

**“THE REVOLVING DOOR OF DESPAIR”:  
ABORIGINAL INVOLVEMENT IN THE  
CRIMINAL JUSTICE SYSTEM\***

SUSAN ZIMMERMAN†

*I am tired of talk that comes to nothing.  
It makes my heart sick when I remember all the  
good words and all the broken promises.*

—Chief Joseph, Nez Percé  
14 January 1879

TABLE OF CONTENTS

I. INTRODUCTION	369
II. WHY ABORIGINAL PEOPLE ARE DRAWN INTO THE SYSTEM	370
III. THE USE, NON-USE AND MISUSE OF POLICE DISCRETION	373
A. DIVERSION	377
IV. WHAT HAPPENS IN COURT	379
A. BEFORE SENTENCING	379
B. SENTENCING	384
1. PRINCIPLES AND GUIDELINES	384
2. WHOSE VIEWS TO CONSIDER	385
3. PROCEDURES	387

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† B.A., B.C.L., LL.B.—Law Reform Commission of Canada.

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V. SENTENCING OPTIONS	389
A. PROBATION	390
B. VICTIM-OFFENDER RECONCILIATION AND RESTITUTION	391
C. FINES, DAY-FINES AND FINE OPTION PROGRAMS	392
D. COMMUNITY SERVICE ORDERS	395
E. INTERMEDIATE PUNISHMENT	397
VI. WHAT HAPPENS IN PRISON	399
A. PLACE OF DETENTION	400
B. INTEGRATION INTO PRISON COMMUNITY	401
C. CORRECTIONAL STAFF AND OFFICIALS	402
D. ABORIGINAL-SPECIFIC PROGRAMS AND ABORIGINAL PROGRAM DELIVERY	404
E. PRISONER SUPPORT GROUPS	406
F. ABORIGINAL SPIRITUALITY	407
VII. PAROLE AND AFTER	408
A. PAROLE	408
B. AFTERCARE	409
VIII. CONCLUSION	411
APPENDIX "A"	412
APPENDIX "B"	413

## I. INTRODUCTION

Aboriginal people<sup>1</sup> are incarcerated in Canadian prisons out of all proportion to their numbers in the general population. This is not news. It has been well-documented for over two decades. The phenomenon known somewhat euphemistically as “overrepresentation”<sup>2</sup> is clear evidence of a massive problem. The question is: where does the problem lie?

The shockingly high number of Aboriginal people in prison is attributable in large part to the profound socio-economic problems in Aboriginal communities, problems deeply embedded in historic injustices which continue in some measure to this day. It is not surprising that a government policy which, until relatively recently, sought to assimilate Aboriginal peoples by eradicating their culture, languages, lifestyles and spirituality, resulted in a loss of self-esteem and self-sufficiency. Ultimately, this policy has created a cycle of dependence, poverty and despair which all too often leads to conflict with the law.

While the problem may originate in these historic and socio-economic circumstances, it is perpetuated and exacerbated by the criminal justice system. Overrepresentation would not occur if Aboriginal people were not arrested in disproportionate numbers, charged in disproportionate numbers, sentenced to prison in disproportionate numbers, and released into the community without having their problems “corrected” by the correctional system.

The original mandate for this paper was to study the sentencing process and to recommend ways in which it could be reformed in relation to the Aboriginal offender. The reality, however, is that the sentencing process is only one link in a chain of interrelated events and circumstances, all of which contribute inexorably to the phenomenon of overrepresentation. This paper seeks to highlight those criminal justice processes, and the actors in them, which are part of the complex problem of overrepresentation, and to make recommendations for reform.

In Canada today, Aboriginal people are fed up with studies which merely describe a deplorable situation they already know too well, cite statistics and authorities and recommend changes, but ultimately amount to nothing. To examine the criminal justice system and to recommend changes is called “tinkering”. Most Aboriginal people are past believing that tinkering with the mainstream justice system is a worthwhile pursuit. They want, they *need* a system over which they have control — one which they shape according to their values, traditions and beliefs. In their view no amount of tinkering with the non-Aboriginal justice system will fully and finally answer that need.

The Canadian criminal justice system, from the perspective of Aboriginal peoples, is a foreign system which was imposed upon them. Self-

determination must therefore include the re-establishment of Aboriginal justice systems, in whatever diverse forms these may take.

But this transition to Aboriginal systems of justice will not come about tomorrow. In the meantime, there is much that can be changed in the way the criminal justice system operates to render it more responsive to the particular circumstances and long-neglected needs of Aboriginal people. These suggestions are a prescription for the short-term and can in no way be a substitute for the broader changes Aboriginal people are calling for so urgently.

The current criminal justice system can and should be improved, without in any way detracting from the movement toward the larger social, political and economic realignment that Aboriginal peoples seek.

## II. WHY ABORIGINAL PEOPLE ARE DRAWN INTO THE SYSTEM

Statistical descriptions of native communities abound in the literature, and with good reason: the numbers are shocking. On any indicator one may choose, Aboriginal people are worse off than non-Aboriginal Canadians, so much so that even cold numbers paint a vivid picture.<sup>3</sup>

The life expectancy of Aboriginal people is roughly ten years shorter than that of the average Canadian. The infant mortality rate is twice to three times higher for Aboriginal infants. The percentage of Aboriginal dwellings without central heating is, on average, four times as high as for all Canadians. On reserves, it is eight times as high. Roughly half of the Inuit and on-reserve Indian population did not attend high school, compared to less than one-fifth of the total Canadian population. Whereas 60% of the Canadian population is employed, the comparable figure for on-reserve Indians is 28%, ranging up to 40% for the Métis and Inuit. The percentage of Indians who receive government transfer payments is more than twice as high as the figure for all Canadians.

Violence is a cause of death three times as often for status Indians as for all Canadians, and the rate is even higher among the Inuit. Suicide is two to three times more common.

Even these few numbers reveal the sub-standard and desperate living conditions of most Aboriginal people. What the numbers do not reveal are the detrimental and debilitating effects such conditions have on the minds and spirits of the people who endure them. Much of the human tragedy behind these numbers arises from circumstances which are difficult to quantify, but are nonetheless harmful.

These intangible but observable effects may be summed up as a lack or loss of self-esteem. Apart from the material disadvantages referred to above, Aboriginal people are confronted by a mainstream society which

has created and continues to reinforce a host of negative messages and stereotypes. These begin with schools whose curricula present a view of history from a singularly Euro-Canadian perspective, and exclude Aboriginal languages, culture, values and traditions.<sup>4</sup> Whole generations of Aboriginal children were educated in residential schools whose overt, government-supported policy was to turn their students into white children by suppressing and even punishing them for their "nativeness."<sup>5</sup>

Growing up on reserves or in remote communities, Aboriginal youth must come to terms with living below or near the poverty line, with few educational or recreational facilities, few employment opportunities and a government-sponsored attitude of dependence. The resulting hopelessness, despair and sheer boredom often lead very quickly to the easiest means of mental and physical escape: substance abuse and petty offences. Shocking though it may seem, going to jail may be seen as just as much of an escape as getting high.

The vast majority of First Nations offenders who are held in prison are ultimately there because they are either alcoholics or poor or both and share one commonality — their race. Principles of punishment are turned upside down. Instead of prison acting as a deterrent, the Kenora Jail [in Northern Ontario] and secure custody facility are looked upon as places where many native youths and adults wish to escape to rather than escape from. They provide meals, a bed, native programmes and, for youths, an opportunity to obtain or continue an education — a structured existence. In short, these places stand as a substitute for the community, providing stability and furnishing basic needs which are often lacking in their homes. . . .

Surely such a state of affairs suggests that there is something fundamentally wrong. It underlines the nature of the despair, poverty and powerlessness that exists in these communities, when incarceration is seen as a rational alternative.<sup>6</sup>

While jail terms may be a harsher experience for some Aboriginal people than for non-Aboriginal people,

[t]here are others . . . who, disturbingly, commit crimes in the *hope* of escaping intolerable community dynamics and going to a place where they are at least well-fed and safe [emphasis in original].<sup>7</sup>

In some ways, the most revealing comment is the following:

For many Indians the food, lodging and facilities [in jail] are superior to what they can hope to find on the outside and, even more significantly, for some Indians prison represents their only experience in social equality with non-Indians.<sup>8</sup>

Sadly, that observation may be as true today as when it was made, almost twenty-five years ago.

Given the above, any crime prevention program which hopes to be effective must address not simply the illegal activity, but the circumstances which give rise to it. Alcohol is without question one of the single largest causes of Aboriginal overinvolvement with the criminal justice system. One government document over a decade ago stated that "nearly 90 percent of the crimes committed by natives involve the use of alcohol."<sup>9</sup> A recent report on conditions in four Aboriginal communities in northern Ontario found that

approximately 80% of all appearances for offences involved alcohol or solvent abuse (i.e. the accused had been abusing alcohol or solvents at the time when the offence was allegedly committed).<sup>10</sup>

A reduction of Aboriginal involvement with alcohol should translate into a reduced involvement with the criminal justice system. Alcohol treatment programs are a necessary but not a sufficient solution. There must be a major effort to get at the problem before it begins. Education about alcohol and substance abuse which aims at preventing Aboriginal youth from becoming addicted can rightly be characterized as a crime prevention strategy, as can addiction treatment programs. While acknowledging that neither is an adequate response to Aboriginal problems, they are necessary nonetheless.

At the National Conference on Native Peoples and the Criminal Justice System held in 1975, the study group discussing prevention of Aboriginal criminality recommended not only an education program directed at providing Aboriginal youth with information on alcohol, drugs and addiction, but also the implementation of "programs of a diversionary nature", focusing on "such things as camping, training in hunting, fishing, arts, crafts, and other activities the native community considers important."<sup>11</sup> The participants also felt that funding should be more evenly distributed because "too much of the present funding is at the corrections end (and) we want it at the prevention end. . . ."<sup>12</sup>

In the North, problems with alcohol are equally high. The study group on Inuit views at the Edmonton conference also recommended education about alcohol in the schools and in adult education curricula. In addition, it suggested "that a detoxification centre be built every time a new liquor outlet is opened."<sup>13</sup>

If despair greatly fuels alcohol abuse on reserves and in remote and urban Aboriginal communities, then prevention of alcoholism will be ineffective unless the frustration underlying that despair is redirected into positive and productive channels. The most fundamental way to do so is to stop prescribing programs or remedies for Aboriginal people without their input and cooperation, and instead simply to support them in their efforts to take charge of their own lives. Local programs

such as those run by the National Native Alcohol and Drug Abuse Program must be encouraged and adequately funded. Only by promoting and facilitating Aboriginal self-sufficiency and self-determination is there hope of achieving lasting solutions to Aboriginal problems. Non-Aboriginal people must learn to play a supporting role and not always to insist upon being the directors.

### III. THE USE, NON-USE AND MISUSE OF POLICE DISCRETION

The police are the "front end" of the criminal justice system, the first contact Aboriginal peoples have with the non-Aboriginal forces of law and order. The police are therefore the most prominent symbol of the criminal justice system and the initial link between Aboriginal communities, the courts and prison.

Consequently, at the level of the criminal justice system, overrepresentation begins with the police. It is police decisions as to where to place surveillance, who to arrest, when to lay charges and what charges to lay which determine, at the start, how Aboriginal people are drawn into what they have dubbed the "injustice" or the "just-us" system. To alleviate overrepresentation at the front end of the system therefore requires an examination of how the police treat Aboriginal people.

While many in the non-Aboriginal community see the police as a symbol of public protection, this view is not shared in most Aboriginal communities.<sup>14</sup> Relations between police and Aboriginal peoples are fraught with distrust. There is a strong perception among Aboriginal peoples that the treatment they receive from the police is inequitable and discriminatory. It is felt that on the one hand the police do not provide adequate protective services to Aboriginal communities, while on the other hand they engage in oversurveillance of Aboriginal people and exercise their discretion in a manner which results in a disproportionate number of arrests and charges.<sup>15</sup>

Despite this perception, empirical evidence is less definite about the extent to which the police are responsible for Aboriginal overrepresentation in the criminal justice system. A 1974 study of arrest and charging patterns in the city of Winnipeg over a one-year period certainly found an overrepresentation of Aboriginal men and women. For instance, although Aboriginal people made up only about three percent of the city's population, Aboriginal men accounted for 16% of arrests for property offences committed by men, while Aboriginal women accounted for 26% of arrests for property offences committed by women. The authors, however, were not prepared to state that the responsibility for these disproportionate numbers necessarily lay with the police. They suggested that

these arrest patterns may be a reflection of socio-economic status. Over and above this, a visible minority may be a target of police discrimination. *Until rates by occupational, educational and income strata can be computed for both Indian and whites, the discretionary role of the police cannot be assessed* [emphasis added].<sup>16</sup>

Another author points out that

[c]onsiderable anecdotal data exist with regard to police/aboriginal contacts and police decision-making, but few empirical data have been collected because of methodological difficulties in participant observation research. In addition, examining practices in one jurisdiction would not necessarily allow the generalization of findings. . . . *As a result, it is difficult to explicitly point to differential police charging and arrests as the basis for the disproportionate incarceration rates* [emphasis added].<sup>17</sup>

Clearly there is a need for greater study of and better data on these issues. Nevertheless, it is beyond dispute that relations between Aboriginal peoples and non-Aboriginal police forces are far from ideal. Issues regarding the policing of Aboriginal people have led directly to three provincial inquiries, and have been a focus of major concern in a fourth.<sup>18</sup>

Difficulties between the police and Aboriginal people are not restricted to regions where there is a high concentration of Aboriginal people. The treatment of Nova Scotia Mi'qmaq Donald Marshall, Jr. by the Sydney police is now notorious, and the tensions between the Quebec Police Force and Montreal-area Mohawks at Kahnawake and Kanasatake have not abated significantly since the summer of confrontation in 1990.

Good relations between police and Aboriginal people, as between any two disparate groups, depend first and foremost on good lines of communication and a thorough understanding of each other's values and concerns. This requires appropriate and adequate cultural training of non-Aboriginal police officers. It also requires appropriate representation of Aboriginal officers on police forces so that the "us-them" barrier may be, if not eradicated, at least reduced.

Greater education and integration of police forces as described above would seem to be a step in the right direction. Before advocating it as the solution, however, one must examine the assumptions inherent in it. Will changing the law enforcers from non-Aboriginal to Aboriginal people necessarily improve respect for the law? Will such a change make it easier to enforce the law effectively? Will the use of Aboriginal officers on reserves and in small communities create difficult conflicts of interest, particularly if the officers are from those communities or live within them?



According to several Aboriginal leaders consulted recently by the Law Reform Commission of Canada, the indigenization of mainstream police forces is not a desirable goal if all it means is that Aboriginal people will be enforcing "white" law. To the extent that the problem of Aboriginal overrepresentation in prison is attributable to the discriminatory effect of the application of "white" law, simply using Aboriginal officers to enforce that law does not address the problem.

The application of provincial fish and game laws is an example of official action which is seen as a form of harassment, in that it obliges Aboriginal people who are fishing and hunting according to their traditional or treaty rights to assert those rights by way of defence to a penal prosecution. In cases where Aboriginal people breach provincial laws by engaging in traditional hunting or fishing practices in accordance with treaty rights, there is a strong argument to be made that what are essentially conflict-of-law disputes should be dealt with in the civil and not in the criminal courts.<sup>19</sup> Courts are beginning to recognize that treaty rights to hunt and fish may take priority over provincial fish and game laws.<sup>20</sup> Aboriginal people should not be forced to clarify rights in penal proceedings.<sup>21</sup>

The main theme underlying the responses of Aboriginal participants during the Law Reform Commission consultations was the need for respect—respect for Aboriginal values, respect for Aboriginal customs, respect for Aboriginal people as fellow human beings. Participants were unanimous in identifying this need. Another strong and recurring theme was the need for Aboriginal peoples to have ownership of the system of laws which govern them. In the context of policing, this would mean that Aboriginal peoples create, control and staff their own police forces. Such forces would reflect Aboriginal values and customs and would enforce Aboriginal laws or would at least take an Aboriginal approach to the enforcement of Canadian laws. It is this Aboriginal content and approach which, in the view of many Aboriginal people, would constitute the most significant distinction from and improvement over the existing system.

