal society.

Although the aboriginal *practices* described form an integral part of the sentencing process, their inclusion appears to be as an adaptation to conventional court protocol rather than an adoption of traditional aboriginal dispute resolution *practices*. Anglo-Canadian adjudication *practices* are retained; the judge controls the final sentencing decision and the voices of defense and Crown counsel are predominant in an otherwise consultative process. Despite the continued prominence of judges and lawyers, these community sentencing approaches demonstrate the flexibility of Anglo-Canadian law, in allowing both local participation and recognition of traditional aboriginal *practices* during sentencing.

Since the initiatives studied are in their infancy, conclusions regarding their impact on offenders, victims, and communities are tentative and largely anecdotal. For example, lawyer Joyce Dalmyn described the positive impact of a sentencing circle on a young man at Pukatawagan:

There are some [offenders], for example, the young man I mentioned earlier who should have been in a penitentiary and [would have] gotten no benefit there, who, for some reason has done extremely well for two years. And I can't explain that. Did the input of the community help him? It must have. He spent three and a half out of the

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<sup>159</sup> Hereafter called the "Pelican Narrows circle."

<sup>160</sup> This point was made strongly by two sentencing circle participants: Berma Bushie, an Ojibway woman from Hollow Water (interviewed 6 February 1995) and Verna Merasty, a Cree woman from Sandy Bay (interviewed 20 October 1994).

<sup>161</sup> Compare this egalitarian process to the hierarchical approach followed in conventional court which focuses almost exclusively on the participation of crown and defense counsel and the judge.

four preceding years in jail. Something good came [from the sentencing circle] for him. Is he an anomaly, or is he a norm?<sup>162</sup>

During a sentencing circle conducted 19 April 1995 at Sandy Bay,<sup>163</sup> Judge Fafard stated that, although two offenders sentenced before local sentencing circles had re-offended, the result of such circles had generally been positive. He believed offenders paid more attention to recommendations from the community than from a judge alone. "Before sentencing circles, I would leave your community at the end of the day without solving any of the underlying problems," he told the circle.

No data was available on recidivism rates for offenders dealt with through community sentencing or mediation in the communities studied. At Pukatawagan, Corporal Bob Brossart believes there has been scant difference in recidivism between offenders sentenced in conventional court and those dealt with by the justice committee.<sup>164</sup> Although prominent cases of recidivism may have had the effect of fuelling opposition to community sentencing,<sup>165</sup> the usefulness of this recidivism as a measure in assessing the effectiveness of these reforms remains open to question, given the track record of the prevailing justice system in aboriginal communities. As Judge Stuart of the Yukon Territorial Court noted, "Whatever failures the [Sentencing] Circle may experience, it is important to note how the justice system ha[s] failed numerous times with the same offender."<sup>166</sup>

The impact of these initiatives upon offenders was gauged through interviews with initiative participants and through observations of offenders in court or during mediation. Although two former offenders were interviewed in Sandy Bay, no offenders were interviewed at the time of sentencing because most were preoccupied with their immediate case.<sup>167</sup> Several community sentencing participants who were interviewed believed they were better equipped to control offender behaviour than judges, lawyers, and probation officers. They viewed peer pressure during community sentencing and mediation as a significant fac-

<sup>162</sup> Dalmyn interview, *supra* note 40.

<sup>163</sup> Hereinafter called the "Sandy Bay circle."

<sup>164</sup> Interview with Corporal Bob Brossart (11 April 1995) Pukatawagan, Manitoba.

<sup>165</sup> W. Goulding, "Sentencing Circle used Previously by Suspect" *The Saskatoon Star Phoenix* (6 June 1995) A6 which focused on the previous circle sentencing experience of person arrested on a charge of break and enter.

<sup>166</sup> Stuart, *supra* note 41 at 5.

<sup>167</sup> During a field trip to Sandy Bay 18–20 October 1994, Dean Stuart, one of the first offenders sentenced before a local sentencing circle, was spoken to while walking down the main street. Plans were formed to interview him during a future visit. However, upon return to Sandy Bay in April 1995, Dean was in jail having been arrested for breaching a no-alcohol provision in his probation order. During this latter trip, Conrad Bear, the offender sentenced in the Sandy Bay circle, was also contacted. He declined to be interviewed.



tor in promoting changed offender behaviour. The immediate effect of peer pressure upon offenders was evident at the Sandy Bay and Pelican Narrows circles and during court at Waywayseecappo and Pukatawagan. Offenders sentenced on these occasions appeared humbled by the experience of coming before other community members. Circle sentencing committee member Donald McKay Jr. of Cumberland House described the impact of his committee on offenders:

If the community people begin to deal with the community problems, you know, and people being accused of these crimes will come in, they are pretty nervous to face the community, but this person has to live in this community. Whether they get probation or jail, they're going to come back and live here. So I just think if they deal with the community and realize people around the sentencing circle are trying to help them out, I think more and more people will ask for the sentencing circle.<sup>168</sup>

By involving community members in sentence design and supervision, judges made additional resources accessible in order to encourage behavioural reform and simultaneously facilitate reconciliation among offenders, victims, and the local community.<sup>169</sup>

The impact of these initiatives upon crime victims was difficult to assess. Out of respect for their situations, no victims were interviewed. Some understanding was gained through comments of participants and observations of victims during circle sentencing and the Hollow Water community review. CHCH at Hollow Water was the only initiative studied that showed evidence of a formal support system for victims. Although a clear emphasis on promoting reconciliation between offenders and victims was claimed by various participants within the other community sentencing and mediation initiatives studied, the

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<sup>168</sup> McKay interview, *supra* note 27.

