Locking Up Natives in Canada

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I. THE NATURE AND MEASURE OF THE PROBLEM

Statistics about crime are often not well understood by the public and are subject to variable interpretation by the experts. In the case of the statistics regarding the impact of the criminal justice system on native people the figures are so stark and appalling that the magnitude of the problem can be neither misunderstood nor interpreted away. Native people come into contact with Canada's correctional system in numbers grossly disproportionate to their representation in the community. More than any other group in Canada they are subject to the damaging impacts of the criminal justice system's heaviest sanctions. Government figures — which reflect different definitions of "native" and which probably underestimate the number of prisoners who consider themselves native — show that almost 10% of the federal penitentiary population is native (including about 13% of the federal women's prisoner population) compared to about 2% of the population nationally. In the west and northern parts of Canada where there are relatively high concentrations of native communities, the over-representation is more dramatic. In the Prairie region, natives make up about 5% of the total population but 32% of the penitentiary population and in the Pacific region native prisoners constitute about 12% of the penitentiary population while less than 5% of the region's general population is of native ancestry. Even more disturbing, the disproportionality is growing. In 1965 some 22% of the prisoners in Stony Mountain Penitentiary were native; in 1984 this proportion was 33%. It is realistic to expect that

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absent radical change, the problem will intensify due to the higher birth rate in native communities.

Bad as this situation is within the federal system, it is even worse in a number of the western provincial correctional systems. In B.C. and Alberta, native people, representing 3-5% of the provinces' population, constitute 16% and 17% of the admissions to prison. In Manitoba and Saskatchewan native people, representing 6-7% of the population, constitute 46% and 60% of prison admissions. A study reviewing admissions to Saskatchewan's correctional system in 1976-77 appropriately titled "Locking Up Indians in Saskatchewan", contains findings that should shock the conscience of everyone in Canada. In comparison to male non-natives, male treaty Indians were 25 times more likely to be admitted to a provincial correctional centre while non-status Indians or Métis were 8 times more likely to be admitted. If only the population over fifteen years of age is considered (the population eligible to be admitted to provincial correctional centres in Saskatchewan), then male treaty Indians were 37 times more likely to be admitted, while male non-status Indians were 12 times more likely to be admitted. For women the figures are even more extreme: a treaty Indian woman was 131 times more likely to be admitted and a non-status or Métis woman 28 times more likely than a non-native.

The Saskatchewan study brings home the implications of its findings by indicating that a treaty Indian boy turning 16 in 1976 had a 70% chance of at least one stay in prison by the age of 25 (that age range being the one with the highest risk of imprisonment). The corresponding figure for non-status or Métis was 34%. For a non-native Saskatchewan boy the figure was 8%. Put another way, this means that in Saskatchewan, prison has become for young native men, the promise of a just society which high school and college represent for the rest of us. Placed in an historical context, the prison has become for many young native people the contemporary equivalent of what the Indian residential school represented for their parents.

The disproportionate number of native people in prison is not limited to Canada. The Australian Law Reform Commission in its 1986

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Report, *The Recognition of Aboriginal Customary Laws*,\(^4\) provides this summary of the comparable Australian statistics:

> [I]n Western Australia in 1965, Aborigines, who constituted 2.5% of the State's population, were convicted of 11% of offences and made up 24% of the prison population. In South Australia in the same year, Aborigines (0.7% of the population) accounted for 14% of the admissions to prison. This over-representation... was not only the result of different patterns of criminality, but of differences in arrest, prosecution and sentencing practices. Although the distribution of offences has changed since the 1960s, the overall situation remains similar. National Prison Census figures for 1984 indicate that Aborigines, while less than 2% of the Australian population, comprise approximately 10.5% of the prison population. The rate of imprisonment of Aborigines is over 16 times that of non-Aborigines.\(^5\)

Commenting on the Australian figures the then Director of the Australian Institute of Criminology said:

> These are dramatic rates of imprisonment by any standards and for any community. Just to quote them is to question their justification. You have to believe either that Aboriginals are the most criminal of minorities in the world or that there is something inherently wrong with a system which uses imprisonment so liberally.\(^6\)

The Australian Law Reform Commission, in considering the implications of the statistics for its terms of reference, concluded that:

> The disproportionate representation of Aborigines at all levels of the Australian criminal justice system will not be avoided by providing greater discretions or setting out new rules for judges and magistrates in sentencing Aboriginal offenders. The primary reasons for this disproportionate representation lie outside the criminal justice system. But this is not to say that improvements cannot be made. Some limited impact can be made if action is taken at all levels (the police, the courts and the prisons).\(^7\)

The conclusion that the heart of the problem lies outside the criminal justice system is one that many other commentators have drawn. The root causes are usually attributed to the social and economic conditions within which native people grow up and live. Cast in this way the problem is seen primarily as an economic one. Native

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\(^5\) *Ibid.*, vol. 1 at 280.


\(^7\) *Supra*, note 4, vol. 1 at 392.
people are disproportionately impoverished and their over-representation in the criminal justice system is a particular example of the well-known correlation between economic deprivation and criminality. There is no doubt that poverty is a factor in the over-representation of native people in prisons; for example, one of the most common reasons for imprisonment for a native person is the non-payment of a fine. However, attributing the problem to poverty itself is not a sufficient explanation. Poverty itself is a product of a particular historical process which has affected native communities and the real fundamental solutions lie in the reversal of that process.