The expansion of Aboriginal police forces should be considered as a serious option for the policing of Aboriginal communities, particularly on reserves or in towns where Aboriginal people form the majority population. In order to be credible, however, Aboriginal Peacemakers must have the training, resources and authority necessary to do an effective job.<sup>22</sup> There are a number of Aboriginal policing programs currently in operation,<sup>23</sup> but the vast differences among the programs make it impossible to evaluate them comparatively.

As of January 1990, there were twelve different Indian-specific policing programs across the country, ranging from RCMP Indian Special

Constables to wholly indigenous local police forces such as the Blood Tribal Police Force on the Blood Reserve in Alberta.

Jurisdiction also varies widely. For instance, RCMP Indian Special Constables (Option 3(B)) have full peace officer status both on and off reserve and may enforce federal and provincial statutes, the *Criminal Code*, the *Indian Act* and band by-laws, whereas Special Band Constables (Circular 55) under the authority of the Department of Indian Affairs and Northern Development have jurisdiction only to handle by-law enforcements and matters of a civil nature and are not allowed to carry firearms.<sup>24</sup>

While it is clearly preferable to have Aboriginal communities police themselves to avoid issues of discrimination or differential treatment, programs ostensibly designed for this purpose must not be handicapped from the outset by inadequate facilities or support. A recent report by the Department of Indian Affairs and Northern Development stated that:

Many Indian-controlled programs suffer from high attrition rates, and morale and organizational problems. Some of the factors contributing to this situation appear to include lack of job security, inadequate facilities, ambivalence regarding roles/responsibilities and accountability, lack of clear career paths, restricted opportunity for promotion, effect of job on family/social life including the difficulties of policing home reserves, and in some instances, personal unsuitability.<sup>25</sup>

In urban areas, where a wholly Aboriginal force would be neither feasible nor appropriate, indigenization of mainstream police forces seems the most viable solution. To that end, there must be active recruitment of Aboriginal officers so that their numbers on the force are proportionate to Aboriginal representation in the local population. Aboriginal officers should be assigned to localities where there are concentrations of Aboriginal residents.

More important than mere numbers, however, is the need for an integrated urban force to accommodate Aboriginal officers, rather than attempting to assimilate them. The police force must be flexible and open enough to incorporate Aboriginal solutions to law enforcement problems, and be willing to rely on the judgment of Aboriginal officers on how best to do so. For instance, Aboriginal officers may exercise their discretion very differently in screening offenders and deciding when to make arrests and when to lay charges.

It is up to the police, Aboriginal or non-Aboriginal, to earn respect for the laws they uphold by showing the communities they serve that laws are not just the brute force of authority. That respect is earned in part by getting to know community members before they become suspects or offenders. Establishing a relationship of trust with community leaders

and plugging into community resources expands police options so that the full force of the law need only be brought to bear when no alternative exists. Police officers at all levels must accept that Aboriginal ways are preferable when dealing with Aboriginal people. Greater integration of mainstream police forces will facilitate the shift in attitude necessary for such acceptance. Ultimately, however, it is Aboriginal people who must have primary responsibility for policing themselves.

#### A. DIVERSION

Even after arrest, the potential for overrepresentation may be reduced by diverting the offender from a charge, trial and sentencing. Diversion is a process, often informal, of re-directing criminal cases or potential cases away from the criminal justice system. Pre-charge diversion may occur before an arrest has been made or a charge has been laid. Pre-trial diversion may occur after a charge has been laid but before the accused has come to trial. In both cases, it is an opportunity to extricate offenders from the system before they have become fully entangled in it.

Essentially, diversion is a discretionary practice of police and prosecutors.<sup>26</sup> What is of concern is whether this discretion is exercised in a manner overtly discriminatory against Aboriginal people, or in a manner which, while not intentionally discriminatory, has a discriminatory effect nevertheless. In discussing diversion as an alternative procedure to sentencing, the Law Reform Commission of Canada observed:

[O]ne of the most disturbing criticisms about sentencing and dispositions is that they tend to fall heaviest on the young, the poor, the powerless and the unskilled. . . . Discretion in law enforcement tends to divert business or professional classes from the criminal courts. . . . On the other hand, people without money or influence, when caught in petty theft or shoplifting frequently are given no opportunity to make redress. . . . One of the most important things sentencing and dispositions can do is to attempt to overcome this inequality. To allow it to continue undermines the legitimacy of law itself.<sup>27</sup>

While this statement was intended as a general observation, it applies with particular force to Aboriginal people who, as we have seen, largely fall into the category of "the poor, the powerless and the unskilled."

Dealing with police discretion first, it seems clear that those most likely to be arrested and charged are to some extent predetermined by those whom the police choose to observe most closely. As one author has put it:

In an effort to prevent crime, police often concentrate their surveillance in areas frequented by persons they believe likely to engage in criminal activity.

Because of the link between poverty and crime, the low income neighbourhoods in which most urban natives are forced to reside come under close scrutiny.<sup>28</sup>

The same observation may perhaps safely be made of reserves and communities with high concentrations of Aboriginals in general. The Chief Judge of the Territorial Court of the Yukon has in fact observed precisely this phenomenon (overpolicing resulting in overcharging) within his jurisdiction.<sup>29</sup> He comments:

Whatever the reason, it has resulted in a high level of involvement by the criminal justice system and an elimination of community participation, which is contrary to traditional methods of dealing with such problems in native communities.<sup>30</sup>

Closer ties between the police and Aboriginal communities could lead to increased community absorption of minor offenders. Greater liaison, perhaps even a formal working relationship, between Aboriginal community leaders and police could aid police in exercising their discretion whether to make arrests or to lay charges. As already mentioned, self-policing by Aboriginal peoples would be preferable, particularly where Aboriginal communities are both remote and self-contained, as in the Yukon.

While it may be difficult, perhaps practically impossible, to establish whether non-Aboriginal police are exercising their discretion in a manner which discriminates against Aboriginal people,<sup>31</sup> it is very clear that overrepresentation begins with a disproportionate number of arrests of Aboriginal people and the consequent laying of charges. To the extent that at least a portion of these arrests or charges could be dealt with through some form of community absorption such as mediation, victim-offender reconciliation or restitution, this would necessarily have the effect of reducing the level of Aboriginal overrepresentation in the courts and prisons.

Once charges have been laid, the opportunity for diversion shifts to the Crown prosecutor, who may decide whether or not to proceed with the charges. At this stage, it is still possible for the victim and the offender to reach an agreement as to appropriate compensation, either in money or services.

The Law Reform Commission of Canada has suggested a model for pre-trial diversion which shifts the responsibility for reaching a pre-trial settlement back to the community, while preserving the Crown's right to proceed with charges if the settlement is not respected.<sup>32</sup>

While diversion presents an attractive, even a necessary option, diversion programmes will be doomed to failure unless they are designed by Aboriginal people, the proper resources allocated to them and the local

law enforcement and legal community brought on side. Specifically, police and prosecutors must be made aware that a particular program is available and must be convinced of its utility. Bureaucratic red tape and accountability to multiple jurisdictions should be strenuously avoided. Finally, the failure of a particular program should not automatically result in the termination of other similar programs, or in a refusal to try the same program again in some other setting. There should be room for trial and error.

Such was not the case with respect to a pilot diversion project attempted in the isolated Alberta community of High Level, which has a largely Aboriginal population. The project was operated by the Native Counselling Services of Alberta, which had to report to all three funding departments (two federal and one provincial), each having different criteria.

Funding for the project was withdrawn after an evaluation was carried out in its third year of operation (1981).<sup>33</sup> The evaluators observed:

Community-based programmes must have control based firmly in the community and in the private agency which is administering the programme, not in the formal agencies of the criminal justice system.<sup>34</sup>

This observation clearly is not restricted to diversion programs, but applies as well to all types of experimental projects. An initial lack of success should be viewed as an educational experience, a blueprint for improved future projects, and not as a justification for government to refuse to fund further projects. One lesson which the High Level Diversion Scheme teaches is that one must educate all members of the community as well as police, lawyers, judges and court staff before implementing such a project. Without this preparation, even the best-conceived diversion project is unlikely to succeed.

It is recommended, then, that pre-charge and pre-trial diversion be effected in consultation with and, where possible, under the direction of the relevant Aboriginal community. In order for the police to exercise their discretion appropriately, they must have an understanding of the Aboriginal community's desire and capability to absorb the offender, they must be aware of the possibility of a settlement between victim and offender, and, above all, they must remain sensitive as to how the community's interests may best be served.

#### IV. WHAT HAPPENS IN COURT

##### A. BEFORE SENTENCING

Once an Aboriginal person has been arrested and charged, if s/he cannot participate in a diversion program, s/he is drawn into the more

formal part of the criminal justice system: the court process. A number of potential problems present themselves

- does the accused understand the charge which has been laid?
- does the accused understand the plea options?
- is legal counsel available for the accused and, if so, is the accused aware of such access?
- does the accused understand the process of plea bargaining such that s/he can make an informed decision on the options presented?
- does the accused have access to judicial interim release (bail)?

These problems—lack of understanding of the judicial process, linguistic<sup>35</sup> and cultural barriers to effective communication and inadequate access to counsel—may result in judicial dispositions which are unnecessarily harsh or even unjustified. Where an accused does not understand what information s/he is expected to provide to counsel or to the court, does not understand why such information is required or cannot convey it in a manner comprehensible to counsel or to the court, the potential for misguided rulings is great.

To reduce the damage which can result from this breakdown of the system requires firstly, that Aboriginal accused understand the formal criminal justice process, and secondly, that they are able to overcome the linguistic and cultural barriers which may prevent them from fully exercising their rights within it.

In a seminal Canadian survey on Aboriginal involvement with the law,<sup>36</sup> the authors made the following observations:

It appears that Indians have little understanding of their legal rights, of court procedures or of resources such as legal aid. . . .

It appears that most Indian people enter guilty pleas because they do not really understand the concept of legal guilt and innocence, or because they are fearful of exercising their rights. Access to legal counsel is seldom possible for them. In remote areas, the Indian people appear confused about the functions of the court, particularly where the Royal Canadian Mounted Police officers also act as Crown prosecutors, or where the magistrates travel about in police aircraft.<sup>37</sup>

In most cases, Aboriginal persons have little difficulty understanding the offence with which they have been charged, particularly in the case of *Criminal Code* charges. There may be cases, however, particularly with respect to provincial offences, where an Aboriginal person may not be aware that s/he has broken the law.

The most likely example would be with respect to charges under provincial fish and game laws, many of which conflict with traditional Aboriginal hunting and fishing practices. In some cases the Aboriginal person is actually unaware of the provisions of such a law,<sup>38</sup> as opposed to a situation where s/he may have deliberately acted in defiance of the law as a means of asserting a treaty right.<sup>39</sup>

What is perhaps an even greater, although less obvious problem than understanding the charge, is understanding the reasons for pleading guilty or not guilty. At first blush, it would seem that if Aboriginal people plead guilty, it is because they *are* guilty. Again, however, linguistic and cultural factors can lead to Aboriginal accused pleading guilty in instances where such a plea is not legally correct.

The case of *R. v. Koonungnak*<sup>40</sup> is instructive in this regard. This was an application by the Crown to quash the conviction of Matthew Koonungnak for having shot a musk-ox, contrary to a provision of the N.W.T. *Game Ordinance*. The musk-ox had appeared near the camp of Mr. Koonungnak, and an older woman had told him that a lone male musk-ox could be very dangerous, and that he should therefore kill it, which he did. When asked at trial, through the court interpreter, whether he pleaded guilty or not guilty, he hesitated in answering, so the Justice of the Peace said to the interpreter: "Does he say that he did this, or does he say that he didn't do it?" When the accused replied that he had done it, the Justice of the Peace said: "Matthew Koonungnak, you plead 'guilty' to the charge."

There were numerous other legal errors in the trial, errors of which the accused, unrepresented by counsel, could never have been aware. The Territorial Court, having become aware of these errors and similar improper convictions against other Inuit, brought them to the attention of the Department of Justice<sup>41</sup>, but the Crown only brought an application to quash the conviction after the Territorial Court had appointed counsel for the accused and instructed her to launch an appeal.

In discussing the validity of the plea, Sissons J. stated:

It is clear the accused did not know and was not informed and possibly could not be clearly informed as to what was meant by "guilty." Eskimos seem to have no corresponding word in their language for "guilty." I have often noted that there always seems to be difficulty in getting the idea across to the Eskimo. When I have asked interpreters what they said to the accused in this connection, the answer has invariably been as in this case: "I asked him if he did this and he said 'Yes'." That, of course, is not sufficient and I do not ordinarily accept it as a "guilty" plea, and I direct that a "not guilty" plea be recorded. Also, I am always afraid that "guilty" is said because the accused Eskimo thinks that this is what you wish him to say and he is anxious to please. I have repeatedly urged that pleas of "guilty" should not ordinarily be accepted from Eskimos.<sup>42</sup>

There is other evidence that a guilty plea is not understood the same way in Aboriginal and non-Aboriginal communities. An Assistant Crown Attorney who works in northern Ontario, where there is a substantial Aboriginal population, has written:

Amongst the Mohawk, one of the most serious crimes is lying, which would include not acknowledging those acts of which you were properly accused. Three convictions for lying results in automatic banishment, and convictions follow you for life. Pleading "not guilty" is, to them, a lie because it means a denial of the truth of the allegation. For us, of course, a not guilty plea does not mean "I didn't do it;" it means instead that we require the Crown to prove it, as is our right. It is little wonder that there are so many guilty pleas from native accused, for it is likely that the offence with which they are charged is less serious *to them* than lying about their involvement in it, precisely what a "not guilty" plea would represent for them. . . . They do not understand the thinking behind our right to enter a plea of "not guilty", do not understand how it can co-exist with our Christian rule that requires confession and acknowledgment before there is the possibility of forgiveness and redemption. Put in that context, quite frankly, neither can I!<sup>43</sup>

It has also been observed that "many Natives plead guilty 'to get it over with' because they are intimidated by the court. . . ."<sup>44</sup>

This brings us to the issue of access to counsel. While the basic goal is certainly to ensure that Aboriginal accused, like all accused, have the opportunity to be represented, the issue does not end there. If counsel cannot afford the accused sufficient time to explain fully and adequately the charges and the options which the accused faces, or if counsel is in fact incapable of doing so due to language or cultural barriers, the right to counsel has not been fulfilled effectively. While it would be difficult to draw a direct connection between inadequate counsel or access to counsel and overrepresentation, they cannot be discounted as contributing factors.

Lawyers who are themselves Aboriginal persons can better assist Aboriginal clients in confronting the language and certainly the cultural barriers faced by many of them. Given the current scarcity of Aboriginal lawyers practicing criminal law, however, this solution is not sufficient to deal with the problem. While many Aboriginal accused turn to legal aid counsel to represent them, many simply go to court unrepresented. Where legal aid lawyers are a relatively available resource, they may provide effective counsel to Aboriginal accused if the barriers between non-Aboriginal legal aid lawyers and their Aboriginal clients are bridged, to some extent at least, by the provision of qualified interpreters for solicitor-client consultations. It is important to note that very often those called upon to interpret for Aboriginal persons themselves have little or no knowledge of legal concepts nor any training as inter-



preters.<sup>45</sup> The cross-cultural difficulties are exacerbated by the very brief time which legal aid lawyers, as a rule, can afford to devote to any one case. This is particularly a problem in the North and other remote areas served by fly-in courts. There, defence counsel only arrive with the court party, usually on the day of the hearing. Under such circumstances, there is clearly no opportunity for serious consultation with the accused client, nor, for that matter, does the Crown have adequate opportunity to consult with witnesses.

At this stage it is appropriate to discuss the role of the Aboriginal courtworker in the criminal justice system. The Native Courtworker Program, which originated in two Aboriginal friendship centres in the West, first received federal support in 1969, partly in response to the problems pointed out in the Canadian Corrections Association survey "Indians and the Law."<sup>46</sup> In particular, the federal government was motivated

by a desire to attack the disproportionately high native incarceration rate in a manner consistent with both government policy favouring native self-help initiatives and the departmental legal services strategy for assisting the disadvantaged. . . .