<sup>169</sup> See *Joseyounen supra* note 73 at 445 where Fafard J. commented:

The aim of sentencing circles is the same when the disposition is arrived at by other means: the protection of society by curtailing the commission of the crime by this offender and others.

However, in sentencing circles the emphasis is less on deterrence and more on re-integration into society, rehabilitation, and a restoration of harmony within the community.

Community members in Sandy Bay had formed, in conjunction with Judge Fafard, the Sandy Bay Youth Sentencing Advisory Committee in the late 1980's. This committee developed sentencing recommendations on specific cases referred from the court. One former young offender, who appeared before this committee, was interviewed during a field trip to Sandy Bay in April 1995. He described the positive impact he had experienced through this process. When the committee challenged him to explain the reason for committing his crime (a break and enter), he felt able to tell the committee about his troubled home life. He said the committee had helped him by exploring the problems underlying his behaviour and by providing him with ongoing support and counselling. He had not re-offended since the initial offence.

involvement of victims and provision for victim support in these communities appeared disorganised and inconsistent. Although victims were usually present at the formal and informal sentencing circles conducted at Pukatawagan, lawyer Joyce Dalmyn and Corporal Robert Brossart questioned the lack of victim involvement in mediation conducted by the local justice committee.<sup>170</sup> In northern Saskatchewan, victim involvement in circle sentencing and mediation was inconsistent. Although the victim had been active in arranging and participating at the Sandy Bay circle, the victim was not present at the Pelican Narrows circle; no one spoke on his behalf.<sup>171</sup> At the Sentencing Circle Committee meeting 13 December 1994 at Cumberland House, no victims appeared before the committee, although some appeared to have been previously consulted by committee members. With the exception of CHCH at Hollow Water, victims appeared to participate less and have less support offered to them than did offenders.

A major impact of these initiatives is the empowerment of community participants. Some view development of community sentencing and mediation as essential to their community's development and health. At Cumberland House, Sentencing Circle Committee Chairperson Cyril Roy stated that expansion of his committee's role in local dispute resolution was the "only way we can keep our community a little stronger and keep it going."<sup>172</sup> Lawyer Felicia Daunt observed that the impact of circle sentencing at Sandy Bay had been both positive and empowering:

Well, in Sandy Bay, in particular, I've noticed that sentencing circles have really had a very positive impact on the community. In Sandy Bay we used to see a lot more violent offenses and higher levels of violence than you do now. In general, I get the impression that the community has started to heal itself and I think sentencing circles were a step in that. It sort of got the people in the community together talking about problems that, although they're sentencing one person, the community shares.<sup>173</sup>

Despite these positive views, others at Sandy Bay are sceptical of the impact of circle sentencing. A Sandy Bay man commented, over breakfast, that he had been to jail "before there were sentencing circles." He viewed circle sentencing negatively, believing it allowed offenders to be sentenced without any penalty and "if you break the law, there has to be a penalty." Indeed, a perception appeared to be developing among Sandy Bay offenders by Spring 1995 that sen-

<sup>170</sup> Dalmyn interview, *supra* note 40 and Brossart interview, *supra* note 164.

<sup>171</sup> This victim had been recently sentenced to custody and was also experiencing further medical problems resulting from the assault being considered in the sentencing circle.

<sup>172</sup> Roy interview, *supra* note 29.

<sup>173</sup> Interview with Felicia Daunt (19 April 1995) Sandy Bay, Saskatchewan. When interviewed 16 December 1995, Fafard J. indicated there had been a fairly dramatic decrease in the court's case load since the beginning of circle sentencing there. He stated, "[m]aybe you could conclude from that that it's having an impact on actual crime."

tencing circles were an "easy way out." Sentencing circle participant Harry Morin viewed this development as resulting largely from the lack of treatment options available for offenders in northern Saskatchewan. This shortage often means that a suspended sentence with few probation conditions is the only available alternative to jail for some offenders, leaving the impression that little, if any, penalty had been imposed.

Criticism of the circle process was also heard at the Winnipeg circle when an Ojibway man, the brother of both victims, openly challenged this approach and suggested that the victims and offender (his father) would have been better off participating in a session with a trained psychologist.

Given such varied reactions and the short history of these initiatives, their long term implications and impact remain difficult to assess. However, in the short term, such approaches clearly have an empowering impact upon the community members involved in their development.

## **B. Justice Issues Raised by Community Sentencing**

This study identified several key issues whose resolution, both at the local community level and across the Canadian justice system as a whole, will affect the evolution of community sentencing and mediation in aboriginal communities. These recurring themes raise the inter-relationship, and at times tension, between local systems of social control and the prevailing justice system.

### **1. The Court's Supervisory Role in Community Sentencing Approaches**

The development of sentence advisory committees at Sandy Bay, Pelican Narrows, and Cumberland House indicates a move away from circle sentencing with a judge in attendance toward the development of community sentencing recommendations reached in the absence of the court party. This reduces the amount of court time required for such cases. However, it also raises the issue of the court's role in such a progression: is its role simply to receive sentencing recommendations from a community committee, or should it actively facilitate sentencing circle recommendations? Judge Stuart of the Yukon Territorial Court<sup>174</sup> expressed concern about the absence of judges within the sentencing circle process. He viewed a judge's presence as the preferred means of identifying and controlling power imbalances between circle participants, although he recognised that such a role could be performed by a community member. While supporting the sentence advisory committee approach, Judge Fafard recognised the need for periodic judicial involvement in such circles to ensure consistency and supervise potential misuse of the process:

I guess I want to ensure some consistency you know, because you have several accused charged with the same or similar offenses, I want to make sure that the dispositions are