An understanding of this process is also important to place in context one other commonly voiced explanation for the over-representation of native people in prisons. Almost every study that has been done notes the high rate of alcohol related offences in which native people are involved. Put at its baldest, there is an equation of being drunk, Indian and in prison. Like many stereotypes, this one has a dark underside. It reflects a view of native people as uncivilized and without a coherent social or moral order. The stereotype prevents us from seeing native people as equals. The fact that the stereotypical view of native people is no longer reflected in official government policy does not negate its power in the popular imagination and its influence in shaping decisions of the police, prosecutors, judges and prison officials.

What links these views of native criminality as caused by poverty or alcohol is the historical process which native people have experienced in Canada, along with indigenous people in other parts of the world — the process of colonization. In the Canadian context that process, with the advance first of the agricultural and then the industrial frontier, has left native people in most parts of the country dispossessed of all but the remnants of what was once their homelands; that process, superintended by missionaries and Indian agents armed with the power of the law, took such extreme forms as criminalizing central Indian institutions such as the potlatch and sun dance, and systematically undermined the foundations of many native communities. The native people of Canada have, over the course of the last two centuries, been moved to the margins of their own territories and of our ‘just’ society.

This process of dispossession and marginalization has carried with it enormous costs of which crime and alcoholism are but two items on a long list. The rest of the list makes for grim reading. The infant mortality rate among Indian children is 60% higher than the national rate. Indian children who survive their first year of life can
expect to live ten years less than non-Indian Canadians. The rate of violent death among Indian people is more than three times the national average. Rates of suicide, especially among young people, are six times the national rate. The likelihood of Indian children being taken out of their family and community and placed under the care of a child welfare agency is five times higher than for non-Indian children.⁸

The relationship between these indices of disorganization and deprivation and Canada's historical relationship with native people has been the subject of intense scrutiny in the last decade. In the mid-1970s the Mackenzie Valley Pipeline Inquiry⁹ focused national attention on the implications for the native people of the North on a rapid escalation of large scale industrial development. Mr. Justice Berger (as he then was) in assessing the causes for the alarming rise in the incidence of alcoholism, crime, violence and welfare dependence in the North had this to say:

I am persuaded that the incidence of these disorders is closely bound up with the rapid expansion of the industrial system and with its persistent intrusion into every part of the native people's lives. The process affects the complex links between native people and their past, their culturally preferred economic life, and their individual, familial and political self-respect. We should not be surprised to learn that the economic forces that have broken these vital links, and that are unresponsive to the distress of those who have been hurt, should lead to serious disorders. Crimes of violence can, to some extent, be seen as expressions of frustration, confusion and indignation, but we can go beyond that interpretation to the obvious connection between crimes of violence and the change the South has, in recent years, brought to the native people of the North. With that obvious connection, we can affirm one simple proposition: the more the industrial frontier displaces the homeland in the North, the worse the incidence of crime and violence will be.¹⁰

Important implications flow from this analysis.

The idea that new programs, more planning and an increase in social service personnel will solve these problems misconstrues their real nature and cause. The high rates of social and personal breakdown in the North are, in good measure, the responses of individual and

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¹⁰ Ibid., vol. 1 at 152.
families who have suffered the loss of meaning in their lives and control over their destiny.\textsuperscript{11}

The principal recommendations which came from the Mackenzie Valley Pipeline Inquiry were that the native people of the North must have the right to control that destiny—the right to self-determination—recognized and that there must be a settlement of native claims in which that right is entrenched as a lodestar. Only then could native people chart a future reflecting their values and priorities rather than living under the shadow of ours.

The critical and central importance of recognizing native peoples’ right to self-determination has been indelibly confirmed by the Special Committee of the House of Commons on Indian Self-Government in its 1983 Report, \textit{Indian Self-Government in Canada} (The Penner Report).\textsuperscript{12} The Special Committee heard from representatives of Indian nations and communities across the country. A common theme of the representations was that jurisdiction in such areas as education, child welfare and health had to be restored to Indian nations. The Special Committee endorsed the native peoples’ call for constitutional recognition of the right to self-determination as an essential first step in helping them rebuild their strength and autonomy as distinct peoples within Canadian Confederation.

Since the Special Committee’s Report, a series of constitutional conferences between First Ministers and the Native Peoples of Canada has focused principally on this issue of entrenchment of native self-determination. The last conference held in March 1987 failed to result in a federal-provincial accord.

Anyone listening to the speeches of federal and provincial politicians at these conferences might be led to believe that the concept of self-determination is both complex and abstract. Complex it is but abstract it is not. The implication of a continuing failure by the federal and provincial governments to give constitutional and legal muscle to native self-determination is that the harsh reality underlying the official statistics regarding the condition and situation of native people will continue and get worse. Lawyers have a particular responsibility to point out these implications and to call upon governments to respond to the challenge they present. As members of the Bar we see the people that lie behind the statistics. We see them in the courts and prisons of this country and are witnesses to the con-

\textsuperscript{11} \textit{Ibid.}, vol. 1 at 194.
\textsuperscript{12} \textit{Supra}, note 8.
continuing injustice towards them which we as a society practice in the name, paradoxically, of a criminal justice system.

What can we as lawyers do beyond exhorting federal and provincial politicians to complete the unfinished constitutional business with Canada's native peoples? There is much else that can and must be done. The reaching of a constitutional accord which entrenches the right to self-determination, while it will represent a moment of great legal, historical and symbolic importance, will not by and of itself be a panacea. The implementation of a right to self-determination will be complex. The Penner Report gives some indication of the scope of this complexity in two of its essential recommendations.

20. The Committee agrees that full legislative and policy-making powers on matters affecting Indian people, and full control over the territory and resources within the boundaries of Indian lands, should be among the powers of Indian First Nations governments.