The essence of the Department of Justice's perception was that the inordinately high native incarceration rate was linked to difficulties encountered by native persons in transmitting to the court the substance of their defences and facts relevant to the determination of sentence. . . . It was believed that by establishing a communications link between the native accused and his counsel and the court, the non-deliberate differential conviction and sentencing of natives could be eliminated.<sup>47</sup>

The program was intended, therefore, to respond to many of the problems which Aboriginal accused still face today — lack of adequate legal representation, problems with language and communication of legal concepts<sup>48</sup> and assertion of legal rights. In general, the program was meant to counter the Aboriginal accused's lack of familiarity with and intimidation by the criminal justice system.

One of the main purposes behind the program was to reduce Aboriginal overrepresentation in prison. Has the program achieved this goal? Statistics concerning the continued disproportionate incarceration of Aboriginal offenders indicate that it has not. In assessing the impact of the Native Courtworker Program, one author has noted that while it has increased the knowledge and awareness of Aboriginal people appearing in criminal court, as well as the sensitivity of the judiciary to the concerns of Aboriginal people, Aboriginal courtworkers must not be viewed as an alternative to legal representation.<sup>49</sup>

To the extent that the Native Courtworker Program was conceived as a means of reducing overrepresentation, it is not a success. As James Hathaway has pointed out:

Clearly, no amount of courtroom intervention to assist natives can reduce the incarceration rate unless an effort is made to attack the factors underlying criminal behavior.<sup>50</sup>

This is not to say that the Native Courtworker Program is not worthwhile—far from it. One must, however, be realistic about what that program can accomplish. As a bridge between cultures, as a means of explaining the justice system to those about to enter it and as a resource for accused persons who might otherwise have none, the Aboriginal courtworker is invaluable.

A courtworker is, however, no substitute for a trained interpreter, nor for a lawyer. The danger of emphasizing the benefits of a courtworker program is that those responsible for the criminal justice system may then feel that the needs of Aboriginal accused have thereby been satisfied. Courtworkers are not and cannot be the sole solution to the problem of Aboriginal overrepresentation in prison.

## B. SENTENCING

Every study done on Aboriginal people and criminal justice cites statistics on the Aboriginal prison population. Certainly it is an inescapable fact that Aboriginal people fill Canadian prisons, both federal and provincial, in staggering numbers.

By way of example, consider that in 1986, although Aboriginal people formed less than eight per cent of the population of Saskatchewan, they constituted 64% of the provincial prison population, and just under 60% of the federal. Comparable figures obtained at the time in Manitoba and Alberta.<sup>51</sup>

### I. PRINCIPLES AND GUIDELINES

Before examining how well or poorly the sentencing process treats Aboriginal offenders, we must determine the principles which underlie it. The Law Reform Commission of Canada, in an early working paper, made the following observation:

In the sentencing and disposition of offenders, a prime value ought to be the dignity and well-being of the individual. . . . Laws protecting inviolability of the person and sanctity of life are simply illustrations of the prime value placed on individual dignity and well-being. This value commands that attention be paid not only to the interests and needs of the collectivity but *to the offender and victim as well* [emphasis added].<sup>52</sup>

In its comprehensive report concerning the reform of sentencing law and practices in Canada, the Canadian Sentencing Commission stated that

[i]n furtherance of the overall purpose of the criminal law of maintaining a just, peaceful and safe society, *the fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions* [emphasis added].<sup>53</sup>

A subsequent parliamentary report made a similar pronouncement.<sup>54</sup>

Both reports see sentencing as one of the means of promoting a just society, and both agree that to do so, the sanctions imposed on offenders must themselves be just. Both go on to enunciate very similar principles of sentencing, designed to achieve these stated purposes. The first principle in each case is that the sentence "be proportionate to the gravity of the offence and the degree of responsibility of the offender. . . ." <sup>55</sup> The Sentencing Commission goes on to state that "a sentence should be the least onerous sanction appropriate in the circumstances," <sup>56</sup> while the parliamentary committee agrees, in effect, stating that "[a] term of imprisonment should not be imposed without canvassing the appropriateness of alternatives to incarceration. . . ." <sup>57</sup>

Given the relentless and disproportionately high number of Aboriginals that are sent to prison, and the fact that a significant number serve time for minor offences, one is forced to question how well the sentencing process respects and abides by these lofty purposes and principles. Perhaps enshrining these principles in statute will exact greater conformity to them in practice.

In the case of Aboriginal offenders, the gap between theory and reality is particularly great. Far from being a last resort, prison seems to be used as if it were the main, if not the only option. Keeping in mind, therefore, the desired thrust of sentencing as spelled out in the above-noted statements of purpose and principle, we turn now to a consideration of the sentencing process.

## 2. WHOSE VIEWS TO CONSIDER

Currently in Canada, only a judge has the legal authority to pronounce sentence on an offender. The *Criminal Code* and all penal statutes usually provide only maximum sentences, which leaves the sentencing judge with enormous discretion. Judges of course hear submissions from the Crown and the accused or, if the accused is represented, from defence counsel. They may also request additional information, notably in the form of presentence reports or medical reports, but the quality is variable and differs according to the significance of the case.

With these limited resources, judges are expected to “preserve the dignity and well-being of the individual” (presumably the victim as well as the offender) while holding the offender accountable for the crime, and at the same time preserving the authority of and promoting respect for the law.

To achieve these goals with respect to Aboriginal offenders, the sentencing judge requires not only more information, but more relevant information. As sentencing involves the assertion of fundamental community values, it would seem not only logical but also necessary to allow the community an opportunity to participate in the process. Some would argue that judges themselves are representatives of the communities they serve. In reality, however, judges do not come from a cross-section of the population,<sup>58</sup> and no matter how well-informed and well-intentioned they may be, they are not and are not perceived to be representative of society at large. This perception is not confined to Aboriginal peoples, whose representatives on the provincial bench may be counted on the fingers of one hand.<sup>59</sup> The non-Aboriginal community, women and minorities in particular, has become increasingly vocal in its criticism of the lack of ethnic, racial or gender diversity on the bench.<sup>60</sup>

The Law Reform Commission suggested many years ago that

[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>61</sup>

Such a practice is particularly desirable in the case of Aboriginal offenders, especially given the rarity of Aboriginal judges. To ensure that Aboriginal values and attitudes are considered in the sentencing process and to achieve that goal immediately requires the involvement of Aboriginal lay assessors to assist the sentencing judge.

There has been some informal precedent for such a step. 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.<sup>62</sup> The formal use of lay assessors is itself also not without precedent.<sup>63</sup>

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>64</sup>

### 3. PROCEDURES

Once it has been accepted that judges should receive as much relevant information as possible, the question becomes what is the best vehicle for the communication of that information. Pre-sentence reports should provide judges with the information necessary to make an enlightened decision regarding the most appropriate sentence for the offender. In addition, judges will require information regarding the sentencing options which are in fact available in their region.

Dealing first with pre-sentence reports, what is wrong with the system as it exists? The fact that these reports are not compulsory is not in itself a problem. Where reports are requested, they will be ordered, generally speaking. The difficulty lies more with access to counsel. An unrepresented Aboriginal accused is unlikely to know about pre-sentence reports, or to appreciate when they would be useful and ought to be requested.

A second difficulty, perhaps more serious, is that the majority of probation officers who prepare pre-sentence reports are non-Aboriginal and are insufficiently trained or otherwise exposed to Aboriginal cultural perceptions and values. The risk of error in such circumstances is substantial, as the following observations of a Crown prosecutor familiar with the difficulties faced by Aboriginal people in the criminal justice system will attest:

[W]hen [Aboriginal] offenders have been placed in "therapeutic" settings while awaiting sentencing, whether they be programs within jails or courses of assessment within psychiatric institutions . . . [t]he reports inevitably come back indicating that the offender was "undemonstrative", "unwilling to confront his dysfunction," "non-communicative," "withdrawn," "non-participating," etc. Reading these assessments, we once again feel compelled to discard the possibility of rehabilitation and to concentrate instead upon deterrence.

What we are seeing is accurately *described* . . . ; the more important issue is whether we are accurate when we interpret it as clear proof of an unwillingness to change.

What we may be missing is the fact that the offender behaves as he does because our *techniques* of rehabilitation, of "healing," may not only be very different, but also traditionally improper. His refusal may stem not from indifference or from amorality but from *allegiance* to ethical precepts we have not seen. . . .

It is interesting to note how infrequently we ask a Native offender what *he* is prepared to do to help turn his life around. Instead, we read his unwillingness or inability to employ *our* techniques as clear signs of an unwillingness or inability to employ *any* techniques. [Emphasis in original.]<sup>65</sup>

If one acknowledges this "cultural blindness" and its attendant dangers for Aboriginal offenders one must recognize as well the need for the court system to ensure that probation officers receive effective cross-cultural training. To have greater impact, the training program should be delivered at least in part in an Aboriginal setting and should be designed with significant input from Aboriginal people.

The aim of this training would be to provide a more appropriate cultural perspective from which probation officers can judge the behaviour of Aboriginal offenders, and more accurately assess what sentence would be effective for them. Criteria currently employed in pre-sentence report evaluations, such as level of education and record of stable employment, while not irrelevant, should not be considered exclusively.

Court officers preparing pre-sentence reports should make the effort to seek out and to include information from the offender's family members or community leaders when assessing his or her character, background and prospects, with a view to determining the appropriate sentence. In addition, judges must ensure not only that Aboriginal offenders are made aware of their right to make submissions on their own behalf, but also that they are provided the resources necessary to do so effectively. In particular, the provision of qualified interpreters and adequately trained courtworkers could make a critical difference in this respect.

Judges and offenders may also benefit from the simple technique known as delayed sentencing. This practice gives the offender the opportunity to take steps to remedy the offence, or the problems which led to the offence. For instance, where alcohol played a part in the commission of the offence, a delay of several months before sentence is pronounced would provide the offender with the chance to enrol in an alcohol treatment program so that, by the time sentence is pronounced, s/he may be on the road to recovery and thus be a better candidate for a non-custodial sentence. S/he may also have reconciled with the victim or provided restitution for damage done. The case law regarding acceptable reasons for delaying the passing of sentence (as opposed to ordering a suspended sentence plus probation) reveals that monitoring the offender's conduct is not ordinarily considered a legitimate reason by courts in various provinces,<sup>66</sup> particularly if the delay before sentencing is lengthy. It is submitted that in certain circumstances, justice would be better served by delayed sentencing than by a suspended sentence with terms of probation. This assertion rests upon the theory that voluntary rehabilitation is more likely to be effective than court-ordered rehabilitation. Despite current judicial debate and even occasional disapproval of this practice, in appropriate circumstances it seems to be a desirable and,

for some judges, a preferred method of dealing with Aboriginal offenders. It is also not a novel practice.<sup>67</sup>

Finally, sentencing procedure should include consideration of all options available and appropriate to the offender, with prison being considered only as a final resort. In order to ensure that such a procedure is followed uniformly, a court official should be responsible for informing the sentencing judge of the options realistically available in the region. In the case of Aboriginal offenders, it is clear that only someone closely involved in the local Aboriginal community would be in a position to apprise the court of Aboriginal programs which could fill this need. In jurisdictions with an Aboriginal courtworker program, this role might be filled by a courtworker, or the courtworker program office could become a clearinghouse where information on Aboriginal sentencing options would be available to any court official.

## V. SENTENCING OPTIONS

The Canadian criminal justice system uses prison at the third-highest rate in the industrialized world, surpassed only by the United States and the U.S.S.R.<sup>68</sup> In light of this fact, it is difficult to deny that Canadian judges overuse incarceration as a sentence. This overuse is most dramatically evident in the Aboriginal community, resulting in overrepresentation. In seeking to address this problem, one must question the adequacy of the options open to sentencing judges, and the extent to which they are willing to use them. If sentencing guidelines are followed and incarceration is used only as a last resort, the question remains — is incarceration too often the only option available<sup>69</sup> to the sentencing judge?

We will now review other options appropriate to Aboriginal offenders which sentencing judges could use in lieu of incarceration. The first four discussed are what are known as “soft options”—while they may involve some restrictions on liberty, they do not constitute punishment in the traditional sense. The options discussed under the heading “Intermediate Punishment” are considered “hard options”, that is, they entail the deprivation of liberty, emphasizing punishment over rehabilitation.

Current overcrowding in prisons demands more cost-effective sentencing options. Yet it is also important not to create a public perception of going easy on offenders. While we are aware that the “soft options” discussed below may not be the current vogue in sentencing,<sup>70</sup> we believe nevertheless that they may be appropriate for many Aboriginal offenders and should therefore be considered seriously.

## A. PROBATION

In the case of minor offences, a suspended sentence with probation is a common disposition, one with much scope for flexible and imaginative conditions and therefore well-suited to adaptation for the particular circumstances of Aboriginal people. Yet studies suggest that Aboriginal offenders are less likely than non-Aboriginals to receive probation orders.<sup>71</sup> This is due, at least in part, to the fact that probation is largely dependent on the recommendations contained in the pre-sentence report or on the assessment of the sentencing judge. Pre-sentence reports, prepared by probation officers who are usually non-Aboriginal, are based on criteria which too often place Aboriginal people at a disadvantage. Conditions such as having stable employment or a fixed address may unnecessarily prejudice an Aboriginal offender's chance at probation. Stable employment poses a problem given the unusually high level of unemployment in most Aboriginal communities, while the requirement of a fixed address does not reflect the often frequent movement of Aboriginal people between reserves or settlements and urban centres. Certainly a condition prohibiting association with anyone with a criminal record may in some cases virtually exclude an Aboriginal person from his or her community.

A practical factor working against Aboriginal offenders is that for those living in remote areas, probation officers are not available to supervise them. In addition, for Aboriginal people who have a traditional lifestyle, particularly in the north, during hunting or trapping season it is impossible to report regularly to a probation officer, even assuming that there is one in a local community. To grant probation to an Aboriginal person without making adjustments for such circumstances virtually assures that the offender will commit an additional offence — breach of probation.

What can be done to counter this essentially systemic discrimination against Aboriginal offenders? As has been stated, Aboriginal probation officers or non-Aboriginal officers who have benefitted from cultural awareness training should be employed to prepare pre-sentence reports.<sup>72</sup> Perhaps more importantly, there should be a statutory requirement that probation officers obtain appropriate information from some family or community member (see previous section — *WHOSE VIEWS TO CONSIDER*). Criteria beyond the standard ones of family background, education, and employment prospects should be considered, such as offenders' skills and potential employability or their enrolment in treatment or training programs. When prohibiting association, such prohibitions should be limited to particular people who have an obviously bad



influence on the offender, and should not extend to everyone with a criminal record.

With respect to reporting difficulties, selected members of every community could be trained to serve as probation officers. Greater use should be made of Band Council members, teachers, community leaders or any other suitable volunteers. Reporting requirements should be capable of variation so as to maximize the offender's ability to achieve or maintain a productive lifestyle. In communities with no trained probation officers, there is no reason why many of their functions could not be performed by respected community members under the guidance of a probation officer located elsewhere. Thus, a locally-recruited probation officer or community member could be assigned to hunt with one or several offenders. There is some precedent for this type of alternative. In Ontario, the Ministry of Correctional Services employs 31 Aboriginal people on contract as Native Community Corrections Workers. They live on the reserves, where they work as probation and parole officers.<sup>73</sup>

Stable employment should not be an essential prerequisite to granting probation. Part-time work, seasonal work, pursuit of job-skills training and even evidence of serious and continued efforts to find work should be taken into account when evaluating whether a particular person is a suitable candidate for probation. Finally, consideration should be given to decriminalising breach of probation, so that it becomes a ground for revocation of the probation order, but not an additional criminal charge.

#### B. VICTIM-OFFENDER RECONCILIATION<sup>74</sup> AND RESTITUTION

Sometimes the most appropriate resolution of an offence is whatever satisfies the victim and the offender, provided such resolution does not offend community values. Societal intervention through the imposition of some standard sentence is not always necessary or desirable.

One of the shared values of the various Aboriginal peoples is an emphasis on the restoration of harmony in the community, rather than on punishment of the offender. If, through mediation, the victim and the offender can be reconciled, additional punishment is not seen as necessary. More fundamentally, it has been argued that the use of jail as a means of punishment does the opposite, from an Aboriginal perspective, to what is required in order to deal with an offender. Where an offender has expressed a loss of respect for a community through his or her offence, removing that person from the community means that the offender avoids both experiencing the censure of the community and re-earning its welcome.<sup>75</sup> From the perspective of a close-knit community, therefore, jail cannot effect rehabilitation. In some cases, of course, the community may wish to remove the offender from its midst.