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<sup>174</sup> Interview by telephone with Judge Stuart (18 September 1994). Circle sentencing has been used regularly in the Yukon since 1992. See Nemeth, *supra* note 46.

fairly consistent, but I guess the greater thing is that it affects so many different people in that one community, that I'm almost afraid of some political influence. Because it touches on so many people, and I just sort of felt that maybe I should be there to ensure that politics doesn't get involved, that you don't have a powerful family dictating to a weaker family, that kind of thing.<sup>175</sup>

Despite this judicial caution over circle power imbalances, trained and experienced community members could eventually perform the facilitation function currently performed by judges during circle sentencing. Indeed, at the Sentencing Circle Committee meeting attended 13 December 1995 at Cumberland House,<sup>176</sup> committee chairperson Cyril Roy performed a facilitation role similar to that performed by Judge Fafard at the Pelican Narrows and Sandy Bay circles.<sup>177</sup> Although judges provide protection from power imbalances during court, the court party regularly departs from these communities upon the conclusion of the court session, leaving community circle participants to deal directly with offenders in the court's absence. As a result, development of mediation and facilitation skills would strengthen local/informal systems of social control that attempt to change offender behaviour and promote rehabilitation.

## 2. Political Influence and Judicial Independence

Community sentencing and mediation involve interaction between local systems of social control and the formal justice system. In these evolving community sentencing and mediation initiatives, the Anglo-Canadian court system, based on the principle of judicial independence from political interference and coercion, interacts with the opinions, informal relationships, and power structures of local communities. This raises the potential influence of local politics and the popularity and status of specific offenders on decisions taken during community sentencing. Judge Fafard expressed concern for the integrity and independence of circle sentencing; he was adamant that power imbalances re-

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<sup>175</sup> Fafard J. December interview, *supra* note 59.

<sup>176</sup> This meeting involved cases referred to the committee both for mediation/diversion and for a sentencing recommendation to the court.

<sup>177</sup> See Stuart, *supra* note 41 at 14 where Judge Stuart described the use of community members as circle sentencing facilitators in the Yukon:

In some communities, the presiding Judge or Justice of the Peace act as facilitators. Other communities have persons as "Keepers of the Circle" who act both as host and facilitator of the Circle process. If a "Keeper of the Circle" is not a Justice of the Peace, the "Keeper" will call upon the Judge or Justice of the Peace to handle all legal matters required throughout the Hearing.

At a community review circle conducted 22 February 1995 at Hollow Water (during which the progress of five offenders and victims previously dealt with through sentencing circles was evaluated), community member Marcel Hardesty acted as a facilitator for the victim, offenders, and community members in attendance.

sulting from political influence be avoided, thereby preventing actual or perceived bias. In *Joseyounen* he wrote:

In the Euro-Canadian model where the judge imposes sentence without the aid of a sentencing circle, the judge speaks for the people and attempts to deliver a fair, impartial and just disposition. This he does without fear of political interference while at the same time he attempts to reflect the legitimate concerns and aspirations of the community ...

In exploring the flexibility of the criminal law of Canada and its ability to accommodate First Nations cultures and legitimate needs, let us not re-invent those things which are so important to an impartial system of justice. If we throw out the essence of impartiality we run the risk of doing grave injustice to both offender and victim. What I mean is the input of community elders and leaders must not mean the exercise of political influence in the circle to the detriment of the accused or a victim.

The principle of judicial independence in decision-making is one that is deeply ingrained in the Canadian population, including the First Nations. The many sentencing circles I have held have included the participation of chiefs, band councillors, mayors, and others in political office. I have never seen any of these persons attempt to influence the outcome by virtue of their political office.<sup>178</sup>

No direct attempt at political influence through community sentencing representations was observed during this study, although the potential for such interference necessitates caution. Closely related to—and at times indistinguishable from—questions of local political interference are the effect of offender popularity and status on the sentencing process. These appeared to be significant factors in the developing initiatives, especially at Pukatawagan. Lawyer Joyce Dalmy explained that judges sitting at this First Nation had been influenced significantly by a lack of community support for an offender:

Sometimes people have nothing to say, which can be very unfortunate. And that's something as defense counsel I have to alert my client to, is if they want to have a circle, they had better make sure that they're going to have someone there to speak for them. Because if the feather gets passed around and no-one makes any comment whatsoever, I have heard a judge state, right on the record, "Well it's clear that because nothing has been said, obviously they're not willing to say anything good about this person therefore I can only draw the conclusion that there's no sympathy for this person and I have to use the harshest penalties available to me."<sup>179</sup>

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<sup>178</sup> *Supra* note 73 at 443. Associate Chief Judge Brian Giesbrecht of the Manitoba Provincial Court found numerous examples of political interference by chiefs and counsellors in the operation of Dakota Ojibway Child and Family Services. See Giesbrecht J., *The Fatal Inquiries Act: Report by Provincial Court Judge into the Death of Lester Norman Desjarlais* (Brandon, Manitoba, 1992) at 210. While recognising the dangers of local political interference, judges are not free of personal biases. See W. Gaylin, *Partial Justice: A Study of Bias in Sentencing* (New York: Alfred Knopf, 1974) in Chapter 3 where the author explored the inevitable personal biases held by individual judges which, in turn, affected their decisions on sentence.

<sup>179</sup> Dalmy interview, *supra* note 40.