21. The Committee therefore recommends that the Indian First Nation governments exercise powers over a wide range of subject matters. The exact scope of jurisdiction should be decided by negotiation with designated representatives of Indian First Nations. A First Nation government should have authority to legislate in such areas as social and cultural development, including education and family relations, law and resource use, revenue-raising economic and commercial development, and justice and law enforcement, among others. First Nation governments may also wish to make arrangements with the federal and/or provincial governments to continue existing programs or services.  

The Penner Report recognized that not only the scope but the manner in which an Indian jurisdiction would be exercised would differ to accommodate the diversity of Indian First Nations. Thus, in the important area of law enforcement, the Committee noted the different approaches advocated by Indian representatives. The Ontario Indian Police Association stressed the importance of Indian police and made detailed suggestions for establishing such a system.

The full task of protecting the Indian public should be entrusted to the Indian people. Our heritage has been built on a foundation of moral policy manifested in community laws adapted to our particular needs. We should cultivate an Indian court system that would strengthen these moral foundations by enforcing the Indian and the Canadian law for our people. Proper Indian policing needs full support from such a court.  

13 *Ibid.* at 64.

On the other hand, the Federation of Saskatchewan Indian nations did not see the need for a separate force.

We would rather see the approach taken whereby we expand on the present force, the RCMP and just cross-deputize their powers to police under Indian jurisdiction and enforce Indian law when they are on Indian territory. When they are off Indian territory they can continue the practice that they are most familiar with of enforcing provincial-federal law.15

As the Penner Report concluded, these suggestions illustrate the need for varied, flexible arrangements across the country and for agreements to ensure a workable sharing of power and responsibility.

The balance of this paper will explore some of the primary questions for the criminal justice system posed by implementing native self-determination. Also considered are the experience in other countries and the spectrum of reform measures which have been advanced by Indian organizations, criminal justice professionals and government bodies to address or alleviate the abuses and deficiencies of the existing system.

II. NATIVE JUSTICE SYSTEMS — EXPLORING THE ALTERNATIVES

A. THE RELEVANCE OF COMPARATIVE EXPERIENCE

The issues and challenges which arise in the context of the criminal justice system and native peoples are ones which other countries have had to confront. Indeed, in this area we can draw from a relative wealth of comparative experience. The Australian Law Reform Commission undertook a major study, which resulted, after almost a decade of hearings and research, in a two volume Report, The Recognition of Aboriginal Customary Laws.16 This Report represents the most comprehensive review undertaken in any country of the problems associated with indigenous people and an imposed criminal justice system. A review of the Commission’s terms of reference and the issues these terms raised is a useful introduction to the range of problems which confronts us in Canada. The Commission’s terms of reference refer to the “difficulties that have at times emerged in the application of the existing criminal justice system to members of the Aborigine race” and require the Commission to investigate, among other things:

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15 Ibid.
16 Supra, note 4.
(a) whether existing courts [dealing with criminal charges against Aborigines] should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines; and

(b) to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines.\(^\text{17}\)

In addressing the second limb of its terms of reference, the Australian Law Reform Commission took the position that this had to be considered against a background of:

debate over, and selective experiments with, existing legal institutions in an attempt to achieve such goals as

- greater use of mediation, conciliation and informal settlement;
- reduction in cost and formality;
- more responsive decision-making in specialised contexts;
- better control of law and order problems, in the light of the defects of existing structures for social control;
- reduction in the number of Aborigines coming into contact with the criminal justice system;
- reduction in the number of Aborigines in Australian gaols; and
- suggestions (from Aborigines and others) that encouragement of local justice mechanisms is a key to the recognition of, or respect for, the local customary law and traditions of Aboriginal groups.\(^\text{18}\)

In approaching the question of Aboriginal self-determination, the Commission had this to say:

If Aboriginal communities are to be given power to apply their customary laws and practices (whether defined broadly or narrowly), is this being done in order to return to Aborigines greater control over their daily lives, or is it rather an attempt to divest the general legal system of a problem it has been unable to resolve? Care is required to ensure that under the guise of saying ‘these are matters for Aborigines to resolve’, the shortcomings of the general legal system as it applies to Aborigines are not foisted onto Aboriginal communities. They may have neither the inclination nor the resources to take on this task. The primary answer is, no doubt, that nothing can be done without the general agreement of those Aborigines affected by a proposal. This is likely to mean that there will be no uniform response. . . .

The history of ‘recognition of indigenous law’, of recognising some indigenous capacity over law and order matters, in Australia and in other comparable jurisdictions, has largely been one of trying to estab-

\(^{17}\) Ibid., vol. 1 at 7.
\(^{18}\) Ibid., vol. 2 at 15.
lish formal 'courts' or other similar mechanisms, usually run by the indigenous people, to which authority could be transferred or which could be recognised. But if the aim is only to recognise local customary laws, then (in societies lacking courts or similar agencies and relying on less formal, less centralised procedures based on kinship and locally-recognized power) attempts to 'find' or 'erect' official machinery are misconceived. Such attempts might have some value if the aim were to 'indigenise' the existing criminal justice system, that is, to recruit Aborigines to perform some or all of the tasks of law-applying and law-enforcement as part of the general legal system. Equally, it would have some value if the aim were to confer a degree of autonomy on Aboriginal groups with respect to law and order matters. These last two aims are not necessarily consistent with each other. If 'indigenisation' were the aim then the existing legislative structure would be taken for granted, with emphasis being placed instead on finding suitable roles (new, existing or modified) which Aborigines may fill within it. If autonomy were the aim, then the focus would be on the scope of autonomy and on identifying the relevant unit of government. Such an exercise, even if thought desirable by outsiders could not occur without the active support and initiative of the Aboriginal group concerned, and need not lead to the 'recognition' or 'application' of customary laws (though it may do so). Aboriginal groups may be more concerned with the kind of rules applied within their group, or with their administration and policing, than with their application by 'courts'. They would be at least as likely to propose new or hybrid solutions to their problems at the legislative or executive levels as to propose customary ones, in particular since many of these problems are perceived as new or introduced, and not necessarily to be resolved through the application of customary laws even in some modified form.