Having an Aboriginal offender face the victim and agree to “pay” for his or her crime in terms that satisfy both the victim and the third party mediator, representing community values, is much more likely to effect rehabilitation than a prison term. It is in this context that sentencing judges should have the benefit of Aboriginal lay assessors, whether they be Elders or other community members knowledgeable about community values and customs. This holds true even in an urban setting, where the Aboriginal community is not a discrete entity. The above discussion presupposes that the offence is not one for which both Aboriginal and non-Aboriginal society demand a prison term for the offender. In the latter cases (e.g. instances of homicide), the latitude of the sentencing judge is limited and will leave little or no scope for a lay assessor to suggest alternatives to incarceration.

Restitution is another option open to the sentencing judge. As with other non-carceral sentences, it may both satisfy the victim and restore harmony to the community while sparing the offender the negative side-effects of a prison term (what some have called the “hardening” of the offender). Given that restitution is primarily a cash-based option, it is unlikely that it will be of great utility to judges faced with Aboriginal offenders who are largely impecunious.

### C. FINES, DAY-FINES AND FINE OPTION PROGRAMS

According to sentencing theory, a fine is less onerous than a prison term and is therefore imposed in circumstances where imprisonment is not warranted. The further logic of the theory is that people would rather pay fines than go to prison, so the sanction for non-payment of a fine is a prison term. The flaw in this theory, and it is a major flaw, is that not all people who are fined can afford to pay. As their failure to pay is involuntary, the threat of imprisonment as a consequence of default is necessarily ineffective. The result of this flawed logic is a system which in effect jails people for being poor.

The Law Reform Commission of Canada’s Working Paper on Fines found that

several studies indicate that the types of offences for which persons are imprisoned for non-payment of fines are typically “poor people’s” offences, such as vagrancy and drunkenness. In other words, the alternative jail term seems to fall discriminatorily on the poor offender. *The discriminatory effect of the alternative jail term has been found in several provinces to weigh most heavily on the relatively poorer Indian population.* In 1970-71 in Saskatchewan correctional centres . . . 57.4% of native admissions were for non-payment of fines as compared to 34.7% of non-native admissions. [Emphasis added.]<sup>76</sup>

Despite the evident disproportionate effect of the imposition of fines, “[s]etting the amount of the fine in terms of the accused’s ability to pay

has been formally rejected by courts of appeal on the grounds of 'equality before the law.'<sup>77</sup>

Aboriginal people are well aware of the problem with fines and have called for changes in the way they are imposed. One particularly eloquent (and successful) use of the courts to redress the inequitable application of fine default incarceration of Aboriginal people is the case of *R. v. Hill*.<sup>78</sup> Mr. Hill, an Aboriginal person and an alcoholic, had been convicted of many *Liquor Licence Act* offences and several *Criminal Code* offences. There were 44 warrants of committal outstanding against him, 38 of which were for being intoxicated in a public place. The warrants amounted to roughly half a year in prison. Mr. Hill brought an application for a writ of *habeas corpus*. He submitted, among other things, that jailing chronic alcoholics for being no more than a social nuisance is cruel and unusual punishment, contrary to s. 12 of the Canadian *Charter*. He also submitted that the apparently automatic imprisonment of persons in default of payment of fines constitutes arbitrary detention or imprisonment contrary to s. 9 of the *Charter*.

Judge Wright referred to a similar application Mr. Hill had brought in 1985, where the judge cited a study showing that, in the District of Kenora where Mr. Hill resided, Aboriginal people made up 44% of the population but 98% of fine defaulters. Further, 71% of admissions to the Kenora jail were for fine default and if all warrants for fine default were executed, the jail would be filled four times over.<sup>79</sup>

Judge Wright noted that the purpose of the *Provincial Offences Act* was to make incarceration for fines a last resort.

Notwithstanding this progressive legislation, a significant portion of our population is still being jailed for the "crime" of being a social nuisance and poor.

That portion of our population being so treated is of native ancestry. . . .

The humane intent of the *Liquor Licence Act* and the *Provincial Offences Act* must be realized in fact or serious social unrest may be the result.<sup>80</sup>

He granted the application and quashed the warrants.

A joint study by the federal government, the Saskatchewan government and the Federation of Saskatchewan Indian Nations singled out fines as one of the major difficulties it had identified:

financial penalties are not always suitable for native offenders as many of them do not have the means to pay them and the alternatives fail to act as a deterrent. As well, there were serious concerns that fine revenues were not returned to alleviate the community problem or compensate the victim.<sup>81</sup>

This observation alludes to two other problems with fines: as Archibald has noted, they have virtually no rehabilitative effect,<sup>82</sup> nor does the

money necessarily benefit the community. Fines for *Criminal Code* offences are forwarded to the Department of Indian Affairs and Northern Development. A band must then apply to DIAND for the return of the money, which is contingent upon DIAND approval of how it will be spent. This is a tortuous and paternalistic process. The leaders of Aboriginal communities (or others specifically chosen for the task) should be given the responsibility of administering fines which are paid within their communities.

There are at least two ways to ensure that fines are imposed equitably. One is to require a means inquiry prior to imposing a fine or prior to imposing imprisonment for fine default.<sup>83</sup> This would entail the court inquiring into the accused's ability to pay a fine and tailoring the fine accordingly.

The other method is to institute a system of day-fines, that is, fines which are determined based on the nature and gravity of the offence, but which are expressed in units with no monetary value. The amount of the payment is then determined as a percentage of the offender's income,<sup>84</sup> thus respecting the principle of effective, not merely formal, equality.

As a short-term measure, the Canadian Sentencing Commission has recommended use of the means inquiry prior to the imposition of a fine. It has also recommended further study of day-fine systems and encouraged pilot projects in their use.<sup>85</sup> Both of these methods merit implementation without delay. Pilot projects should be centred in regions where Aboriginal offenders are hardest hit by fine-default incarcerations.

Another way to minimize problems of fine default and inability to pay is to set up fine option programs.<sup>86</sup> Such programs give offenders who are eligible for fines but unable to pay the option of working off their fines by performing services which have a monetary value equivalent to the value of the fines to which they are subject. Such programs require the consent of the offender, the availability of employment with a value equivalent to that of the fine and the human resources necessary to supervise the program.

In designing fine option programs with a view to helping Aboriginal offenders, it is clear that Aboriginal communities, whether rural or urban, should be consulted. There are certain obstacles to implementation of successful fine option programs for Aboriginal people. For programs based in Aboriginal communities where the unemployment rate is high, the possibilities for valuable work which offenders may perform to pay off their fines are limited. In any case, programs established under provincial offences legislation do not operate on reserves, where band by-laws come under the *Indian Act* and are therefore federal

legislation. Conversely, programs off-reserve or in urban centres may effectively be inaccessible to Aboriginal people. If a daunting amount of paperwork is required of the offender in order to participate, this too will reduce the effectiveness of the program. Adequate human resources to supervise fine option programs may also present an obstacle, although in some cases the need for supervision can be reduced by setting tasks to be completed by a given date, rather than by setting a number of hours of work which someone must oversee.<sup>87</sup>

Common sense dictates that, for fine option programs to assist Aboriginals effectively, they must be available in areas where Aboriginals live and they must offer the opportunity to do work for which the community has a need and for which the local population is likely to have the appropriate skills. In addition, the process required to take part in the program must be simple and easy to understand, requiring a minimum of paperwork and supervision.

#### D. COMMUNITY SERVICE ORDERS

The Standing Committee on Justice and Solicitor General has described community service orders in the following terms:

an alternative to jail terms, sentences involving community service require offenders to perform without pay prescribed work in the community for specific periods of time. . . . The essential characteristic of the work required is that it be of benefit to the community.<sup>88</sup>

This type of sentence is particularly well-suited to Aboriginal offenders, as it accords with the emphasis placed on community healing and the re-integration of the offender into society which is integral to First Nations conceptions of justice. In an early report on sentences, the Law Reform Commission also noted the conciliatory purpose behind community service orders:

The object of community service is to

- (a) achieve reconciliation between the community and the offender by repairing directly or indirectly the harm done. . . .
- (c) apply a positive form of censure to an offence. . . .<sup>89</sup>

It should be underlined, however, that community service orders are to be used as an alternative to incarceration, not merely as an additional condition of probation. In other words, community service orders (and, for that matter, other community-based sanctions) should be applied only to offenders who would otherwise have been incarcerated, not as a *more* onerous sanction to offenders who would have received a non-carceral sentence in any case. Such misuse of community service orders would have the effect of "widening the net,"<sup>90</sup> that is, increasing the

number of people subject to such orders without in any way addressing the problem of inappropriate and unnecessary overuse of incarceration. Community service orders should be applied only to offenders who would have received prison terms but for whom incarceration is an unnecessarily harsh and an inappropriate sanction.

In the Law Reform Commission's recommendations, "citizen's justice councils" would be responsible for identifying community needs and making the necessary arrangements for the fulfilment of community service orders. The administrative burden of such an undertaking would be considerable. In urban areas, Friendship Centres, Métis organizations, Aboriginal women's groups or other Aboriginal social service agencies would be the most appropriate organizations to undertake the administration of such programs. On reserves or in other Aboriginal communities, most likely the duty would fall to the Band Council, Elders or some group such as a justice committee. When one considers how many community-based sanctions will fall to these same people to design, supervise and run, and when one considers that these criminal justice tasks are not their only duties, nor even necessarily their communities' priorities, one begins to get a sense of the obstacles to the success of such initiatives.

As community involvement is so critical to the success of community-based sentences, it is likely that the most successful programs will be those which are conceived by the community to suit its needs and capacity. A recent survey of sentencing options relating to aboriginal offenders lists several factors cited by communities which have engaged in such activities as essential for their success:

- identification of community needs;
- reference to community values;
- the employment of methods of prevention, mediation, reconciliation, restitution, rehabilitation;
- the commitment of all community members;
- the active involvement of Elders;
- connecting justice-related efforts to the land.<sup>91</sup>

The survey cites the use of wilderness camps for young offenders as one initiative which has been successful in various communities. Aboriginal professionals and community leaders train young offenders in wilderness skills and academic subjects while teaching them customary values.<sup>92</sup> While this program may be seen more as a form of open custody, it is an example of how a community can take the initiative in creating sentencing options which will be of value to the offender and the community as well.

A recent study of sentencing options in Canada listed two primary advantages to the use of community service orders. They were: 1) the

reduced cost of supervising a community service order as compared to the cost of maintaining an offender in prison<sup>93</sup> and 2) the reduced social cost, as the offender does not undergo the experience of prison and is also able to maintain his or her family and community ties while serving the sentence. These benefits are affirmed and expanded upon elsewhere:

[The popularity of community service orders] of late . . . is in no small measure due to the fact that they potentially alleviate jail over-crowding and are a means by which to reduce the costs of corrections. From a rehabilitative point of view community service orders allow for redevelopment of improved work habits, acquisition of new skills and the cultivation of helpful contacts in the general community. This is accomplished in a manner which avoids the negative aspects of institutionalization from prison culture. In addition, the offender may creatively "pay the debt" he or she owes to society—with attendant material benefit to the community and possible psychological benefit to the offender.<sup>94</sup>

For all the above reasons, community service orders should be promoted as a potentially viable alternative to incarceration.

#### E. INTERMEDIATE PUNISHMENT

Open custody is a concept currently set out in the *Young Offenders Act*.<sup>95</sup> The definition<sup>96</sup> includes a community residential centre, group home, forest or wilderness camp or any other like place or facility. While no legislation aimed at adult offenders specifically provides for open custody, the concept may apply equally well to adults who do not pose a threat to public safety. In effect, open custody just takes the concept of a minimum security prison one step further. The offender remains subject to more or less continuous supervision, but the context of the supervision allows the offender to maintain social and employment ties to the community and therefore encourages his/her speedier reintegration.

This option lends itself to Aboriginal offenders, as it allows for flexibility in the form of custody and in particular, allows for programs where Aboriginal offenders from rural and remote communities may remain in their communities and learn or continue to pursue traditional lifestyles. There is no reason why the wilderness camp for young offenders referred to earlier in the section on community service orders could not be adapted to the needs of adult offenders.

Intensive supervision (presumably by a probation officer) is another form of "loose" custody which allows an offender to remain in the community. Due to the necessarily close relationship which is likely to arise under this form of custody, the supervision would be most effective for Aboriginal people if the supervisors were themselves of Aboriginal

origin. Where the appropriate personnel is available or can be trained, intensive supervision could provide the opportunity for a positive role model to exert a significant beneficial influence over those offenders s/he supervises.

Electronic monitoring is a still relatively untried option. The theory is that it provides some elements of custody (offenders are confined to one place, usually their residence, for periods which vary according to the offender's need for supervision) while avoiding others (e.g. institutionalization, break of ties with community, loss of employment). Electronic monitoring may be used both as an alternative to remand in custody<sup>97</sup> and as a sentencing option.<sup>98</sup>

The Canadian Sentencing Commission referred to electronic monitoring as a community sanction which merited further study.<sup>99</sup> At the time the Sentencing Commission reported, various provinces were considering pilot projects in this area. British Columbia undertook an electronic monitoring experiment, a voluntary program for impaired driving offenders. The experiment was judged a success, which led to plans for expansion of the program in 1989.<sup>100</sup>

The utility of electronic monitoring as a sanction for Aboriginal offenders must be considered in light of technological, practical and, potentially, cultural limitations. For Aboriginal people living in remote areas, where transfer to prison may present a particularly sharp break in community ties, electronic monitoring might be seen as an attractive means of maintaining a non-violent offender within the community, despite a lack of trained supervisors. In fact, however, while the physical range of electronic monitoring devices may be wide enough to cover a large remote area, the system is ineffective if there is no means of rapidly reaching the offender who violates the terms of his/her monitoring agreement. For this reason, electronic monitoring may only be practical in an urban setting.

Even in an urban setting, electronic monitoring will not be a viable option for offenders who are transient, as the program requires that the offender reside at a fixed address. The imposition of home confinement on someone who shares a house with several other people may impose an unwanted burden on those people.<sup>101</sup> For offenders who are homeless, housing would have to be provided.

More importantly than these practical problems, however, is whether electronic monitoring would be acceptable to Aboriginal offenders and whether it is, on its own, an appropriate sanction. There is a danger that the availability of electronic monitoring or home confinement will result in a widening of the net, as discussed above. In other words, offenders who otherwise would only have been subject to probation will suddenly



find themselves the object of confinement orders which are much more restrictive of personal freedom. Such a tendency might unduly affect Aboriginal offenders who are already not perceived as good candidates for probation. Electronic monitoring may simply provide judges with a novel but equally unnecessary way of restricting their freedom, and one they may be apt to use more frequently, as it appears to be less onerous than jail.

As to whether electronic monitoring is sufficient on its own, consider that non-violent persons with a substance abuse problem may be good candidates for monitoring programs in the sense that they do not present a danger to the public. This is fine as far as public safety goes, but monitoring alone does not treat the substance abuse problem. As the Standing Committee pointed out, electronic monitoring should not be used "as a substitute for appropriate rehabilitative services which may be provided in accordance with other forms of probation (or related orders)."<sup>102</sup>

As there is no definitive verdict yet on the efficacy of electronic monitoring, it certainly merits further study. Given the obvious preliminary obstacles it presents with respect to Aboriginal offenders, however, it should not be viewed as a priority.

## VI. WHAT HAPPENS IN PRISON

As mentioned earlier, one aim of this paper is to examine the criminal justice system with a view perhaps to explaining why so many Aboriginal people are drawn into it, and why so many of them are sent to prison. For this inquiry to be thorough, it is essential that one understand not just the process that lands Aboriginal people in jail, but also what effect incarceration has on them. This is essential because when studying the involvement of Aboriginal people with the criminal justice system, the question is not just why are so many involved but equally, why are so many involved in it so repeatedly? The latter syndrome is one all too aptly described by one consultation participant as "the revolving door of despair."<sup>103</sup>

If the purpose of sentencing is not merely to warehouse offenders but to ensure their reintegration into society as well-adjusted and law-abiding citizens, then prisons which produce recidivists are failing not only their prisoners, but society as well. While one aim of this paper is to promote the use of non-custodial sentences for Aboriginal offenders, it must also address the quality of custodial terms that Aboriginal people serve.