This raised the possibility of community bias against unpopular or marginalised offenders. This occurred in *R. v. Howard*<sup>180</sup> where the British Columbia Court of Appeal reduced a sentence that had been unfairly aggravated by community animosity. The sentencing hearing had turned into an extended post hoc attack upon the accused when the sentencing judge permitted anyone who wished to comment on the accused's character or the impact of the [victim's] death on the native community to be heard.<sup>181</sup>

The Anglo-Canadian court system has evolved as a buffer between offenders and the harshness of public and victim reaction to their crimes. Indeed, one of the tenets of the formal court system is avoidance of personal reprisal by victims, or their agents, against perpetrators.<sup>182</sup> A concern with these community sentencing and mediation approaches is that local involvement should not become a forum for the application of political pressure to the advantage of local elite and to the detriment of politically unpopular or marginalised offenders or victims.<sup>183</sup> In the future, when judges seek community sentencing advice without the consent of offenders or victims, judicial vigilance will be required to ensure community comments and recommendations are not motivated by political considerations.<sup>184</sup> Despite this potential danger of community input, personal

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<sup>180</sup> (1991), 15 W.C.B. (2d) 28 (B.C.C.A.).

<sup>181</sup> Contained in the case summary.

<sup>182</sup> See T. Marshall, *Alternatives to Criminal Courts: The Potential for Non-Judicial Dispute Settlement* (Aldershot: Gower, 1985) at 10: "[t]he historical antecedents of our criminal adjudication system suggest that its main purpose is to preserve peace and public order by substituting state sanction for private vengeance."

<sup>183</sup> See Giesbrecht, *supra* note 178 at 213 where Judge Giesbrecht described the following examples of political influence within two Manitoba reserve communities:

(i) Constable Ralph Roulette of the Ontario Provincial Police Force described an incident that occurred at the Birdtail Sioux Reserve when he was a constable with DOTC Police. Mr. Roulette had evidence that the chief's son was guilty of the offence of impaired driving. The chief ordered Mr. Roulette not to charge his son.

(ii) Constable Edward Riglin of the Brandon City Police described incidents of political interference that took place when he was a constable with DOTC Police from 1986 to 1990. Constable Riglin was personally threatened with a band council resolution (BCR) banning him from the reserve on a number of occasions because he insisted on charging influential reserve residents with criminal offenses.

Also see A. McGillivray, "Therapies of Freedom: The Colonization of Aboriginal Childhood" (Faculty of Law, University of Manitoba, January, 1995) [unpublished] at 16-17 for examples of political interference with the operation of on-reserve child welfare agencies.

<sup>184</sup> In the Saskatchewan communities studied, an indication of community support for the offender was one of the conditions precedent to the formation of a sentencing circle making negative bias unlikely. Indeed, as a significant number of circle participants were supporters of the offender, any bias was likely in favour of rather than against the offender.

relationships between circle participants and the offender, although in effect representing a lack of objectivity and a partiality towards offender support and rehabilitation, provide the court with a better understanding of the problems causing or contributing to the offender's behaviour. These relationships also increase the resources available to a court in attempting to control and change such behaviour.

### ***3. Financial Infrastructure or Volunteer Support?***

To what degree should such initiatives be supported by government funding as opposed to the voluntary efforts of citizens? Lawyer Sid Robinson of La Ronge viewed a financial infrastructure as essential to the evolution of circle sentencing in northern Saskatchewan. Financial compensation for justice committee members who sat with the court was raised as a significant issue at Pukatawagan. Judge Fafard, however, viewed payment as an interference with the independence of the court and preferred circle sentencing in northern Saskatchewan to continue developing through the dedication of community volunteers.

Although community and volunteer support was essential to the continued success of all initiatives, financial resources to train and pay support staff and establish treatment facilities contributed significantly to the development of several of the community initiatives studied. At Pelican Narrows, participation by most members of the sentencing circle committee was facilitated through their employment with the Peter Balantyne Band. The committee's chairperson Derek Custer managed this committee as part of his assigned employment duties. At Waywayseecappo, additional government funding supported the movement of court from Rossburn to the reserve, the employment of an aboriginal person as a resident probation officer, and payment of a per diem allowance for the elders sitting in court. At Hollow Water, most members of the CHCH assessment team were social workers employed by various levels of government. A shortage of treatment facilities in northern Saskatchewan, as well as a lack of money to build them, appears to be slowing the development of circle sentencing since 1995. According to Sandy Bay resident and sentencing circle participant Harry Morin, a shortage of accessible treatment resources limited the sentencing options available for repeat offenders.<sup>185</sup> The expansion of support and treatment resources appears essential to the evolution of all community sentencing and mediation initiatives.

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This left open the potential for inter-family politics. Before the Sandy Bay circle, the offender's family met outside the court apparently concerned about the number of non-family community members and outsiders in attendance. At the start of the circle family members questioned whether non-family should be allowed to participate, suggesting an attempt by this family to control the sentencing process. As the circle was open to the public, Judge Fafard refused to disqualify anyone from the circle.

<sup>185</sup> Interview with Harry Morin (18 April 1995) Sandy Bay, Saskatchewan.

#### 4. Expansion of Community Sentencing Approaches

Another issue identified through this study was the breadth of application and potential for expansion of community sentencing and mediation approaches. In the context of community sentencing development, should local representatives be involved in all sentencings at court, as in the Elders' Council at Waywayseecappo, or only in specific cases, as in all other communities studied? Realistically, even assuming the appropriateness of circle sentencing for all offenders, current court resources in the northern Saskatchewan and Manitoba communities studied were insufficient to allow circle sentencing for every offender facing sentencing, given the time requirements of circle sentencing.<sup>186</sup> A significant increase in court funding (which appears unlikely) or a move towards the sentence advisory committee model or the elders' sentencing panel model seem to be the options available for making community sentencing available to more offenders.<sup>187</sup> A further option was broader-based diversion to local mediation committees.