Clearly there are a number of different approaches in the field of 'law and order' in Aboriginal communities which might be taken. These include:

the recognition of local customary laws and of the authority of the group to apply customary law procedures and sanctions;

the conferral of autonomy in law and order matters (whether or not alongside other matters) on particular Aboriginal groups. This is likely to include both customary and non-customary matters, and would certainly involve a degree of control over outsiders;

the creation of Aboriginal courts to hear defined offences, whether customary or not, committed within an Aboriginal community;

the use of Aboriginal personnel (e.g. Aboriginal police, police aides, justices of the peace) in applying the general legal system to Aborigines.19

19 Ibid., vol. 2 at 16-7.
B. The Concept of Aboriginal Courts

As we can see from the foregoing discussion, an Aboriginal court system is only one of a range of alternatives suggested by the Commission but it is the one which has received the most attention by native groups in Canada. The following material reviews the relevant experience with systems of Aboriginal courts in other jurisdictions with a view to assessing whether these present appropriate models for Canada.

I. Indian Tribal Courts in the United States\(^{20}\)

There are three different types of Indian court systems in the United States: first, the traditional courts; secondly, the courts of Indian offences and thirdly, the tribal courts. The traditional or customary courts are the smallest group, numbering eighteen and operating among the Pueblos Indians of the American Southwest. The tribal Governor of the Pueblos performs judicial functions, enforcing laws based on long-standing tribal custom. The Pueblos have no written constitution or codes of offences and the customary law is handed down within the oral tradition. Considerable power is exercised by the Pueblos Council, composed of ex-Governors, which is responsible for appointing a Governor annually.

The second category of Indian courts are the Courts of Indian Offences, first established in 1883. Far from being an instrument of Indian self-determination, they were conceived as an adjunct to the process of cultural assimilation. The establishment of these Courts was part of the concerted effort to outlaw traditional cultural institutions, eliminate plural marriages, weaken the influence of the medicine men, promote law and order, civilize the Indians and teach them respect for private property by breaking up tribal land holdings into individual allotments. The initial plan was to develop these Courts of Indian Offences for every tribal government. Eventually they were established, at the direction of the Commissioner of Indian Affairs, in roughly two-thirds of all Indian agencies. The Courts were staffed by the local Indian Agent, who applied the law as defined by an abbreviated criminal and civil code drafted by the Commissioner. Customary law was ignored or outlawed as it represented a way of life that the Court was designed to destroy.

Currently, seventeen of these Courts still exist under the direct control of the Secretary of the Interior. The Bureau of Indian Affairs appoints all judges to four year terms, subject to the approval of the Tribal Council. Any adult member of the tribe can be appointed to the Bench so long as he or she has no felony conviction. No legal education or knowledge of customary law is required, although some universities and self-help organizations provide some formal training. The current Courts of Indian Offences apply all relevant federal law, rulings of the Department of the Interior and any tribal ordinances or customs that are not inconsistent with federal law. The Courts also apply the specific provisions of the *Code of Indian Tribal Offences* as established by the federal government.

The actual operation of many of these Courts has been the subject of considerable criticism. Since they rarely produce any written decisions, the case law has developed no precedents. Consequently, the parties lack certainty as to the result. Furthermore, political or familial considerations frequently enter into the decision-making process, calling into question the court's impartiality.

The third form of Indian court was the result of a change in federal Indian policy in the 1930s and restored a measure of autonomy to the tribes. The *Indian Reorganization Act* of 1934 authorized each tribe, if they so desired, to adopt their own constitution, to establish a tribal government, to define conditions of membership and to enact laws governing their internal matters. Many tribes responded by establishing their own tribal court systems to enforce their tribal codes and by-laws.

It is important to understand that this legislation was conceived against a legal backdrop in which the United States Supreme Court had, in the early days of American Confederation, acknowledged and affirmed legal concepts of tribal sovereignty. However, the *Indian Reorganization Act* envisaged that tribal governments and tribal court systems would be based upon western and not tribal conceptions of government and adjudication. The Bureau of Indian Affairs drafted model codes which contained both penal and civil sections. Most tribes, lacking the resources to evaluate critically these codes, simply adopted them without regard to whether they reflected traditional conceptions of offences or traditional conflict resolution pro-

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22 W. J. Lawrence, "Tribal Injustice: The Red Lake Court of Indian Offences" (1972) 48 North Dakota Law Rev. 639.
cesses. Because of the adoption of the model code many of the tribal courts have operated in similar fashion to the Courts of Indian Offences which apply the same code of offences.

In recent years, however, greater differences have emerged as many tribes, in pursuit of tribal self-determination and with the benefit of legal expertise, have redesigned their tribal codes. There are now substantial variations in the operation of different tribal courts; in some cases the tribes appoint their judges while others elect them; terms of office vary over a broad spectrum although two or four year terms are common. The quality of the judges, the prevalence of an appeal system, the applicable law, the extent of facilities and support staff, the ability to enforce court orders, the independence of the judiciary, the utilization of customary law, the availability of legally trained counsel and prosecution and the sophistication of the court system vary enormously from one tribal court to another.