## A. PLACE OF DETENTION

One of the objectives of Correctional Service Canada is to place offenders serving prison terms close to their home communities. At the same time, each offender must be assigned to an institution which provides the appropriate level of security. As the choice of institutions is limited in the regions where most Aboriginal people live, they may end up in higher security institutions than necessary in order to maintain some proximity to their home community.<sup>104</sup>

For Aboriginal women, the problem is much more acute: there is only one federal institution for women, the Prison for Women in Kingston. Its location virtually ensures the isolation of most female Aboriginal offenders from their families and their home communities for the duration of their prison term. While the suicides of four Aboriginal women and the attempted suicide of another at P4W (as it is known) since late 1989 may not be attributable solely to this isolation, it is undoubtedly a contributing factor to their alienation from the prison community where they are already a minority. All four of the suicides were from Saskatchewan or British Columbia. Elder Joan Lavallee, who visits the Aboriginal inmates at P4W, in commenting on these suicides, is quoted as saying:

They didn't know how to cope with such despair, they had left families so far behind and they had to deal with that. . . . They would build a wall around themselves and try to forget their families so it wouldn't hurt so much.<sup>105</sup>

The difficulty of placing prisoners near their home communities may be alleviated to some extent through exchange of services agreements. Such agreements allow for the transfer of federal inmates to provincial institutions and vice versa. According to the 1988 Final Report of the Task Force on Aboriginal Peoples in Federal Corrections, only Ontario does not participate in such agreements. To date, Ontario still does not accept federal inmates into its institutions.<sup>106</sup>

In what appears to be the first case of its kind in Canada, a judge in Prince Albert, Saskatchewan ruled in July 1990 that Aboriginal offender Carol Daniels, convicted of second degree murder, must not serve her term at the Prison for Women.<sup>107</sup> She held that incarceration of Aboriginal women at P4W constituted both sexual discrimination (s. 15(1)) and cruel and unusual punishment (s. 12) under the *Charter*. Women offenders are not treated similarly to men as there are penitentiaries for men available across the country, with a range of programs offered which are not available at P4W. The trial judge found that "isolation, despair and hopelessness" characterized the condition of Aboriginal women, "exiled to an alien culture" at P4W.

On appeal,<sup>108</sup> the Saskatchewan Court of Appeal set aside the trial judge's order on purely jurisdictional grounds. It held that as the issue really concerned the exercise of discretion by the Commissioner of Corrections (as to where to order the offender to serve her term), it called for a remedy within the exclusive jurisdiction of the Federal Court. The merits of the case were not addressed. It is to be expected that Ms. Daniels or some other Aboriginal female offender will pursue this challenge in Federal Court, to highlight the unusually bleak circumstances of Aboriginal women at P4W and to demand that the Commissioner for Corrections show flexibility, within his current discretionary powers, to place Aboriginal women offenders *now* in facilities nearer their home communities.

Exchange of service agreements should be encouraged and expanded, particularly with respect to Aboriginal female inmates, until P4W is closed and the five promised regional facilities for women are opened, including the proposed Aboriginal healing lodge in Western Canada. In particular, the establishment of a healing lodge in one of the Prairie provinces deserves support.<sup>109</sup> This facility should be connected to an Aboriginal community and should be developed using the expertise of Aboriginal women.<sup>110</sup>

## B. INTEGRATION INTO PRISON COMMUNITY

The Daubney Committee noted in its report on sentencing, conditional release and related aspects of corrections that "[i]t appears that Native inmates are often not as familiar with release preparation processes and the conditional release system as other inmates"<sup>111</sup> and, possibly as a result, often waive their right to apply for early release. When they do apply for such release, it is granted to them at a later point in their sentence. Further, Aboriginal inmates require more assistance in preparing and applying for early release.<sup>112</sup>

This problem could be alleviated to some extent if a greater effort were made by corrections officials to explain prison procedures to Aboriginal inmates in such a way that they will be fully understood.<sup>113</sup> Moreover, it should be the responsibility of corrections officials to provide the appropriate staff (e.g. translators) to ensure that Aboriginal inmates are able to apply for early release or otherwise exercise their rights and opportunities within the prison system.<sup>114</sup>

One creative solution in this regard is a video produced for Aboriginal inmates by Bowden Institution in Alberta and the National Parole Board. Using Aboriginal Board members as actors, the video explains the system for securing early release.<sup>115</sup> Such creative techniques should be employed so that Aboriginal inmates are fully informed of all aspects

of prison life, for example, prison routine, prisoners' rights, prison rules and punishment for infractions.

### C. CORRECTIONAL STAFF AND OFFICIALS

At several stages in the criminal justice system, we have noted a lack of effective communication between Aboriginal people and those, largely non-Aboriginal, who administer the system, from police to court officials to lawyers to judges. This problem continues in the prisons, as most prison officials, guards and other staff are non-Aboriginal. Staff and officials who do not understand Aboriginal culture, languages, values and outlook naturally have difficulty communicating with Aboriginal inmates and consequently can have only limited success in understanding their needs.

Such misunderstanding can result in inappropriate programming for the inmate and inappropriate responses to misinterpreted behaviour. For example, a cultural taboo against discussing one's problems may be interpreted as a lack of willingness to deal with them. In such circumstances, attempts at mainstream therapy are likely to fail, and may result in the offender being classified as uncooperative.

There are two responses to this problem. One is to require all correctional staff and officials who come into contact with Aboriginal inmates to undergo effective cross-cultural training programs. These programs should be designed either wholly by or at least in conjunction with Aboriginal people. The purpose of these programs is to instill in non-Aboriginal workers an understanding of and an appreciation for Aboriginal values, attitudes and beliefs.

The other response is to "indigenize" the correctional staff by actively seeking out and hiring more Aboriginal workers. While Aboriginal staff and officials will of course relate more easily to Aboriginal inmates, and while those inmates will likely be much more comfortable with Aboriginal workers, "indigenization" brings with it its own set of problems. Specifically, Aboriginal staff

are torn between the conflicting expectations of their correctional colleagues and the Aboriginal offenders. . . . [W]ith little in the way of support mechanisms to deal with the resulting stress, Aboriginal staff resign early in their careers.<sup>116</sup>

The APFC Final Report recommends both that there be increased Aboriginal employment within the Ministry of the Solicitor General and that such staffing be approached "in a manner which recognizes the many difficulties encountered by Aboriginal people who work in the correctional system."<sup>117</sup> The Report suggests that those Aboriginal

people hired should be able to function in both Aboriginal and non-Aboriginal society.

Current information<sup>118</sup> reveals that Aboriginal liaison services in the federal correctional system have increased since the Report was written. Aboriginal liaison services have been restored in the Atlantic Region (two workers for thirty inmates). In Quebec, there are 1.5 workers for forty inmates. In Ontario, a full-time liaison worker was assigned to the Prison for Women in April, 1990. The Prairie region is close to reaching its target of one liaison worker for every fifty Aboriginal inmates. In the Pacific, the ratio is now one worker to roughly every forty-three inmates.

Apart from practical considerations of how best to reach Aboriginal inmates so as to be able to help them effectively, there are political considerations which may influence which of the above two options will ultimately be more successful. Some Aboriginal people continue to call for more hiring of Aboriginal staff, while others feel that such a change is merely cosmetic. At the Kananaskis conference, while it does not seem to have been the majority view,<sup>119</sup> one group stated that

[p]utting natives into traditional CSC jobs is not a good way to go. Programs in or from native communities to correctional work would attract native workers. Natives going into CSC institutions to work get blended in with the bureaucracy and get frustrated by the demands of inmates on the one side and correctional workers on the other.<sup>120</sup>

For those Aboriginal people who view autonomous justice systems as the ultimate goal, it is understandable that increased representation of Aboriginal staff and officials in the current correctional system may not be seen as a priority or even as a desirable goal. Nonetheless, the current system continues to be responsible for a large number of Aboriginal offenders. However the issue of Aboriginal autonomy with respect to the justice system is ultimately resolved, it would seem that, in the short term at least, greater involvement by Aboriginal people in correctional institutions would significantly ameliorate the prison environment for Aboriginal offenders.

In a recent submission to the Standing Committee on Justice and the Solicitor General, the Indigenous Bar Association responded to a report which recommended that a ministry policy be developed to address the need for awareness and sensitivity of correctional staff and officials. The IBA stated, in part:

While we agree that this is important, we note that this recommendation is aimed particularly at the need for sensitivity and understanding among decision-makers. We believe this would require the hiring of aboriginal people in decision-making and policy-making roles. *We do not believe any amount of cultural sensitization will replace an aboriginal person* [emphasis added].<sup>121</sup>

Clearly, there are two currents of thought with respect to where the emphasis should be put: indigenization or cross-cultural awareness training. The two approaches are by no means mutually exclusive, however. Greater involvement of Aboriginal people in the correctional system should take the form of ongoing cross-cultural training of non-Aboriginal prison staff and officials as well as the recruitment of Aboriginal people to all levels of correctional staff, administration, policy- and decision-making.

#### D. ABORIGINAL-SPECIFIC PROGRAMS AND ABORIGINAL PROGRAM DELIVERY

While the advent of Aboriginal-specific programming in correctional institutions is relatively recent, there is now a fairly broad range of programs available to Aboriginal inmates. It should be stressed, however, that these programs are not universal. They depend to some extent on the attitudes and resources of individual institutions' administrators, and on the demands expressed by the Aboriginal inmates themselves. Thus in institutions which do not have a high concentration of Aboriginal inmates, Aboriginal-specific programming may be sparse or even non-existent.

While this paper cannot begin to present an exhaustive list of the Aboriginal-specific programs available in institutions across Canada, it will attempt to provide a representative sample of the types of programs available.

As discussed earlier, alcohol abuse is a factor in the majority of offences committed by Aboriginal people. Consequently, it is of prime importance for Aboriginal offenders to have access to alcohol and other substance abuse treatment programs. The importance of Aboriginal-specific programming is highlighted by a Correctional Service report which states:

Aboriginal inmates tend not to participate in substance abuse treatment programs designed for the general inmate population. Experience within the Service, to date, indicates that Aboriginal inmates respond positively to treatment which has appropriate cultural content or which is facilitated by Aboriginal counsellors.<sup>122</sup>

The National Native Alcohol and Drug Abuse Program (NNADAP), of the Medical Services Branch, Health and Welfare Canada provides a range of substance abuse treatment programs to Aboriginal people, including a twenty-eight day residential treatment program. However, not all of the centres offering this program accept former inmates for treatment. In 1986, NNADAP funded a pilot project in Ontario aimed

specifically at Aboriginal offenders: the Native Inmate Liquor Offender Program, which was developed by the Ontario Native Council on Justice.<sup>123</sup>

The Program is designed to help inmates achieve a basic understanding of the problems associated with alcohol use and abuse, including the role that alcohol plays in Native people's conflict with the criminal justice system. It is, therefore, a pre-treatment and education program. A major aim of the Program is to encourage inmates to make concrete plans for community treatment upon release.<sup>124</sup>

This program is now being offered in Quebec.<sup>125</sup>

The Collins Bay Institution in Ontario is now piloting a program in which an experienced alcohol counsellor works intensively with inmates. Various treatment models are available in all major federal institutions in the Prairie Region and the Pacific Region has a master contract with one organization to deliver substance abuse treatment in all the major facilities in the Region.<sup>126</sup>

One problem noted in the APFC follow-up report is that there are insufficient post-release treatment facilities, as roughly one-half of residential treatment centres do not accept offenders. Correctional Service Canada and other government bodies are jointly funding a national Aboriginal treatment organization to develop a program specifically for offenders. Initial pilot testing and evaluation have been completed and more extensive piloting and evaluation is planned. Another focus of programming for Aboriginal inmates is to improve learning and life skills.<sup>127</sup>

In general, Aboriginal-specific programming is provided by Aboriginal service agencies which work under contract to correctional institutions, both federal and provincial. For example, Native Counselling Services of Alberta provides a wide range of programs for Aboriginal inmates in that province, including life skills, alcohol and drug abuse treatment, Pow-Wows, and Sweatlodge ceremonies.

There is a debate in the literature as to the most desirable framework for service delivery to Aboriginal inmates. Is it sufficient for correctional institutions simply to contract with independent Aboriginal agencies for these services, as they are entitled to do, or is it preferable to enact enabling legislation which, while not necessary, "would clearly demonstrate the government's endorsement of the role of Aboriginal organizations in the delivery of correctional services"?<sup>128</sup> Both the Correctional Law Review Working Paper and the Final Report of the Task Force on Aboriginal Peoples in Federal Corrections recommended that the latter course was desirable, as, in the words of the Task Force, it would provide "explicit authority for Aboriginal communities or organizations to assume control of certain correctional processes that affect them. . . ."<sup>129</sup>

Where effective programs can be put in place without the need for enabling legislation, such programs and their delivery should not have to await the passage of legislation. Enabling legislation demonstrating governmental commitment is desirable and should be promoted contemporaneously with program development. Energy and resources in the critical area of correctional programs should focus on obtaining high quality programs designed and delivered by Aboriginal people and ensuring that they are made as widely available as inmates require and resources permit.

#### E. PRISONER SUPPORT GROUPS

Native Brotherhood, an Aboriginal inmate self-help group, originated in Stony Mountain Institution in the late 1950s.<sup>130</sup> Native Sisterhood is the parallel group for Aboriginal female inmates. They exist in most federal penitentiaries and several provincial institutions as well. When questioned as to the purpose of Brotherhood/Sisterhood and their main reasons for participating, Aboriginal inmates in one study focused on the support and helping functions of the groups and the feeling of identity with other Aboriginal people. They also stressed the importance of the educational aspects, learning about Aboriginal culture and history.<sup>131</sup>

While the importance of Brotherhood/Sisterhood to Aboriginal inmates is undeniable, the groups have not always received appropriate recognition and encouragement from prison administration and staff.<sup>132</sup> Indeed in Saskatchewan, despite the high number of Aboriginal inmates, it has been reported that Brother/Sisterhoods have not been permitted since a period of prison unrest in the mid-1970s.<sup>133</sup> In Alberta, where the groups are encouraged by prison administrators, they operate a diverse range of activities and projects. For example, at the Drumheller Institution, the Brotherhood maintains twelve programs, including Cree and Blackfoot language classes, a newsletter and a course on Native Studies and Native Life Skills.<sup>134</sup>

The recommendation of the Standing Committee on Justice and Solicitor General "that Native Brotherhoods/Sisterhoods be fully recognized and provided with the resources necessary to function properly"<sup>135</sup> merits immediate implementation.

Cultural awareness and training programs for correctional officials and staff will likely assist in improving official attitudes toward Brotherhood/Sisterhood groups. Recent developments are encouraging. Correctional Service Canada has contracted with an aboriginal educational institution for the development of three separate staff training curricula: first, a general cross-cultural course for all staff; second, a



course in culturally appropriate interactive skills for staff who are in daily contact with aboriginal offenders; and finally, a course intended to provide an appropriate level of knowledge to staff who have diagnostic, treatment or case management responsibilities in relation to those offenders.<sup>136</sup>

#### F. ABORIGINAL SPIRITUALITY

It was only in 1987 that the correctional system officially recognized, by way of a Commissioner's Directive,<sup>137</sup> the legitimacy and importance of Aboriginal spirituality for Aboriginal inmates, although such recognition had apparently been supported by national policy since 1985.

This Directive alone is not sufficient to ensure respect for the practices of Aboriginal spirituality. One recurring complaint is that prison officials will often insist on inspecting sacred bundles in such a way as to desecrate them. In addition, Aboriginal Elders, who are spiritual leaders, are not accorded the same treatment as other religious representatives. Recognizing these problems, the Solicitor General's Task Force on Aboriginal Peoples in Federal Corrections recommended, *inter alia*, that

[t]o complement the national directive, regional instructions and standing orders should be developed addressing the issue of security clearance for Elders' sacred bundles and ensuring sensitive handling of those bundles. . . .

and

[t]he issue of access to segregation and dissociation should be addressed by giving contracted Elders the same status as Chaplains.<sup>138</sup>

These recommendations are echoed in the Daubney Committee Report.<sup>139</sup> These proposals merit support, possibly in the form of legislation. In addition, there should be increased support for the development and implementation of other novel Aboriginal-initiated culturally specific programs designed to promote inmate rehabilitation.