A related question was whether community sentencing approaches could be used in larger, less isolated and ethnically diverse communities. All of the initiatives studied are located in small, relatively isolated aboriginal communities. In *Morin*,<sup>188</sup> the court directed a sentencing circle for a Metis man from Saskatoon after representations of support were made by the local Metis community. Although no definition of "community" has been judicially rendered so as to restrict the application of circle sentencing or other community participation approaches,<sup>189</sup> one strength of the sentencing initiatives studied is the ability of local community members to influence offender behaviour both during and after sentencing. Corporal Bob MacMillan of Pelican Narrows suggested local so-

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<sup>186</sup> Sentencing circles considered during this study involved a minimum of two and a maximum of fourteen hours.

<sup>187</sup> Despite the attention attracted by circle sentencing development in northern Saskatchewan, these circles represented a very small percentage of the sentencings occurring. During the Sandy Bay court sitting on 19 April 1995, one sentencing circle was conducted and approximately thirty other offenders were sentenced in the conventional fashion.

<sup>188</sup> *Supra* note 48.

<sup>189</sup> In *Cheekineew*, *supra* note 100 at 147, Grotzky J. commented:

[T]he nature of an offender's community, and its willingness to participate in the sentencing process, are factors which, in my respectful view, will in each particular case, depending always on the offender's suitability as a candidate therefor, be relevant to the determination of whether a sentencing circle ought to be established.

In *Morin*, *supra* note 43, Bayda C.J.S. commented in dissent that one condition precedent to circle sentencing was a community "reasonably well defined by reason of the racial origin of its members, their religion or their culture or by geography or some other feature which distinguishes the community from other communities ... ."



cial control is more easily identified and accessed in smaller and more isolated communities than in the larger urban centres:

You can't have a ... sentencing circle in Saskatoon that would work. I can't see how it would work, because who are the community that's going to be dealing with the offender? You're going to go to Saskatoon and you're going to find a few Elders somewhere that will come to a sentencing circle, impose whatever they feel is right for the accused, but then there's no follow-up. Who have these people got to go to? The rest of the community doesn't even know about it. Nor do they care.<sup>190</sup>

Although community based sentencing and mediation has not been precluded in larger mixed centres, the social control which can be brought to bear on offenders in small communities is a strength.

Whether these community sentencing and mediation approaches will be applied to non-aboriginal communities and offenders remains unclear. These approaches have evolved within aboriginal communities, largely in reaction to problems experienced with the prevailing justice system. They utilise the strengths of local resources and systems of social control in the sentencing process. Although these approaches appeared well suited to the communal tradition of aboriginal society, nothing within Anglo-Canadian law prevents non-aboriginal offenders from seeking local sentencing input. There is no reason to believe the same degree of concern and social control could not be found and applied among identifiable communities in non-aboriginal society. Indeed, two recent sentencing circle cases from Saskatchewan involved non-aboriginal offenders.<sup>191</sup>

### **5. The Potential Effect of Statutory Reform and Appellate Sentencing Review**

The power of judges to involve community participants in the sentencing process is based on the broad discretion given to judges within Anglo-Canadian law. No specific reference to community sentencing participation, by sentencing circle or other means, appears in the *Criminal Code*, although s. 723(3) provides that "[t]he court may ... require production of evidence that would assist it in

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<sup>190</sup> Interview with Corporal Bob MacMillan (16 November 1994) Pelican Narrows, Saskatchewan.

<sup>191</sup> In *R. v. Bogdan* (11 September 1996) Katepwa (Sask. Prov. Ct.) [unreported] a non-aboriginal offender, charged with stealing a snowmobile, participated in a sentencing circle involving "the judge, lawyers, police and about a handful of Katepwa residents." See T. Sutter, "Circle Deals with Non-native Offender" *The Regina Leader-Post* (12 September 1996) A6. In *R. v. Williamson* (3 June 1997) Loon Lake (Sask. Prov. Ct.) [unreported] a local farmer, charged with dangerous driving causing death, received a suspended sentence following a sentencing circle. See T. Coulombe, "Suspended Sentence in Accidental Death" *The Meadow Lake Progress* (8 June 1997).

determining the appropriate sentence"<sup>192</sup> and s. 717 of the *Code* establishes a framework for "alternative measures" (mediation/diversion).<sup>193</sup> Regardless of these provisions, judges are clearly authorised to involve community members and victims in the sentencing process, making statutory reform unnecessary to the continued development of these approaches. One statutory change which may affect the evolution of these approaches is the conditional sentence of imprisonment. Section 742.1 of the *Criminal Code* now provides that where a court imposes "a sentence of imprisonment of less than two years" and is "satisfied that serving the sentence in the community would not endanger the safety of the community" the offender may be allowed to serve the sentence in the community, subject to the conditions of a conditional sentence order.<sup>194</sup> This amendment should allow offenders, who previously would have been facing an almost certain period of incarceration, to remain at home and access local resources identified through community sentencing processes.<sup>195</sup>

The Saskatchewan Court of Appeal, in *Morin*,<sup>196</sup> appears to be the only Canadian appellate court to comment in any depth on the *practice* of circle sentencing.<sup>197</sup> Clearly, a major difference of opinion was evident within that court. The majority, led by Sherstobitoff J.A., although recognising the legality and appropriateness of circle sentencing in some circumstances, clearly viewed the court's over-riding consideration as sentence parity. The focus was on whether there existed any extraordinary circumstances which would distinguish this case

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<sup>192</sup> Section 718.2(d) and (e) of the *Code* also require that sanctions other than imprisonment, where appropriate or reasonable, be considered with particular attention to the circumstances of aboriginal offenders.