The jurisdiction of the Tribal Courts and Courts of Indian Offences has been a contentious issue since the first recognition of Indian sovereignty by the U.S. Supreme Court, and the present jurisdictional problems are complex. Factors such as whether the persons involved are Indian or non-Indian, the nature of the offence and the location of the offence may determine whether tribal courts, state courts or federal courts have jurisdiction. These difficulties and uncertainties arise from both legislative encroachments on Indian sovereignty and conflicting decisions of the Supreme Court. The Federal Government in particular has significantly affected the scope of the tribal courts' criminal jurisdiction. In The Major Crimes Act of 1885, following a decision of the Supreme Court in Ex parte Crow Dog, which upheld the right of Indian tribal courts to hear offences between Indians on reservations, Congress specified seven (since extended to fourteen) major offences which were to be dealt with in federal court.

In 1953, in the first part of a federal initiative to terminate federal responsibility towards Indians, Congress transferred to five states civil and criminal jurisdiction over Indians. Their legislation had the effect of emasculating existing tribal courts in those states. More recently The Indian Civil Rights Act of 1968 has significantly affected tribal

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24 R. Hommingson, supra, note 20.
jurisdiction by prohibiting tribal courts and governments from violating certain enumerated civil liberties contained in the American Bill of Rights. The requirement that defendants in criminal cases be given the right of counsel and that trial by jury be available for any offence punishable by imprisonment have been particularly difficult for tribal courts to meet. The Act also restricts sentencing powers to a maximum of a $500 fine or six months imprisonment.

The combined effect of federal legislation and the Supreme Court decisions regarding criminal law jurisdiction can be broadly summarized in this way. Offences occurring off reservations will come within state or federal jurisdiction regardless of whether the offender is Indian or non-Indian. The principal exception to this rule is that where tribal fishing areas off reservations are recognized by treaties, tribal courts retain jurisdiction to prosecute their own members for breaches of any tribal fishing regulations. This is a particularly important head of tribal court jurisdiction in the states of Washington, Oregon and Michigan. For offences occurring on reservations, tribal courts have jurisdiction over Indian offenders with the following exceptions: the fourteen enumerated offences in The Major Crimes Act which come within federal jurisdiction and all offences where federal responsibility has been transferred to the states. Tribal courts have no jurisdiction over non-Indians even if there is an Indian victim.

The Australian Law Reform Commission in its review of the American tribal courts pointed to some criticisms of their operation. These include informality, which can lead to a lack of respect toward judges and court officials; the absence of due process requirements; the lack of trained personnel, although major efforts are being made to provide judges and officials with some legal training; the poor physical facilities prevailing in the courts; the insertion of tribal politics into the court system, including, in many cases, the selection of judges; the fact that the courts are modelled on the regular court system and apart from Indian personnel have nothing uniquely Indian about them; shortcomings in the tribal codes which do not cover all matters coming before the courts and have to be supplemented by state legislation; and the codes themselves which contain little of what might be called indigenous or traditional Indian law. The tribal courts' shortcomings and special needs are recognized not only by commentators but by Indian judges, tribal councils and organiza-

28 U.S. Const. Amend. I-X.
Tribal courts today face a monumental task. They must comply with the mandates imposed by the federal government, yet maintain the uniqueness and cultural relevance that makes them 'tribal courts' and not merely arms of the federal government operated by Indians in Indian country. Accomplishment of these goals depends, to a great extent, on the availability of adequate funding and relevant and pervasive training programs. In addition, tribes must address the need for separation of powers in those courts which are not traditional or customary, in order to assure procedural due process, fundamental fairness, stability and credibility. Moreover, tribes must demand, and other government entities, both within and outside the tribe, must give recognition to the judgments of tribal courts.21

The Australian Law Reform Commission referred to the comment of an Australian lawyer who had worked in one of the Indian courts which perhaps sums up the trade-offs which the tribal courts have had to make as the basis for exercising some measure of tribal sovereignty.

The justification that I see for the tribal courts that operate along similar lines to a European court under a written law and order code is that they are a visible aspect of the tribe’s sovereignty. Generally neither the procedures nor the substantive law have anything to do with traditional Indian law. The present move is largely toward tightening up the procedures through training to ensure due process. ‘Due process’ is used entirely in the Anglo sense. I believe that many of the judges and others who were involved in tribal government are aware that ‘due process’ may not reflect the Indian way of doing things but, especially following the Indian Civil Rights Act, it is seen as another imposed value (which may or may not be good) that must be observed if the right to run one’s own affairs is to be preserved.22

2. ABORIGINAL COURTS IN AUSTRALIA

Official responses to law and order in Aboriginal communities have generally been limited to the creation of special courts for Aborigines. These courts have not used existing Aboriginal authority structures, but have sought to adapt the model provided by the regular court system to allow for what was perceived as the special situation of

20 Supra, note 4 at 62-3.
31 Ibid. at 54.
32 Supra, note 4, vol. 2 at 64.
Aborigines. They have not necessarily been intended as concessions to Aboriginal communities. According to the Australian Law Reform Commission, one reason for their creation may have been the difficulty in obtaining convictions before the ordinary courts, where juries were often reluctant to convict. Aboriginal court systems have often been imposed on Aborigines with little consideration given to their views or to the effectiveness of their customary mechanisms.

Both Queensland and Western Australia still have systems of Aboriginal courts. While these operate in different ways, basically they involve the enforcement by Aboriginal personnel of a set of local by-laws. In Queensland, Aboriginal courts operate in fourteen Aboriginal trust areas (formerly reserves). The courts have criminal jurisdiction over breaches of local by-laws and over local disputes where there has been no breach of the general law. In exercising its powers, the court can take into account the usages and customs of the community. All Aborigines and non-Aborigines resident within the community with certain exceptions, for example, persons such as police officers and nurses who reside in the community by reason of their employment are within the jurisdiction of the court. The courts are constituted by two Aboriginal justices of the peace. Legislation passed in 1984 restricts the powers of the Aboriginal courts so they can no longer order imprisonment for breach of the by-laws and also requires that the procedures for and the enforcement of decisions of an Aboriginal court shall be the same as for other courts presided over by justices of the peace or magistrates. The intent behind this legislation is to require Aboriginal courts to operate with a great deal more formality than they have in the past.