The Native Offenders Program of Correctional Service Canada has recently completed a follow-up evaluation of how these and all other recommendations in the Task Force Report have been implemented in the three years since their promulgation. With respect to Aboriginal spirituality, Correctional Service Canada is establishing national program standards to ensure that Elders are accorded the same status and freedom of movement as chaplains, that they receive the materials and space they require to perform their duties and that their sacred bundles are treated sensitively during security inspections.<sup>140</sup>

The importance of promoting Aboriginal spirituality, Aboriginal support groups and Aboriginal-run programs is highlighted in the words of an Aboriginal inmate:

Since the concept of Native Brotherhood and Sisterhood organizations started, it has taken approximately 35 years for Correctional Service Canada to realize that their support of Native Spirituality and culturally-specific programs for Aboriginal inmates is the means by which we can take an active role in the process of our rehabilitation.<sup>141</sup>

## VII. PAROLE AND AFTER

### A. PAROLE

Aboriginal offenders are less likely than other federal inmates to be released on parole instead of mandatory supervision. . . . [D]uring 1987, the proportion of releases of Aboriginal offenders on full parole was 18.3 per cent, compared with 42.1 per cent for non-Aboriginal offenders.<sup>142</sup>

Why is it that Aboriginal inmates spend more of their term in prison than their non-Aboriginal counterparts? Perhaps, as noted, Aboriginal offenders do not understand the prison system well enough to assert their rights and to press for available opportunities fully.<sup>143</sup> Perhaps more significant is the fact that very few case management officers (who determine, *inter alia*, whether an inmate is ready for conditional release) are of Aboriginal origin or have been adequately trained to recognize Aboriginal needs. As noted earlier, lack of understanding of Aboriginal culture and attitudes may lead to misinterpretation of an inmate's eligibility for conditional release. In addition, certain parole criteria are inherently weighted against Aboriginal offenders.<sup>144</sup>

Consequently, Aboriginal inmates may be detained in prison for longer periods, and unnecessarily, due to inappropriate analysis of their behaviour or of the risk they represent to society.<sup>145</sup>

In addition to the difficulty of obtaining conditional release, Aboriginal offenders who *are* granted parole are more likely to find themselves back in prison.<sup>146</sup> Consultations undertaken by the Task Force on Aboriginal Peoples in Federal Corrections suggested that the lower release success rate of Aboriginal offenders was due to inappropriate conditions imposed on them, more stringent enforcement of release conditions and inadequate support and resources upon release, among other things.<sup>147</sup>

Clearly, Aboriginal inmates require assistance in the preparation of pre-release plans. Those who come from remote communities or reserves face several obstacles in seeking to return to their home communities. If their reintegration is to be successful, they require the prior approval of their community to return. Such approval requires planning which is next to impossible given the remoteness of these communities from prisons, even assuming offenders can overcome the potential reluctance of their home communities to accept them back. There is also the

problem, once again, of scarce resources to devote to such planning. Parole supervision ordinarily is not available in such communities. In addition, the imposition of the very common parole condition prohibiting the parolee from associating with anyone who has a criminal record works a particular hardship on Aboriginal people due to the high percentage of Aboriginal people with a criminal record.<sup>148</sup>

In order for a release plan to work, the criteria for acceptability must be broadened, and the community to which the inmate will be returning must be involved in the plan to some considerable extent. These recommendations are similar to those made in relation to diversion schemes: the offender must be willing, the community must be welcoming, and it must have the appropriate resources.

There is a further concern that Aboriginal offenders may waive their right to a parole hearing more frequently than non-Aboriginal offenders.<sup>149</sup> There is some evidence that this may be due, in part, to subtle encouragement by case management officers as well as to a less than perfect understanding of the parole process.<sup>150</sup>

To counter these concerns, the Federal Task Force on Aboriginal Peoples in Federal Corrections recommended that staff and inmates have clear information on the options regarding waiver and that the National Parole Board and CSC develop a national policy on this issue.<sup>151</sup> This recommendation deserves support.

## B. AFTERCARE

The problem of Aboriginal involvement in the criminal justice system has to do not only with offending, but with re-offending. A smooth transition from prison to the outside world and reintegration into society is the surest way to guard against recidivism and to reduce overrepresentation. The success of such reintegration is dependent upon the availability of appropriate aftercare facilities and programs. Specifically, this means halfway houses, substance abuse treatment programs, employment and life skills programs which are designed for or sensitive to the particular needs, circumstances, attitudes and values of Aboriginal people. As the mainstream programs and facilities of federal and provincial correctional services are not designed by or for Aboriginal people, the most effective and expedient means of providing for the needs of Aboriginal offenders on conditional release or mandatory supervision is to involve Aboriginal service organizations and Aboriginal communities actively in their aftercare.

The recent conference "Sharing Our Future" was a first attempt by Correctional Services to woo Aboriginal communities (in Alberta) into becoming more involved with Aboriginal inmates, in order to ease their

transition back into society. While such efforts to encourage community involvement with Aboriginal offenders are necessary, they are not sufficient. In order for Aboriginal communities, rural or urban, to provide effective liaison and aftercare services to Aboriginal offenders, they require a level of financial support consistent with the duties they are being urged to undertake. This could involve a commitment of new funds or perhaps simply a re-allocation of resources currently used for mainstream programs.

For Aboriginal inmates to be released successfully into urban communities requires a social structure which approximates the communal leadership of a band council. In urban centres, this structure may be provided by Aboriginal Friendship Centres, Métis community organizations and aboriginal women's groups. Operating to some extent like umbrella social service agencies, such groups provide a focal point for urban Aboriginal communities.

These organizations, which exist across the country, should be funded to a level which permits their fullest use as a resource for Aboriginal people. Currently, for example, Friendship Centres are not in a position to offer universal programs. Facilities and services for Aboriginal offenders are dependent upon the budgets and priorities of the individual Centre. Existing for the most part on shoestring budgets, the organizations referred to generally have too many demands on their resources already to be able to take on the supervision of offenders on parole, assuming that this is a role they would choose to undertake. With appropriate financial support and training from Correctional Services, however, it is likely that these organizations, should they so choose, could provide the structure and the leadership that band councils provide on reserves and in remote Aboriginal communities.

Evidence of the success of Aboriginal-run aftercare programs can be found in the experience of Grierson Centre in Edmonton, Canada's first private Aboriginal-run halfway house<sup>152</sup> for federal and provincial offenders, administered by Native Counselling Services of Alberta since the fall of 1989. The Executive Director has praised Grierson as a "fine example" of the federal and provincial governments working together, and working with a Aboriginal service organization.<sup>153</sup>

The benefits of such collaboration are clear. More cooperative efforts are needed where the financial support comes from government, but the design and administration of the programs are in the hands of Aboriginal people and organizations. Equally important is the use of alternative residential facilities for Aboriginal offenders in areas where halfway houses are neither available nor economically feasible. For instance, the Federal Task Force on Aboriginal Peoples in Federal Corrections recom-

mended the use of private homes, with indirect supervision of parolees.<sup>154</sup> In this area, as in most other areas of interaction between Aboriginal peoples and the criminal justice system, the solutions lie in creativity and flexibility born of an awareness and understanding of the distinct needs of Aboriginal peoples.

### VIII. CONCLUSION

It has become a cliché to refer to the problem of Aboriginal overrepresentation in Canadian prisons. It is easy to blame the sentencing process, but upon examination, it is clear that all stages of the criminal justice system and all the actors involved in it must share the blame. Overrepresentation is a problem of excesses every step of the way: the police overarrest and overcharge, Crowns overprosecute, judges oversentence and corrections officials overrestrain.

This system has only recently begun to recognize and attempt to promote values which Aboriginal peoples have always held. These include the emphasis on maintaining community harmony, the importance of healing both the victim and the offender and the need to understand and treat rather than just to punish the offender.

Reforms to the current system are necessary, even urgent, and initiatives in this direction are laudable and should be encouraged. It is certainly vital that all participants in the present system learn to approach Aboriginal people with openness to their ways, respect for their differences and an understanding of their distinct problems and needs.

There is no denying, however, that the reforms suggested in this paper and those proposed in the multitude of papers on Aboriginal offenders which have preceded it are rightly classified as “tinkering”. No reform *within* the current system addresses the aspiration of Aboriginal peoples to assert control over their lives and destinies.

Fundamentally, the answer to the problem of Aboriginal overinvolvement with the criminal justice system lies in a recognition that Aboriginal peoples have and have always had a right to order their lives in accordance with their own values and beliefs. The imposition of foreign laws has failed utterly to bring harmony, order or health to Aboriginal peoples in Canada. It is time to acknowledge that Aboriginal peoples know best how to heal themselves, and it is long past time that they should have the opportunity to do so.

## APPENDIX "A"

*Life expectancy at birth*<sup>155</sup>

Status Indian male	62 years (1981)
Canadian male	72 years (1981)
Status Indian female	69 years (1981)
Canadian female	79 years (1981)
Inuit	
Labrador	60 years (1971-1980)
Northern Quebec	62 years (1971-1981)
Northwest Territories	66 years (1978-1982)

*Infant mortality rate (per 1,000 births)*

Status Indians	22 (1981)	17 (1986)
Inuit	38 (1981)	28 (1986)
All Canadians	10 (1981)	8 (1986)

*Dwellings without central heating (% of total dwellings)—1986*

Status Indians (on reserve)	28%
Status Indians (off reserve)	9%
Inuit	17%
Canada	5%

*Did not attend high school (% of population 15 years and over)—1986*

Status Indians (on reserve)	45%
Status Indians (off reserve)	24%
Inuit	53%
Métis	35%
Canada	17%

*Employed*

Status Indians (on reserve)	28%
Status Indians (off reserve)	37%
Inuit	40%
Métis	39%
Canada	60%

*Income from government transfer payments*<sup>156</sup>

Status Indians (on reserve)	39% (1980)	48% (1985)
Status Indians (off reserve)	25% (1980)	41% (1985)
Inuit	22% (1980)	26% (1985)
Canada	16% (1980)	20% (1985)

*Selected Causes of Death (per 100,000 population)*

## Accidents, poisoning and violence:

Status Indians	248 (1976)	174 (1983)
All Canadians	67 (1976)	58 (1983)

## Infections and parasitic diseases:

Status Indians	18 (1976)	7 (1983)
All Canadians	4 (1976)	4 (1983)

## Suicide:

Status Indians	43 (1981)	34 (1986)
Inuit (NWT)	38 (1981)	54 (1983)
All Canadians	14 (1981)	15 (1986)

## Violent deaths:

Status Indians	157 (1986)
Inuit (NWT)	173 (1986)
All Canadians	54 (1986)

## APPENDIX "B"

	<i>Total aboriginals as % of prov. pop.<sup>157</sup></i>	<i>As % of prov. prison pop.</i>	<i>As % of fed. prison pop.<sup>158</sup></i>
Manitoba	8.1	55 (7×) <sup>159</sup>	35 (4×)
Saskatchewan	7.8	64 (8×)	58.5 (7.5×)
Alberta	4.4	30 (7×)	21 (5×)
Yukon	21.4	58.5 (2.5×)	33 (1.5×)
NWT	58.7	87.5 (1.5×)	74.5 (1.3×)

While more recent population figures will not be available until the completion of the 1991 Census, prison admission figures are collected annually. The 1989-90 data for prison admissions is as follows:

	<i>% of provincial prison population</i>	<i>% of federal prison population<sup>160</sup></i>
Manitoba	47%	40%
Saskatchewan	66%	54%
Alberta	31%	23%
Yukon	65%	44%
NWT	82%	75%

With the exception of the Manitoba provincial rate and the Saskatchewan federal rate, the Aboriginal percentage of the prison population seems only to have increased. If the increase proves to be accounted for by a proportionate increase in the Aboriginal population, then at best it will show that the issue of Aboriginal overrepresentation has not improved.

#### NOTES

- 1 The term "Aboriginal" is used in this paper to include people of North American Indian (both status and non-status), Métis and Inuit origin.
- 2 No global study has ever compared the rate of Aboriginal incarceration to the rate for non-Aboriginal people of similar socio-economic and demographic make-up to prove that Aboriginal people are indeed "overrepresented" in the criminal justice system.  
The academic debate over the term overrepresentation misses the point however. It is the historic oppression of Aboriginal peoples which has resulted in the current chronic socio-economic and cultural disadvantages and deprivation which Aboriginal people suffer disproportionately to the non-Aboriginal Canadian population. The result is a disproportionate conflict between Aboriginal peoples and the criminal justice system which has been imposed on them.  
Thus, while the term "overrepresentation" may be inaccurate, it has nevertheless become the catchword for the undeniable phenomenon of the disproportionate numbers of Aboriginal people in conflict with the law and incarcerated. It is in this popular sense that we use the term in this paper.
- 3 See Appendix A for the precise figures from which the following two paragraphs are derived.
- 4 Innu students must adopt a view of the world that treats their own nation as invisible or non-existent if they are to pass their grades. Innu children seeking to understand their own history . . . are considered subversive, or at least, misguided. Recently a group of Innu teenagers . . . attended an unauthorized seminar on Innu history and geography and were reprimanded by the school principal. He told them they were being 'brainwashed.'  
*B. Richardson, ed., Drumbeat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press [with] The Assembly of First Nations, 1989) at 57.



- <sup>5</sup> As epitomized by the following remarks of Duncan Campbell Scott, Deputy Superintendent of Indian Affairs, c. 1920:

I want to get rid of the Indian problem. . . . Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department . . .

Public Archives of Canada, RG10 (Records of the Department of Indian Affairs), Vol. 6810, file 470-2-3, pt. 7, evidence of Scott before the Committee of the House, as cited in E.B. Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver, University of British Columbia Press, 1986) at 50.

- <sup>6</sup> The Osnaburgh/Windigo Tribal Council Justice Review Committee, July 1990, at 5.
- <sup>7</sup> R. Ross, "Leaving Our White Eyes Behind: The Sentencing of Native Accused" [1989] 3 C.N.L.R. 1 at 10.
- <sup>8</sup> Canadian Corrections Association, *Indians and the Law*, August 1967, survey prepared for the Department of Indian Affairs and Northern Development, at 47.
- <sup>9</sup> A.J. Siggner, *An Overview of Demographic, Social and Economic Conditions Among Canada's Registered Indian Population*, Ottawa, Indian and Inuit Affairs, 1979, at 21, as referred to in James C. Hathaway, "Native Canadians and the Criminal Justice System: A Critical Examination of the Native Courtworker Program" (1985) 49 Sask. L. Rev. 201 at 227. The Metis and Non-Status Indian Crime and Justice Commission which surveyed approximately 300 native inmates across Canada, reported that "[o]nly 10.07% of all offences had been committed with no alcohol or drug involvement . . . The greatest proportion [almost half] had been committed under the influence of alcohol alone". (Report, October 1977 at 35).
- <sup>10</sup> The Osnaburgh/Windigo Tribal Council Justice Review Committee, *Tay Bway Win: Truth, Justice and First Nations* (Report prepared for the Ontario Attorney General and Solicitor General, 1990) at 62 [unpublished] ["Osnaburgh/Windigo Report"].

In the same vein, the Final Report of the Solicitor General's Task Force on Aboriginal Peoples in Federal Corrections reported that

alcohol abuse was identified as a problem among 76 per cent of the Aboriginal inmates in comparison to 64.6 per cent of non-Aboriginal inmates.

National Parole Board, *Final Report—Task Force on Aboriginal Peoples in Federal Corrections* (Ottawa: Supply and Services Canada, 1988) at 26 ["Final Report: APFC"].

- <sup>11</sup> *Native Peoples and Justice: Reports on the National Conference and the Federal-Provincial Conference on Native Peoples and the Criminal Justice System*, Edmonton, 3-5 February 1975 (Ottawa: Solicitor General Canada, 1975) at 19 ["Native Peoples and Justice"].
- <sup>12</sup> *Ibid.* at 18.
- <sup>13</sup> *Ibid.* at 29.
- <sup>14</sup> The study group on crime prevention in remote areas noted that native and non-native peoples perceive justice differently and that the present language of the law and language barriers tend to strengthen the differences. A further complication is that *native peoples seldom encounter Canada's justice system until faced with arrest and have come to equate justice only with punishment* [emphasis added]. *Native Peoples and Justice*, *supra*, note 11 at 18.
- <sup>15</sup> Although within the last decade, efforts have been made to better law enforcing services to Native people, it remains inadequate both in terms of accessibility and

immediate availability of police service. There is not enough emphasis put into [*sic*] the promotion of crime prevention; rather Native people are subjected to unwarranted arrests and convictions, inspired by lack of understanding which is causing an adverse psychological effect on Native people, by many losing their respect for the law and law enforcers.