<sup>193</sup> In ss. 717-717.4.

<sup>194</sup> The conditional sentence of imprisonment does not apply to offences which require a minimum term of imprisonment such as a subsequent conviction for impaired driving. Effective 2 May 1997, Parliament amended this provision to require that, in addition to being satisfied that community safety would not be endangered, the court must also be satisfied that a condition sentence would be "consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2." This may serve to restrict the number of conditional sentences granted although discretion still must be applied in determining which principle of sentencing is paramount in a given case, and hence, whether a conditional sentence would be inconsistent with this criteria.

<sup>195</sup> See *R. v. McDonald*, [1997] S.J. No. 117 (QL) (Sask. C.A.) in which the Saskatchewan Court of Appeal considered the propriety of a conditional sentence of imprisonment for an aboriginal woman charged with criminal negligence causing death.

<sup>196</sup> *Supra* note 42.

<sup>197</sup> Provincial appellate courts in the Yukon (in *Johnson*, *supra* note 69 and *Johns*, *supra* note 70) and Alberta (in *John*, *supra* note 54) have considered sentence appeals from lower court sentencing circles, but appear to have focused on the fitness of sentence and have not commented at any length on the appropriateness of circle sentencing or other forms of community sentencing.

from the normal appellate range given the offender and the circumstances of the offence.<sup>198</sup> Chief Justice Bayda, in a strong dissent, argued that the principle of sentence parity must defer, in some cases, to attempts at ameliorating the over-representation of aboriginal people in jail. He viewed circle sentencing as a tool in addressing this inequity:

[O]ur present justice system is flexible, accommodating and geared to do what must be done to achieve fairness and justice for all. That quality enables the system to embrace sentencing circles as part of the system and to ascribe to them a role in addressing the disparity in the prison population by empowering communities to help individuals break their personal cycles of misbehaviour ... . In that sense, the perpetuation of entrenched attitudes in relation to sentencing in the guise of maintaining sentence parity is not in the interests of the administration of justice in this province or the well-being of our society.<sup>199</sup>

Whether subsequent appellate comment adheres strictly to maintenance of established sentencing ranges and tariffs will indubitably affect the development and scope of circle sentencing.<sup>200</sup> Since one aim of the community sentencing approaches considered in this study is to change offender behaviour through community reintegration rather than jail, many sentences achieved through these initiatives fall outside accepted appellate ranges. This has drawn criticism from those espousing the goal of province-wide sentence uniformity.<sup>201</sup> However, such arguments fail to take account of the availability and effect of local resources, including informal systems of social control and offender support, within aboriginal communities. These resources provide a wider range of sentencing options. The philosophy behind these developing initiatives has run counter to the prevailing assumption that more severe penalties (including prolonged incarceration) provide greater general and specific deterrence than community-based sentences. The community of Hollow Water disagreed with this assumption:

The legal system, based on principles of punishment and deterrence, as we see it, simply is not working. We can not understand how the legal system doesn't see this.

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<sup>198</sup> It was undisputed at the appeal that the appellate range for the offence in question (robbery of a convenience store) was a penitentiary term.

<sup>199</sup> *Morin*, *supra* note 42 at 72.

<sup>200</sup> In an interesting lower court decision following *Morin*, Lilles J. in *C.P.*, *supra* note 85 at 2–5, appeared to criticise what he viewed as the Saskatchewan Court of Appeal's preoccupation with sentence parity in determining the propriety of a sentencing circle for the offender *Morin*. Judge Lilles commented that there are many advantages to community consultation through a sentencing circle regardless of whether the sentence imposed is one of incarceration within the range "expected in ordinary court."

<sup>201</sup> See M. Mandryk, "Sentence Method Defended" *Regina Leader Post* (13 April 1995) A8 where Opposition Justice Critic Don Toth was said to have suggested that sentencing circles might be creating a two-tiered justice system granting "special treatment under the law based on race."

Whatever change that occurs when people return to the community from jail seems to be for the worse. Incarceration may be effective in the larger society, but it is not working in our community.<sup>202</sup>

Crown support of community sentencing in general and of specific sentences awarded was essential, as a crown appeal could result in the imposition of a harsher sentence in accordance with any relevant appellate sentencing tariff. Of the many sentencing circles that Judge Fafard has conducted in northern Saskatchewan, only one has been appealed by the crown. This infrequency of appeals was largely due to his assurance of crown support before directing specific cases to a sentencing circle.

A further, and apparently not yet addressed question is whether the *Charter of Rights and Freedoms*<sup>203</sup> applies to these community sentencing approaches. Does an offender have a constitutional right to be sentenced before a sentencing circle or to seek other community participation during sentencing? Can the *Charter* be used to resist attempts by judges to consult local community members at sentencing? No reported cases have considered these questions; as well, they have not been raised by an offender or counsel in any of the communities studied. As all offenders sentenced through sentencing circles appeared to have consented to this approach, use of the *Charter* as a shield against state oppression during circle sentencing was unlikely. The *Charter's* application will more likely be raised where an offender does not consent to some other form of community involvement in the sentencing process or where community antagonism or lack of offender support has aggravated sentencing.<sup>204</sup> Whether a right to involvement of an offender's local community in sentencing might be an aboriginal right, protected by sections 25 and 35 of the *Charter*, remains a vital issue, but one that is outside the scope of this study. This question was not raised in any sentencing case considered.<sup>205</sup>

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<sup>202</sup> Community Holistic Circle Healing, *CHCH Position on Incarceration* (Hollow Water, Manitoba, 1993) [unpublished] at 3-4.