The Australian Law Reform Commission, as part of its research, visited Aboriginal communities in order to view the Queensland courts and to examine court records. It concluded that in almost all cases the charges that came before the courts were based on four offences: being under the influence of alcohol, behaving in a disorderly manner, assault and gambling, with the majority of the offences falling within the first two categories. Appeals were rare because of difficulties of access to appellate courts and general ignorance of the right of appeal.

Some of the criticisms levelled at the Queensland Aboriginal court system are that the courts are inferior or second class institutions; the lack of real Aboriginal influence or control over the court; the court's inability, or failure, to take into account local customs and

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33 Community Services (Aborigines) Act, 1984, No. 51, 33 Eliz. II (Qld.).
traditions; and overarching all of these, the reality that the court system and the general reserve system of which it is a component are an imposition of alien structures and values. This last point has been expressed by one commentator in this way:

The Aboriginal court was ineffective primarily because it did not reflect the mores of the local community. The Queensland Government dictated the structure and content of the laws, which stigmatized behaviour that was acceptable to the reserve population under certain conditions, e.g.,...swearing in public.... The purpose of this imposition was to teach Aborigines European values and decorum, and to deter behaviour which Whites found offensive. The administration of justice at Yarrabah provided no such deterrence; it just caused economic hardship.3

Although the Commission pointed out that recent legislative changes in Queensland sought to address some of the criticisms, particularly in giving Aboriginal councils greater autonomy in drafting their own by-laws and in authorizing the court to exercise its jurisdiction having regard to the usages and customs of the community, it remains to be seen what these provisions would mean in practice.

Based upon the material presented by the Australian Law Reform Commission, it is difficult not to draw the conclusion that the Queensland court system bears the same imposed colonial imprint as the American Courts of Indian Offences. However, as the Commission pointed out, the Aboriginal courts have now been operating for over forty years and have, in most places, become part of community life and have created something of a buffer between the white world and the Aboriginal world.

The system of Aboriginal courts in Western Australia is of more recent vintage than that of Queensland. Its establishment stems largely from the efforts of one stipendary magistrate who had adopted a practice of inviting local elders to sit with him in the courtroom while Aboriginal defendants were being dealt with and discussing possible penalties with them. In 1977 he was asked by the Western Australian government to conduct an inquiry into aspects of Aboriginal law and to formulate plans to improve the understanding of the law by Aboriginal communities. As a result of that inquiry, a system of Aboriginal courts was introduced on an experimental basis in several communities and has since then been extended to others.

The *Aboriginal Communities Act, 1979* enables community councils to make by-laws covering a large range of matters, including entry to community lands, restrictions on alcohol, disorderly conduct and regulation of firearms. The by-laws apply to all persons, Aboriginal and non-Aboriginal, within the community lands. Penalties of a fine not exceeding $100 and imprisonment for a maximum of three months may be imposed for breaches of the by-laws. The Act does not create a special Aboriginal court: rather it envisages that the regular justice of the peace court be staffed by Aboriginal justices and Aboriginal court staff and that white magistrates would train the Aboriginal justices of the peace who, once they became proficient, would then be left to run the courts themselves. This has apparently occurred only to a limited degree. In practice Aboriginal communities still have little real responsibility for local law and order problems.

Commentaries on the operation of the Western Australian scheme have differed. The magistrate who was the architect of the scheme is of the view that it has been very successful.

It seems likely that their [Aboriginal] involvement will contribute towards a harmonisation of relationships on a much wider scale by reducing resentment felt when a law alien to their culture is administered by Europeans. Moreover, by administering European law to their own people, traditional constraints such as "shame" are automatically invoked against offenders. This gloss is absent where proceedings are administered by Europeans. Further, it is likely that nontraditional offences contained in bylaws such as those relating to alcoholic liquor will become 'Aboriginalized'.

A similar view was expressed to the Law Reform Commission by the non-Aboriginal magistrate who trains the Aboriginal justices. The result of the scheme in his view has been a synthesis of local customary law and the by-laws. On the other hand, some commentators have pointed out that an Aboriginal justice of the peace, hearing an offence against community by-laws and sentencing the defendant, if found guilty, to a fine or jail, cannot be said to be dealing with the person as he would under Aboriginal law, even if by coincidence he stands in the right relationship to the defendant and has a personal responsibility to deal with him as a wrongdoer.

A recent review of the Australian scheme was also highly critical

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35 No. 8, 28 Eliz. II, 3d. Sess., 29th Parl. (West. Aust.).
of the way the scheme has operated in practice, partly based on the lack of real independence of the Aboriginal justices, but more fundamentally on the scheme's failure to incorporate local customary laws. Part of this criticism is worth citing because it points to some of the problems which the establishment of any similar scheme in Canada might encounter.