Métis and Non-Status Indian Crime and Justice Commission Report, *supra*, note 9 at 166.

- 16 R.M. Bienvenue & A.H. Latif, "Arrests, Disposition and Recidivism: A Comparison of Indians and Whites" (1974) 16 Cdn J. of Crim. and Cor. 105 at 114.
- 17 C. LaPrairie, "The Role of Sentencing in the Over-Representation of Aboriginal People in Correctional Institutions" (1990) 32 Cdn J. Crim. 429 at 431.
- 18 The Rolf Commission of Inquiry in Alberta — Policing in Relation to the Blood Tribe — is a result of concerns regarding police investigation into deaths on the Blood Reserve. The Sinclair-Hamilton inquiry in Manitoba — the Public Inquiry into the Administration of Justice and Aboriginal People — is a broadly-based inquiry triggered by the police investigation into the rape and murder by four white men of Helen Betty Osborne, an Aboriginal woman, and the death of Aboriginal leader J.J. Harper, who was shot by a police officer. The Osnaburgh/Windigo Tribal Council Justice Review Committee, which examined how the criminal justice system operated in four Aboriginal communities in northern Ontario, was triggered in part by the case of community member Stanley Shingebis, who became a quadriplegic while in police custody after being arrested for drunkenness. A fourth provincial report, the Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta (the Cawsey Report), devoted over one-third of its 340 recommendations to issues concerning policing.
- 19 This point was made forcefully at the Law Reform Commission consultations, particularly in Toronto.
- 20 See, for example, *R. v. Ireland and Jamieson* (1990), 1 O.R. 3d 577 (Ont. Ct.(Gen. Div.)).
- 21 Even the Supreme Court has noted that "the trial for a violation of a penal prohibition may not be the most appropriate setting in which to determine the existence of an aboriginal right." (*R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1095).

Penal prosecution for such perceived infringements of provincial law are all the more unjustified in light of judicial pronouncements such as this:

It is clear that the effect of s. 88 of the *Indian Act* is to exempt Indians from provincial legislation if it is at odds with their treaty rights. The terms of the treaty have paramountcy even if the provincial legislation is of general application.

*R. v. Ireland* (1990), *supra*, note 20 at 584, following the Supreme Court decisions in *R. v. Simon*, [1985] 2 S.C.R. 387 and *R. v. Sioui*, [1990] 1 S.C.R. 1025, *inter alia*.

It is to be noted that the Province of Ontario has recently taken the lead in enacting regulations which give Indians broad permission to hunt and fish for personal, social and ceremonial purposes, thus avoiding charges under provincial legislation. Such a policy goes far toward alleviating the type of harassment of which Aboriginal people complain. However, it does not resolve their main concern, which is that Aboriginal rights be fully recognized and respected by the provincial and federal governments so that such prosecutions cannot arise.

The policy also raises its own problems, in the form of a backlash against native people by others who continue to be subject to the fish and game laws. A spokesperson for Ontario anglers is quoted as saying that "[t]he anger in rural Ontario is unbelievable. . . . People are threatening to shoot native people and threatening to

wrap them in gill nets and see if they can swim.”

Toronto Star, 30 June 1991 at A12.

- 22 In late June 1991, the Minister of Indian Affairs and Northern Development announced a “comprehensive national policy on Indian policing”, promising “a \$116.8 million increase in grants to expand police services on reserves across Canada.”  
The Globe and Mail, 1 July 1991 at A4.
- 23 Department of Indian Affairs and Northern Development, *Indian Policing Policy Review: Task Force Report* (Ottawa: DIAND, 1990) Annex 2 at 26.
- 24 *Ibid.* at 31.
- 25 *Ibid.* at 8.
- 26 Incidents where the victim of an offence chooses not to call in the police are also examples of diversion.
- 27 Law Reform Commission of Canada, *The Principles of Sentencing and Dispositions* (Working Paper No. 3) (1974) at 7-8.
- 28 Hathaway, *supra*, note 9 at 229.
- 29 H. Lilles, C.J., “Some Problems in the Administration of Justice in Remote and Isolated Communities” (1990) 15 Queen’s L.J. 327 at 337-8.
- 30 *Ibid.* at 19.
- 31 See LaPrairie, *supra*, note 17.
- 32 The Commission recommends that, once a decision has been made that a case is suitable for diversion, it should be referred to a community agency, where a settlement would be negotiated and then reduced to a written contract. The agency is responsible for overseeing the fulfilment of the contract. If fulfilled, the Crown withdraws the charges; if not, criminal proceedings resume. Participation in such a program must be voluntary and informed — the offender must understand the legal implications of disclosures he may make in the course of settlement discussions, although an admission of guilt is not necessary. Law Reform Commission of Canada, *Diversion* (Working Paper No. 7) (1975) at 14-19.
- 33 See G.S. Clark and Associates, *Sentencing Patterns and Sentencing Options Relating to Aboriginal Offenders*, study for the Department of Justice, Policy, Programs and Research Sector, June 1989 at 43-46.
- 34 As quoted in “Creating a Monster: Issues in Community Program Control”, Native Counselling Services of Alberta (1982), 24 Cdn. J. of Crim. 323 at 328.
- 35 The legal concepts of ‘guilty’ and ‘not guilty’ are not translatable into native languages as they tend to mean ‘I did it’ or ‘I didn’t do it’. . . . Apparently, in the Cree language the term judge is translated as ‘the man sitting over there,’ the Crown attorney is ‘the man talking to the man over there’ and defence counsel is ‘the man talking for you to the man over there.’  
Canadian Bar Foundation, *The National*, (Oct. 1987) vol. 14, no. 9 at 9.
- 36 *Indians and the Law*, *supra*, note 8.
- 37 *Ibid.* at 39-40. A similar type of observation was made in the case of *Reg. v. Koonungnak* (1963), 45 W.W.R. (N.S.) 282 (N.W.T. Terr. Ct.) dealing with an Inuit who was convicted of an offence while unrepresented:  
The accused was not informed as to what rights he had or whether he had any rights. The proceedings were not explained to him. He was not told that he had the right to make full answer and defence, and had the right to call evidence and witnesses and to examine and cross-examine witnesses. He was not told that he had

the right to appeal or what an appeal was or how he could go about appealing.  
*Ibid.* at 297.

- 38 While ignorance of the law is, of course, no defence, the necessity for public education about a law is particularly acute where it is clear that the law runs counter to the traditional practices of a specific group of people, who will therefore be inordinately affected by it.
- 39 The *Sioui* case [1990] 1 S.C.R. 1025 was just such a deliberate and successful challenge of a provincial law.
- 40 *Supra*, note 37.
- 41 As Judge Sissons points out in his reasons: "The department of justice with considerable Ottawa arrogance and contempt refused to move to quash the convictions." *Ibid.* at 285.
- 42 *Ibid.* at 297-298. Similarly, there was testimony at the Marshall Inquiry to the effect that  
 many Micmacs translated the judge's question, "How do you plead: guilty or not guilty?" as "Are you being blamed?" Heard in this way, the natural response is to answer in the affirmative, which can then be interpreted by the Court to mean "guilty."  
 "The Mi'kmaq and Criminal Justice in Nova Scotia," The Royal Commission on the Donald Marshall, Jr. Prosecution, February, 1989, Vol. 3, at 47-48.
- 43 R. Ross, *supra*, note 7 at 9-10.
- 44 "The Mi'kmaq and Criminal Justice in Nova Scotia," *supra*, note 42 at 47.  
 A similar view was voiced with strong conviction but for different reasons at the recent Law Reform Commission consultations. The Manager of Justice Programs for the Council of Yukon Indians said that, in many cases, Aboriginal accused would like to simply plead guilty and get the ordeal over with, but counsel seek to prolong the cases by urging the accused to plead not guilty and presenting what are perceived as technical arguments. (R. Trehearne, Edmonton, 19 March 1991).
- 45 Interpreters who are used are often called upon, in an *ad hoc* fashion from those available in court, irrespective of their understanding of local dialects.  
*Osnaburgh/Windigo Report, supra*, note 10 at 58.
- 46 *Supra*, note 8.
- 47 J.C. Hathaway, "Native Canadians and the Criminal Justice System: A Critical Examination of the Native Courtworker Program" (1985) 49 Sask. L. Rev. 201 at 204.
- 48 While field workers participating in the 1967 survey referred to *supra*, in note 8, noted that there was no real language barrier for Indians in southern Canada, they "observed, however, that *communication*, with full understanding and good rapport, is practically non-existent. The use of interpreters does not alleviate this fully because, for the most part, the interpreters themselves were not able to grasp the significance of court language." *Indians and the Law, supra*, note 8 at 40.
- 49 Hathaway, *supra*, note 47 at 220. At the same page, the author cites a 1982 British Columbia study which found that  
 favorable case outcomes . . . were substantially more probable for native clients assisted by privately retained, legal aid and community law office lawyers than for those persons aided only by a native courtworker.
- 50 *Ibid.* at 228.
- 51 See Appendix B.

- <sup>52</sup> *Supra*, note 27 at 3.
- <sup>53</sup> Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa, Supply and Services Canada, 1986) Rec. 6.2(3) at 153.
- <sup>54</sup> *Taking Responsibility: Report of the Standing Committee on Justice and the Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections* (Ottawa: Supply and Services Canada, 1988) (Chair: David Daubney) Rec. 5 at 55 ["*Taking Responsibility*"].
- <sup>55</sup> *Sentencing Reform*, *supra*, note 53, Rec. 6.2 (4(a)), at 154 and *Taking Responsibility*, *supra*, note 54, Rec. 6(a) at 55.
- <sup>56</sup> *Ibid.*, Rec. 6.2 (4(b)) at 154.
- <sup>57</sup> *Taking Responsibility*, *supra*, note 54, Rec. 6(d) at 56.
- <sup>58</sup> The Canadian criminal justice system is operated by a professionally-trained class of prosecutors and defenders who decide the fate of an offender on terms that reflect their privilege and perspective. In addition, a superordinate group of decision-makers is selected from this professional class. If representatives of a particular population do not secure access to the professional legal class their participation at this level is defeated and they are also excluded from the process which is used to select the decision-makers. This is an example of systemic discrimination.
- P. Monture and M. E. Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" (1992) 26 U.B.C. L. Rev. 239 at 243.
- More women judges are being appointed to the bench but not at a fast enough rate. Judicial appointment committees are still largely comprised of white males, from the upper echelons of society.
- "Gender Equality in the Courts—Criminal Law," study by the Manitoba Association of Women and the Law, March, 1991 at iii.
- <sup>59</sup> The recent appointment of Terry Vyse as an Ontario Court judge (Provincial Division), made her only the fourth Aboriginal judge in Canada, and the first Aboriginal woman to be appointed to the bench. The Hamilton Spectator, article of February 21, 1991, p. D4. Since then, Graydon Nicholas has been appointed to the Provincial Court in New Brunswick. There are no federally-appointed Aboriginal judges.
- <sup>60</sup> Note, for example, the study "Gender Equality in the Courts," *supra*, note 58, which cites inappropriate comments by male judges, discrimination against female lawyers and not enough women judges and law professors. . . . The study says there are many examples where judges view the law and the facts of a case from a distinctively male perspective and give decisions that are 'unjustifiable, outrageous, insulting and demeaning' to Canadian women.
- Vancouver Sun, 17 May 1991 at A10.
- The Minister of Justice herself acknowledges the lack of representativeness of the bench. In opposing a fifty-fifty split between male and female appointees to the bench, Ms. Campbell stated: "But there are other groups who are also underrepresented on the bench." The (Hamilton) Spectator, 13 June 1991 at A11.
- <sup>61</sup> *Supra*, note 27 at 29.
- <sup>62</sup> For example, this is the case at the Provincial Court of Alberta sittings at Grande Cache, where Judge Michael Porter initiated the practice of using Aboriginal Elders as lay assessors to assist him with sentencing in the summer of 1990, a practice continued by his successor, Judge Sandra Hamilton. (Telephone conversations with Judge Porter, 5 and 6 February 1991 and courthouse official in Hinton, Alberta, 20 June 1991). Similarly, at sittings of the Provincial Court at Sandy Lake in northern

Ontario, the judge is assisted by three Elders who investigate the background of the accused, make recommendations to the court regarding sentencing and oversee probation. (Telephone conversation with Assistant Crown Attorney Rupert Ross, 19 April 1991).

- <sup>63</sup> In England, the use of specialists or experts sitting with judges is well-established, notably in Admiralty courts and other specialized tribunals. See R.M. Jackson, *The Machinery of Justice in England*, 7th ed. (Cambridge: Cambridge University Press, 1977) at 88 *et seq.* A more recent and more relevant use of assessors, for our purposes, is set out in the *Race Relations Act* 1968, 16-17 Eliz. II, ch. 71, at ss. 19(7), which states:
- In any [civil proceedings brought before the Race Relations Board] in England and Wales the judge shall be assisted by two assessors appointed from a list of persons prepared and maintained by the Lord Chancellor, being persons appearing to the Lord Chancellor to have special knowledge and experience of problems connected with race and community relations.
- <sup>64</sup> The obstacle may come from the Elders themselves, who, it has been suggested, may not wish to participate in the enforcement of the non-Aboriginal criminal justice system. (Opinion expressed by Elder Joan Lavallee, LRCC Consultation on Aboriginal Criminal Justice Issues, Edmonton, Alberta, 18-19 March 1991).
- <sup>65</sup> R. Ross, "Cultural Blindness and the Justice System in Remote Native Communities", unpublished paper prepared for delivery at the "Sharing Common Ground" Conference on Aboriginal Policing Services, Edmonton, Alberta, May 1990 at 9-10.
- <sup>66</sup> See *R. v. Urton*, [1974] 5 W.W.R. 476 (Sask. C.A.) (appeal court expressly disapproved of trial judge having adjourned sentencing "primarily to enable [her] to assess the conduct of Urton following conviction" which assessment "would be a primary factor in her determination of the appropriate sentence.") (At 477). See also *R. v. Shea*, (1980), 42 N.S.R. (2d) 218 (N.S.S.C.A.D.) (appeal court held deferral of sentencing so accused could bring his drug habit under control was error in the exercise of the trial judge's discretion, and was wrong in law). The Ontario Court of Appeal found that judges have discretion to postpone sentencing so long as this is not done for illegal purposes, the definition of which must "be determined largely by policy considerations as applied to the facts of each case." *R. v. Nunner* (1976), 30 C.C.C. (2d) 199 at 205.
- <sup>67</sup> Anecdotal evidence exists of judges with a large caseload of Aboriginal offenders who make use of delayed sentencing to the satisfaction of all concerned. The practice is also referred to approvingly in *Indians and the Law*, *supra*, note 8 at 40:
- The field staff encountered several magistrates who are attempting to better serve the need of the Indian people by use of remand procedures; Indian offenders appearing before them are remanded on their own recognizance for sentence at a later date. This allows for the accused to return to the community and re-establish himself in employment or obtain the services of other community agencies. The subsequent sentence is dependent upon the steps the accused has taken to get himself straightened out.
- <sup>68</sup> See *R. v. J.A.P.*, unpublished decision of the Yukon Territorial Court, 28 May 1991 at 11. The Chairman of the National Parole Board recently cited 1989 statistics which show that Canada incarcerates 106 of every 100,000 people, second only (in the western world) to the United States, at 413. Compare this to the United Kingdom's 97.4 and The Netherlands' 40. The Times-Transcript (Moncton), 29 July 1991 at 16. Note that in referring to a 1986 survey by Correctional Service Canada, the Canadian Sentencing Commission stated: "In Canada, we use our most severe punishment — imprisonment — more than most other western countries." *Sentencing Reform*, *supra*, note 53 at 52.

<sup>69</sup> The term "available" brings up the question not only of what alternatives currently exist but also, what other alternatives the system can offer. The latter issue is often painted as an issue of resource allocation. Lack of resources is a reason (excuse?) often cited for not instituting a new program.

While it is true that all recommendations for new or expanded sentencing alternatives require both capital and human resources, so do all the existing ones. Channelling funding towards programs which respond to Aboriginal needs arguably is not *more* costly than current programs which are obviously not working.