<sup>203</sup> Part 1 of the *Constitution Act, 1982*, being schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>204</sup> Although no reported cases dealt with application of the *Charter* to community sentencing, the effects of community antagonism were seen in *Howard*, *supra* note 180, while the negative interpretation of community silence at sentencing by judges in Pukatawagan was noted by lawyer Joyce Dalmyn, *supra* note 40.

<sup>205</sup> The Supreme Court of Canada in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 did consider, at length, the meaning of an "aboriginal right" in the context of a claim that a provincial fishing regulation was invalid because it violated s. 35(1) of the *Charter*. This analysis, however, was limited to the application of a provincial statute as opposed to the federal *Criminal Code*. Despite the lack of judicial consideration of the *Charter* involving community sentencing, it has been applied in other sentencing cases. See *Smith v. R.* (1987), 34 C.C.C. (3d) 97 (S.C.C.) in which the mandatory seven year sentence for importing narcotics under the *Narcotic Control Act* was invalidated as it was held to violate of s. 12 of the *Charter*.

### C. Policy Implications of Expanded Community Sentencing and Mediation within the Canadian Justice System

The local initiatives studied were based in the formal justice system, but intersected with and related to local systems of social control and dispute resolution. Judge Murray Sinclair highlighted an important aspect of this inter-relationship through the distinction he made between “community,” “offender,” and “judge” driven sentencing approaches.<sup>206</sup> Although judges may be considered by some aboriginal people as agents of “state control,” several judges presiding in the communities studied asserted their judicial independence in response to local community concerns and their own recognition of problems existing within the prevailing system. Judge Fafard was clearly conscious of the need for countering his court’s lack of local credibility. He did this partly through his introduction of circle sentencing into the aboriginal communities of northern Saskatchewan.

The community sentencing and mediation initiatives studied evince a conjunctive relationship between local aboriginal communities and the Anglo-Canadian justice system. Several findings of this study illustrate such an inter-relationship. At Hollow Water, the threat of being charged under the *Criminal Code* with breach of probation (or undertaking) served as an inducement for offenders to actively continue their treatment within CHCH. At Waywayseecappo, offenders were regularly ordered by the judge, or a justice of the peace, to attend a meeting of the Elders’ Council as a term of their release. At Pelican Narrows, Pukatawagan, and Cumberland House, local committees limited the number of opportunities for an offender to appear before them before “turning them back” to the conventional court system.

Despite this conjunctive relationship, many aboriginal people have envisaged “breaking” from the prevailing system and establishing an independent justice and dispute resolution system. On 22 February 1995 at Hollow Water, CHCH assessment team member Marcel Hardesty expressed the conviction that eventually his community would break from the prevailing justice system and operate independently. He said control and reform of offender behaviour would be achieved through public awareness of specific offenders and offenses and through education and treatment of offenders, suggesting an evolution of

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Also see *R. v. Wallace* (1987) (Ont. Dist. Ct.) [unreported] where the lack of a local temporary absence program was found to deny the offender her right to equal protection and equal benefit under the law as guaranteed in s. 15 of the *Charter*. As a result, the offender received a fine rather than imprisonment. See also *R. v. Willocks*, [1994] 1 C.N.L.R. 167 (Ont. Ct. Just. Prov. Div.) where the Crown’s refusal to divert a non-aboriginal offender to an alternative measures program for aboriginal offenders was found not to constitute a breach of the offender’s rights under s. 15(1) of the *Charter*. Given the breadth of these cases, it appears likely that the constitutional implications of community sentencing will soon be litigated.

<sup>206</sup> *Supra* note 107. This distinction referred to identification of the driving force behind specific sentencing initiatives.

dispute resolution and social control dependant on local rather than central authority. Evolution of the community sentencing and mediation approaches considered in this study, whether moving towards total local autonomy within a separate justice system as advocated recently by the Royal Commission on Aboriginal Peoples,<sup>207</sup> or simply towards increased local participation and control within the existing system, will depend on resolution of the justice issues raised in this article. In addressing these issues, the following courses of action will enhance the development and credibility of community sentencing and mediation.

### ***1. Recognition of approaches by appellate authority***

Outside of Saskatchewan, no appellate court has commented, in any depth, on the community sentencing approaches identified and analysed in this study. Within Saskatchewan, a significant difference of opinion on the breadth and applicability of circle sentencing is apparent in the majority and minority decisions in *Morin*.<sup>208</sup> Although specific appellate guidelines should not be required, and perhaps are undesirable, appellate recognition and support of these approaches across Canada will be crucial to the continued evolution of community sentencing.

### ***2. Government support through provisions of personnel and treatment facilities***

Although voluntary participation and support of community members is vital to the development of these initiatives, expansion of government-funded resources, specifically providing trained personnel and treatment facilities, will be essential. Availability of these resources will increase the community-based sentencing options open for repeat offenders and will facilitate offender rehabilitation through community-based treatment and supervision. Governments must see a choice between funding these programs or continuing to pay currently high incarceration costs.

### ***3. A focus on victim participation and support***

Despite an apparent concern by local community participants favouring victim involvement and support within the initiatives studied, a greater emphasis on voluntary participation by and organised support for victims, both through formal justice channels and through local community involvement, will facilitate initiative development. Enhanced support and voluntary participation will reduce the chances of victim alienation from the system, as well as promoting healing by victims and reconciliation among victims, offenders, and local communities.

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<sup>207</sup> *Supra* note 6 at 76–81.

<sup>208</sup> *Supra* note 42. Mr. Morin applied for leave to appeal his sentence to the Supreme Court of Canada, but subsequently abandoned this application.