There are general feelings of discontent among community members participating in the scheme.... The whole social organisation of traditional Aboriginals rests on the kinship structure which is closely linked to expectations and obligations between kin. The justice of the peace scheme is creating havoc among tribal Aboriginals in terms of the expectations alone. Tribal laws are either being ignored or undermined by an alien value system. Further, Aboriginal justices feel they are becoming powerless both within their own law, and within the framework of the...Act.... There is a lot of resentment and an increasing sense of impotency because they feel they are still advisors to the court.37

As the Law Reform Commission points out however, the Western Australian scheme was never intended to be a recognition of "tribal law" or of "tribal arbitration". Structurally it was from the beginning an extension into local communities of the regular court system, with certain adjustments and with the addition of local personnel. The range of offences covered is limited, both in theory and practice, and most are directly or indirectly related to alcohol. It is most unlikely that any scheme centring on the application of "tribal law" or "tribal arbitration" would concern itself with many of these matters. Although the scheme does not incorporate tribal law, it seems that an effort was made to respond to the kinship system in that Aboriginal justices are chosen as representative of particular sections or sub-sections of the community in order to overcome kinship difficulties. As the Commission points out the difficulties which have been encountered may suggest that there are a large number of cases which, because of kinship difficulties, the Aboriginal justices do not wish to hear and which they are quite happy for a non-Aboriginal magistrate on circuit to hear. In these cases the Aboriginal members of the community may seek only the opportunity to give background information or advice on sentencing, rather than be the decision-maker.

This more limited role for Aboriginal involvement in the administration of the criminal justice system is reflected in a pilot project

which was initiated in 1982 in the Northern Territory in the community of Galiwin'kun. Under the scheme a group of clan elders sit with the local magistrate in order to give their views on the seriousness of the offence and an appropriate sentence. The family of the accused and other community members may also attend court to give their views on the accused's behaviour and what they think is a proper sentence. An anthropologist employed within the scheme is responsible for assessing family and community views both on individual cases and on broader issues. This person assesses family structure and proposes strategies for the offender's future. That role is supplemented, and will eventually be taken over, by two locally employed Aborigines who gather information required by the court. A report is prepared on each offender detailing this information for the magistrate before the offender appears in court.

The scheme has a number of aims worth setting out because this is a model which has been tried in some northern Canadian communities and is relatively easier to implement than the establishment of separate native court systems. According to the Northern Territory Department of Law, the aims of the scheme are:

1. More community involvement in the system of courts.
2. The community to be able to give more advice in particular court cases, especially facts and background advice and advice as to forms of sentencing.
3. Matters brought before the courts to be dealt with in traditional ways, if that is what the community wants, as long as those ways do not offend existing law.
4. Advice from the communities about the traditional ways of maintaining control in the community.
5. Resolution of some disputes before they get to court.
6. Information concerning the effect upon the community of someone in the community being jailed.\(^3\)

The most significant aspect of the scheme is not that local Aborigines sit with the magistrate, in effect as assessors (something which has been done previously in the Northern Territory and other parts of Australia) but the work done by the anthropologist and by the two local Aborigines employed under the scheme in preparing the background report on the offender used to link relative kinship responsibilities with the eventual sentencing decision. This information

allows the magistrate, with the advice of senior Aboriginal men, to make better informed sentencing decisions:

Prior to the sentencing of a defendant in the community court there is afforded to the magistrate a reasonable assessment as to whether or not the clan group of the offender has the ability to rehabilitate him in the manner in which they wish, such as isolating him at an outstation, putting him through a ceremony subservient to the authority of older men etc. Although many clans may aspire to do this, the magistrate must have a realistic assessment as to whether or not the clan has the ability to carry out such actions and whether the wider community will allow it to happen.\textsuperscript{39}

Because this scheme has only been operational for a short time it is too early to assess its real impact although preliminary figures indicate a drop in imprisonment rates.

3. VILLAGE COURTS IN PAPUA NEW GUINEA

Village courts began operating in Papua New Guinea in 1975. Since that time the number of courts has increased to almost nine hundred. The courts are established on request from the local community and have been described as perhaps "the most important legal institution in the country".\textsuperscript{40} Significantly, the creation of village courts was linked to the end of the colonial era and the move towards independence during the late 1960s and the early 1970s. This involved, to some degree, a rejection of the British common law traditions previously adopted and an attempt to make the legal system of the newly emerging nation more relevant to the Melanesian people. An important part of this movement was an attempt to "customize" the existing legal system so that the "underlying law" (the phrase used in the Papua New Guinea Constitution),\textsuperscript{41} made up of both custom and common law, became the dominant law. One of the functions of the court is "to ensure peace and harmony in the area for which it is established by mediating in, and endeavouring to obtain, just and amicable settlement of disputes". If mediation fails the court has jurisdiction to hear civil and criminal disputes. The

\textsuperscript{39} S. Davis, \textit{Aboriginal Communities Justice Project: Northern Territory} at 187, cited in A.L.R.C. Report, \textit{ibid}.

\textsuperscript{40} N. O'Neill, \textit{The Papua New Guinea Legal System} at 3, cited in A.L.R.C. Report, \textit{ibid} at 53.

court can order compensation, or impose fines or community work but imprisonment may only be ordered if a previous order of compensation has been ignored. The magistrates of the court are appointed from local residents and hold office for three years. No specific qualifications are required and short training courses are run for new magistrates.\(^{42}\)

The Australian Law Reform Commission reviewed some of the difficulties and concerns which have been raised during the ten years the courts have been in operation. Many village courts have not developed in accordance with the intended model which envisaged informal procedures, no technical rules of evidence, ability to sit at any time and any place and mediation of disputes rather than arbitration. Instead, some village courts have tended to take the common law courts as their model and have, to an extent, neglected mediation and compromise. However, more recent evidence gathered by the Papua New Guinea Law Reform Commission suggests that mediation was twice as common as formal hearings.\(^{43}\)

Although village courts are meant to apply custom to settle disputes, there has been a tendency for magistrates to search for formal rules of law, rather than rely on local custom in order to exert their authority and the authority of the court within the village. On the other hand, the application of custom is not always easy: it is rarely in written form, although it seems there is a growing record of customs as applied in the courts, and the ability of the court to apply custom is restricted to some extent by the limited knowledge of magistrates, who are not always the older or more knowledgeable persons in the community. As the Commission points out, the reality of this criticism diminishes when one takes into account the fact that parallel to the jurisdiction of the village court are unofficial dispute resolution systems which continue to operate and significantly reduce the number of matters which otherwise might come before the village court.