Statistics and studies repeatedly show that Canadian prisons are a failure for Aboriginal people. What is needed in order for other programs to work is not new capital, but the political will to re-direct existing resources in creative and promising directions. As the Gitksan and Wet'suwet'en people point out in their funding proposal for an alternative dispute resolution program:

the problems that western justice systems have with Aboriginal people have been vividly recounted in a number of enquiries across Canada, any one of which cost more than [their alternative dispute resolution] project.

As cited in M. Jackson, "In Search of Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities" (1992) 26 U.B.C. L. Rev. 147 at 207.

<sup>70</sup> See N. Morris and M. Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (New York: Oxford University Press, 1990) which criticizes the so-called "soft options."

<sup>71</sup> The Native offender is less likely to receive probation or a pre-sentence report, whether sentenced in a rural or urban area. Facilities are not as available in rural areas, where most Natives live, and the differential in urban areas partly may be explained by the less serious nature of charges against Native persons.

D. Schmeiser, *The Native Offender and the Law* (Study Paper prepared for the Law Reform Commission of Canada) (1974) at 82.

<sup>72</sup> Such training, at all stages of the criminal justice system, should be ongoing and not just a one-shot deal.

<sup>73</sup> Telephone conversation with communications officer, Ontario Ministry of Correctional Services, 21 June 1991. Over a decade earlier, the Progress Report on Government Action Taken Since the 1975 Federal-Provincial Conference on Native Peoples and the Criminal Justice System (28 January 1979; prepared for the Ontario Native Council on Justice) reported that the Ministry employed 23 Assistants to Probation Officers who lived in Aboriginal communities and acted as friend and counsellor to probationers and parolees.

<sup>74</sup> The Canadian Sentencing Commission, in discussing community sanctions, supported the notion of victim-offender reconciliation programs. (*Sentencing Reform, supra*, note 53 at 352). Note that this option may be applied either as a form of diversion (i.e. prior to trial or even to charges being laid), or prior to sentence being pronounced.

<sup>75</sup> R. Ross, *supra*, note 65 at 15-16.

<sup>76</sup> Law Reform Commission of Canada, *Fines* (Working Paper No. 6) at 32. The Canadian Sentencing Commission, noting the unequal impact of identical fines on persons of unequal means, stated:

Inherent in proposals to equalize the impact of fines is a recognition that some offenders, *such as native offenders* and female offenders, are seriously handicapped in their ability to pay fines because of their relative poverty. [emphasis added] *Sentencing Reform, supra*, note 53 at 376.

A study of the problems facing four Aboriginal communities in northern Ontario

reported that almost half of all Ontario Aboriginal persons admitted to prison are admitted for fine default. The authors stated the following:

While it could be argued that many people with means to pay, chose to go jail instead of paying and that it is improper to assume that committal warrants are evidence of poverty, in the case of First Nations people in Northern Ontario who are largely outside the wage economy, such an assumption is clearly more justifiable.

*Osnaburgh/Windigo Report, supra*, note 10 at 63, note 37.

- 77 B. Archibald, "Sentencing and Visible Minorities: Equality and Affirmative Action in the Criminal Justice System" (1989), 12 Dalhousie L.J. 377 at 398. See the corresponding footnote for case references.
- 78 (1990), 1 O.R.(3d) 62 (Ont. Ct. (Gen. Div.)).
- 79 *Ibid.* at 67.
- 80 *Ibid.* at 68.
- 81 *Joint Canada-Saskatchewan-FSIN Study of Certain Aspects of the Justice System as They Relate to Indians in Saskatchewan*, April, 1985, Vol. IV, Executive Summary, Report of the Steering Committee for the Corrections Working Group at 5.
- 82 *Supra*, note 77 at 398.
- 83 See *R. v. Hebb* (1989), 89 N.S.R. (2d) 137 (S.C.), where the Nova Scotia Supreme Court held that the court must consider the accused's ability to pay prior to imposing imprisonment in default of the payment of a fine.
- 84 For instance, in Sweden, a day-fine is 1/1,000 of the offender's annual gross income. So a sentence of twenty day-fines for a person with a gross income of \$5,000 would be \$100, while a person with a gross income of \$50,000 who received the same fine would have to pay \$1,000. See *Fines, supra*, note 76 at 34 and 43 *et seq.*
- 85 *Sentencing Reform, supra*, note 53 at 378-79.
- 86 The Cawsey Task Force, *supra*, note 18, recommended that "alternatives to incarceration for fine default be explored specifically for poor Aboriginal offenders, and most specifically for female Aboriginal offenders." (Rec. 4.25)
- 87 Discussion with Rupert Ross, Assistant Crown Attorney, Kenora, Ontario on 19 April 1991.
- 88 *Taking Responsibility, supra*, note 54 at 79.
- 89 *Law Reform Commission of Canada, Guidelines—Dispositions and Sentences in the Criminal Process* (Report No. 2) (1976) at 23-24.
- 90 For a more detailed discussion of this phenomenon, see *Sentencing Reform, supra*, note 53 at 367-371.
- 91 "Sentencing Patterns and Sentencing Options Relating to Aboriginal Offenders," G.S. Clark and Associates Ltd. for the Research and Development Directorate, Department of Justice, Canada, June 1989 at 77.
- 92 *Ibid.* at 77-78.
- 93 One 1979 study cited in the Ekstedt and Jackson report estimated that the relative costs were \$2.35 versus \$50 a day in Ontario.
- 94 *Supra*, note 77 at 400 (footnotes omitted).
- 95 R.S.C. 1985, c. Y-1.
- 96 Section 24.1.
- 97 For a detailed description of a British pilot project using electronic monitoring in lieu of remand in custody, see G. Mair and C. Nee, "Electronic Monitoring: The Trials and Their Results", Home Office Research Study No. 120, 1990.



- In keeping with our earlier observation that the options being discussed are really alternative forms of custody rather than alternatives to custody, defendants who participated in this pilot project "saw it as restrictive and closer to custody than bail with other conditions. . . ." This said, they almost all preferred it to custody. *Ibid.* at 65.
- <sup>98</sup> For a brief discussion of the American experience, see C. Griffiths and S. Verdun-Jones, *Canadian Criminal Justice* (Toronto: Butterworths Canada, 1989) at 474-479. The authors refer to the concern expressed over "net-widening" as well as the legal and ethical concerns (e.g. possible violation of citizens' rights under *Charter* or U.S. Constitution) which electronic monitoring raises.
- <sup>99</sup> *Sentencing Reform, supra*, note 53 at 366.
- <sup>100</sup> Griffiths and Verdun-Jones, *supra*, note 98 at 474. The Canadian Bar Association Committee on Imprisonment and Release, in recommendations arising out of the B.C. experiment, supported in principle the use of electronic monitoring and encouraged the use of such orders as alternatives to incarceration for bail and probation. These recommendations were endorsed by the Standing Committee on Justice and Solicitor General in *Taking Responsibility, supra*, note 54 at 118 *et seq.*
- <sup>101</sup> The British study found that "friction between members of the family when one is undergoing electronic monitoring may be a potentially serious consequence of the system. . . .": "Electronic Monitoring: The Trials and Their Results," *supra*, note 97 at 57.
- <sup>102</sup> *Taking Responsibility, supra*, note 54 at 119.
- <sup>103</sup> Toronto consultation, 25-26 March 1991.
- <sup>104</sup> This is certainly the implication of the discussion in the *Final Report: APFC, supra*, note 10 at 23-25.
- <sup>105</sup> The Ottawa Citizen, 9 March 1991 at B3.
- <sup>106</sup> Telephone conversation with employee of Ontario Ministry of Correctional Services, Communications Branch, 25 June 1991.
- <sup>107</sup> *R. v. Daniels*, [1990] 4 C.N.L.R. 51 (Sask. Q.B.).
- <sup>108</sup> *R. v. Daniels*, [1991] 5 W.W.R. 340 (Sask. C.A.).
- <sup>109</sup> This was recommended in *Creating Choices—The Report of the Task Force on Federally Sentenced Women*, Correctional Service Canada, April 1990 at 120, at the suggestion of the Aboriginal women on the Task Force. On 16 December 1991, Solicitor-General Doug Lewis announced that a healing lodge for Aboriginal women prisoners would be built in Saskatchewan (*Globe and Mail*, 17 December 1991 at A4).
- <sup>110</sup> *Ibid.* at 135.
- <sup>111</sup> *Taking Responsibility, supra*, note 54 at 214.
- <sup>112</sup> *Ibid.*
- <sup>113</sup> Although the same information is made available to all offenders, consultations revealed that Aboriginal offenders often fail to understand . . . the intricacies of the correctional and parole process. This comment probably applies to many offenders, but Aboriginal offenders often will not attempt to seek clarification from the administration because of lack of trust or difficulty in communicating. *Final Report: APFC, supra*, note 10 at 66.
- <sup>114</sup> See reasons of Wilson J. in *Socit des acadiens du Nouveau-Brunswick v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549.

- 115 Reference to this video is found in the transcript of *Sharing Our Future: A Conference of Aboriginal Leaders and Correctional Service Managers*, Kananaskis, Alberta, 11-13 February 1991 (Ottawa: Correctional Service of Canada, 1991) ["Kananaskis"], remarks made in Group 4.
- 116 *Final Report: APFC, supra*, note 10 at 39.
- 117 *Ibid.* at 40 (Recommendations 8.1 and 9.1).
- 118 *Task Force on Aboriginal People in Federal Corrections, Year-End Implementation Report, 1990-91* [unpublished].
- 119 Three of the four groups which addressed this issue called for recruitment of more Aboriginal workers by CSC (Groups 5, 6 and 9).
- 120 *Kananaskis, supra*, note 115, Group 1, para. 16.
- 121 Minutes of Proceedings and Evidence of the Standing Committee on Justice and the Solicitor General, Evidence of Mr. Donald Worme, President, Indigenous Bar Association, 18 December 1990 at 57-22.
- 122 *Final Report: APFC, supra*, note 10 at 69.
- 123 *Ibid.* at 69-70.
- 124 W. Warry, The Ontario Native Council on Justice, "Breaking the Cycle—A Report on the Native Inmate Liquor Offender Project" (October 1986) at 66.
- 125 This and the information which follows is taken from the *Task Force on Aboriginal Peoples in Federal Corrections, Year-End Implementation Report, supra*, note 118.
- 126 *Ibid.*
- 127 Life skills programs vary according to the needs of the client group. They may teach how to access resources they may require (e.g. . . . social assistance, government benefits, education and training programs, etc). They may teach clients how to manage money wisely, and how to eat nutritiously. In addition, and most important, they help clients build self-esteem and develop assertiveness.  
*Taking Responsibility, supra*, note 54 at 107.
- 128 *Final Report: APFC, supra*, note 10 at 78.
- 129 *Ibid.*, Recommendation 46.1.
- 130 Métis and Non-Status Indian Crime and Justice Commission Report, Harry Daniels, Commissioner, 1977 at 56.
- 131 *Ibid.* at 56-59.
- 132 Both Native Brotherhoods/Sisterhoods and Native spirituality are allowed to function within the correctional system (in fact there are Commissioner's Directives in support of this), but they are looked upon with cynicism and disdain in some circles.  
*Taking Responsibility, supra*, note 54 at 214.
- 133 B. Morse and L. Lock, Native Offenders' Perceptions of the Criminal Justice System (Ottawa: Department of Justice Canada; Policy, Programs and Research Branch, 1988) at 75. The author has been informed by the prison administration, however, that a Native Awareness Group run by Aboriginal inmates does operate at Saskatchewan Penitentiary. (Telephone conversation, 8 August 1991).
- 134 Presentation of Richard Harvey Yellow Bird, President, Drumheller Native Brotherhood, at Kananaskis, *supra*, note 115.
- 135 *Taking Responsibility, supra*, note 54, Recommendation 72 at 214.
- 136 *Supra*, note 118.
- 137 Directors of institutions with native inmates shall ensure that, within the boundaries of institutional safety, security and good order, native spiritual programs are

offered and that these programs, including those using traditional articles, respect native traditions. . . .

The Director, following consultation with the Regional Council of Elders, shall appoint one or more elders who shall be responsible for conducting native spiritual practices in the institution.

Commissioner's Directive No. 702, 1 January 1987, Correctional Service Canada, paras. 7 and 11.

<sup>138</sup> *Final Report: APFC, supra*, note 10, Recommendations 20.1 and 21.1 at 52.

<sup>139</sup> The Committee recommends that Native spirituality be accorded the same recognition and respect as other religious denominations and that Native Elders be accorded the same treatment as other religious leaders.

*Taking Responsibility, supra*, note 54, Recommendation 73 at 214.

<sup>140</sup> *Supra*, note 118.

<sup>141</sup> Remarks of Richard Harvey Yellow Bird at Kananaskis, *supra*, note 115 at 9.

<sup>142</sup> *Final Report: APFC, supra*, note 10 at 27.

<sup>143</sup> The Daubney Committee report supports this view:

Native inmates often waive their right to apply for early release or when they do apply for such early release, it is granted to them at a later point in their sentence. It appears that Native inmates are often not as familiar with release preparation processes and the conditional release system as other inmates.

*Taking Responsibility, supra*, note 54 at 214.

<sup>144</sup> For example, using employment prospects as a criterion for parole inevitably discriminates against Aboriginal people who often come from communities with high unemployment rates. See, e.g., "The Mi'kmaq and Criminal Justice in Nova Scotia", research study for the Royal Commission on the Donald Marshall, Jr., Prosecution, 1989, at 44, where it is noted that "with chronic unemployment rates of over 50 per cent [the] question 'prospects for employment' is thus automatically loaded against the Micmacs' interests."

<sup>145</sup> The [Feb. 28, 1990 Evaluation of the Detention Provisions of Bill C-67] indicates that the discretion of the case management officer . . . in determining the likelihood of future serious harm is likely to have a significant influence on the [National Parole Board]'s decision [re whether to detain an offender as dangerous]. This also raises questions, given that so few CSC personnel are aboriginal and studies have shown that cultural factors are likely to play an important role in forming an impression about someone.

*Supra*, note 121 at 57-18.

<sup>146</sup> A 1986 study prepared for the Solicitor General of Canada found that Aboriginal penitentiary inmates had the worst total release supervision success rate (defined as "% of released inmates who successfully complete their supervision period without readmission to penitentiary") — 55.9%. White inmates had a 66.2% success rate, while inmates of other races had a 74.2% success rate. W. Harman and R. Hann, "Release Risk Assessment: An Historical Descriptive Analysis", User Report No. 1986-32, at 2-9 and 4-4. Note that this statistic does not appear to differentiate between those whose parole is revoked due to breach of a parole condition and those who reoffend while on parole.

<sup>147</sup> *Final Report: APFC, supra*, note 10 at 31.

<sup>148</sup> *Taking Responsibility, supra*, note 54 at 215. This view was also expressed by participants at the LRCC consultations.

<sup>149</sup> *Final Report: APFC, supra*, note 10 at 29.

- <sup>150</sup> *Ibid.* at 47.
- <sup>151</sup> *Final Report: APFC, supra*, note 10, Recommendations 17.1-17.3 at 47.
- <sup>152</sup> Transcript of remarks of its Executive Director, Carola Cunningham, at Kananaskis, *supra*, note 115, 12 February 1991.
- <sup>153</sup> *Ibid.*
- <sup>154</sup> *Final Report: APFC, supra*, note 10, Recommendation 37 at 68.
- <sup>155</sup> All the following statistics are taken from *Unfinished Business: An Agenda for All Canadians in the 1990's — Second Report of the Standing Committee on Aboriginal Affairs*, March 1990, Appendix C and footnotes thereto.
- <sup>156</sup> Includes income from federal, provincial or municipal programs such as family allowance, unemployment and cash welfare.
- <sup>157</sup> Includes those of Aboriginal origin only as well as those of mixed Aboriginal/non-Aboriginal origin. The figures are derived from Statistics Canada, 1986 Census of Canada, Aboriginal Peoples Output Program ("APOPOP"), Table 1.1 for each province and territory respectively.
- <sup>158</sup> ACS, Tables 18 and 42 (average of 1985-86 and 1986-87 figures).
- <sup>159</sup> These figures, rounded to the nearest half, express the Aboriginal prison population as a multiple of the Aboriginal population in each province or territory cited.
- <sup>160</sup> ACS, Tables 18 and 42.