#### 4. Protocol negotiation between local communities and justice system representatives

Crown support is essential to the continuation and development of community sentencing and mediation. Although this support can be expressed in various forms, one way of ensuring ongoing support and consistency within these initiatives will be through negotiation of protocols between local communities and representatives of the justice system. Protocols will establish the conditions precedent to and the procedures to be followed within such community sentencing approaches.<sup>209</sup> Establishment of protocols will also ensure continuity of approach within each initiative and help to reduce the dependence upon and the influence of any one individual in initiative development.<sup>210</sup>

#### 5. Development and expansion of criminal mediation

Mediation was the only model studied which diverted full decision-making power from the prevailing system to local community members. Although the *Criminal Code* now formally recognises alternative measures for adults, expansion of this approach, by diverting more offenders from the court system, will increase the amount of court time available for consideration of more serious charges.<sup>211</sup> At the same time, communities will be allowed to regain some measure of control over criminal dispute resolution. For expansion of mediation to be effective, training in mediation and facilitation skills must be provided to local committee members.

## IV. CONCLUSION

COMMUNITY SENTENCING AND MEDIATION in Canadian aboriginal communities is in the initial stages of development. Judge Fafard, the major non-aboriginal informant for this study, repeatedly urged that it was too early to draw any firm conclusions about the impact of the community sentencing initiatives. While respecting this limitation, Rupert Ross's comment is prophetic: "The cries for local control over community justice are growing."<sup>212</sup> The need for sentencing

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<sup>209</sup> An example is the protocol signed between Hollow Water and the Manitoba Department of Justice in 1991.

<sup>210</sup> One of the reasons the community of Hollow Water sought to negotiate a protocol with the department of justice was that Crown attorneys responsible for this community frequently changed, thus forcing the CHCH assessment to re-educate each successive attorney.

<sup>211</sup> Regardless of statutory recognition, the Crown still controls the range and number of offenders and offences to be diverted.

<sup>212</sup> R. 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 Jackson, *supra* note 144 at 208–209.

reform in Canadian aboriginal communities is undeniable, if only because of highly disproportionate incarceration rates in the conventional system. Hopefully, this study provides insight into the functioning and evolution of community sentencing and mediation in aboriginal communities and will generate discussion and debate on the appropriate path for future sentencing reform.

Local feelings of estrangement and separation from the Anglo-Canadian justice system among aboriginal people have recently come to co-exist with feelings of empowerment among local participants in community sentencing and mediation. In an apparent contradiction, these participants were prepared to devote considerable time and energy towards initiatives operating within a system they had frequently criticised. Their active involvement, however, suggests these initiatives are having a positive impact at the community level. The breath of discretion existing within the prevailing justice system allows judges and justice officials to adapt significantly the process and substance of sentencing in such communities. Although the reforms considered in this study have not achieved an autonomous justice system for aboriginal people, they highlight the flexibility available within the conventional system to allow for a recognition of aboriginal *practices* and processes and to involve local community members in a sentencing process previously dominated by lawyers and judges.

The evolution of community sentencing and mediation may be deeply distressing to those who believe strongly in province-wide sentencing uniformity. Many of the sentences resulting from these approaches are outside of established appellate sentencing ranges. Although recognising that sentencing uniformity is a concept inherent to Anglo-Canadian law, blind adherence to this principle neglects the current reality in aboriginal communities. As identified through this study, local resources, including informal systems of social control previously ignored by the conventional court system, are now being accessed by judges with a view towards promoting changed offender behaviour and increased public safety. These local systems provide the potential for achieving the broader Canadian sentencing goals of deterrence, denunciation, and rehabilitation. Judge Stuart's analysis of the tension existing between community sentencing and principles of sentence uniformity is compelling:

To fit the sentence to the circumstances not only of the offence and offender, but also to the needs of the victim and the community, and do so within available time and resources requires significant information and time. The temptation is to impose standard sentences must be overcome for the sentencing process to avoid squandering scarce resources, and to be used to its full potential in achieving its objectives.<sup>213</sup>

Most would agree that the ultimate goal of any criminal justice system is protection of the public. Given the undeniable over-incarceration of aboriginal people, even the possibility of these approaches succeeding, by changing of-

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<sup>213</sup> D.N., *supra* note 26 at 29.



fender behaviour and deterring crime, makes their continued development important if not crucial.

A significant danger exists if such processes become forums for political interference and the persecution of unpopular or marginalised offenders or victims. Vigilance by both judges and community participants is required to avoid this result. If victims are to be directly involved in these approaches, care must be taken to ensure their support and protection both during and after adjudication. Although the goal of public protection is laudable, this aim is hollow if the developing processes lead to the alienation and re-victimisation of victims.

The continuing evolution of these community-based approaches depends on a broad spectrum of support and participation, including local community members, judges, crown and defense counsel, and probation officers. According to Associate Chief Judge Giesbrecht of the Provincial Court of Manitoba, the past two decades have seen other sentencing projects come and go in aboriginal communities.<sup>214</sup> Their demise was usually brought about by the departure of a key participant. It is essential that the evolving initiatives not come to be controlled by any one individual or lobby group. A major strength of the approaches studied was the broad-based support they enjoyed both within local circles and the broader justice system.

Perhaps five years from now many answers will have been provided to the questions raised in this study. Hopefully, many of these answers will be articulated by aboriginal voices. Other questions will remain unanswered, perhaps forever. If this study has accomplished anything, it will be to provide insights, particularly for the non-aboriginal legal community, into the current reality of sentencing and mediation reform in aboriginal communities and to offer some guidance towards resolving the issues surrounding their continued development.

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<sup>214</sup> Telephone interview with Associate Chief Judge Giesbrecht (24 February 1995).