One issue of particular importance in the Canadian context is the role of the village court in urban areas. Doubts have been raised about their viability in areas where there may be little or no community cohesion, where people are drawn together from many different areas, and where custom no longer plays a significant role in day to day

\(^{42}\) *Supra*, note 4, vol. 2 at 54.

life. In these areas persons may be more likely to rely on the general court system. At present, in Papua New Guinea, village courts operate only in one urban area.

In its overall assessment of the Papua New Guinea system, the Australian Law Reform Commission suggests that the village courts have clearly filled a gap in achieving order at the community level and that the large number of cases dealt with by village courts suggests that they are meeting local needs and reducing the number of cases coming before the higher courts.

4. ASSESSMENT OF THE OVERSEAS EXPERIENCE WITH ABORIGINAL COURTS

The Australian Law Reform Commission in its review of the international experience with Aboriginal courts drew some general conclusions, in particular that many of the "justice mechanisms" cannot be regarded as indigenous, nor do they deal with problems in ways that can be regarded as traditional. They are usually modelled on lower courts within the regular legal system and tend to become more formal over time as a result of demands for due process, rights to appeal and legal representation. In general, they deal with relatively minor matters, particularly in the criminal field.

Of the various systems studied, the Law Reform Commission concluded that the idea of the village courts in Papua New Guinea had the greatest potential application for Aboriginal communities. The emphasis in village courts is on resolving disputes rather than acting as a criminal court; the courts rely on local custom rather than a written code, locally administered and readily available to the people. They do not create the jurisdictional problems that have arisen in the United States with the Indian Tribal Courts. Furthermore, and perhaps most importantly, they are accepted by the people as "their" courts. The overseas experience confirmed that it was rarely, if ever, possible to establish an official code or legal structure which accurately reflected the dispute resolution mechanisms operating within indigenous communities. This was the case even of the village courts in Papua New Guinea.

[Some] observers see the [Village Courts] Act as a bridge between custom and customary law and modern justice. Others in contrast, have emphasised the way the Act has set up new institutions and officials and uses non-traditional mechanisms and adjudication for settlement of disputes. . . . In our view the second approach, that the Act establishes a new system of formal courts in villages, better reflects the Act
as a whole, while the glowing prose on mediation ... describes one aspect of the total operations envisaged for the courts.44

As the Australian Law Reform Commission points out, in considering the Papua New Guinea experience it is important to take into account the important differences between institutions established by and for an indigenous majority, as with the village courts, and non-indigenous institutions established but modified or extended for small indigenous minorities as has been the case in Australia and in the United States. Even where such courts come to be accepted by the indigenous groups in question, the Commission concluded that their inherent tendency — in some cases their express intention — is to expand still further the operation of the general criminal justice system, with whatever modifications, into the lives of those concerned. This is particularly the case with the Australian example. The special features of Aboriginal social structures, with their diffusion of authority and their strong basis in kinship, present real difficulties in setting up courts which vest power in specified persons in all cases. While these comments were directed to the Australian context this is no less relevant in the context of Canadian native societies.

The Australian Law Reform Commission, after considering the submissions it had received and after examining the relevant Australian and overseas experience, recommended against a general scheme of Aboriginal courts for Australia. It felt that while similar bodies to the village courts in Papua New Guinea might be suitable in some Aboriginal communities, the wholesale transplanting of such a scheme was unlikely to be successful. The village court scheme required a central secretariat and machinery for supervision which, though necessary to cope with the considerable demands of the village courts there, was unlikely to be practical in Australia. It concluded that establishing elaborate machinery, with framework legislation, focusing on local courts and law and order issues did not necessarily reflect the priorities which Australian Aboriginal communities themselves would establish in their quest for self-determination.

However, the Commission felt that their overall recommendation did not mean that particular local courts, or rather, local justice mechanisms, should not be established in response to genuine local demands or initiatives. In such cases, it was of the view that certain basic standards should be applied to local Aboriginal courts. The requirements with particular relevance to the Canadian context are: that appropriate safeguards need to be established to ensure that

individual rights are protected, by way of appeal or a right to elect an alternative form of trial; local communities should have the power within broad limits to determine their own procedure, in accordance with what is "seen to be procedurally fair by the community at large"; the community should have some voice in selecting the persons who will constitute the court, and appropriate training should be available to those selected. In minor matters there need be no automatic right to be represented by legal counsel, though the defendant in such cases should have the right to have someone, for example a family member, speak on his behalf; the court's power should include mediation and conciliation. A court which is receptive to the tradition, needs and views of the local people may be able to resolve some disputes before they escalate, perhaps avoiding more serious criminal charges.\textsuperscript{45}

In reviewing the experience of other countries with Aboriginal courts, it is not difficult to see that, with the single exception of the Pueblos, these have not been developed by native communities themselves. In all other situations the courts are the product of colonial governments seeking to assimilate the native communities into the mainstream justice system. Even though in the United States some of the tribes, as part of a general drive to reinforce tribal jurisdiction, have taken greater control of their tribal courts, they are not starting with a clean slate. In this connection, it is particularly instructive to look at the one scheme advanced before the Australian Law Reform Commission that was developed by an Aborigine community. This scheme, instead of relying on imported models, sought to build on traditional ways of settling disputes and restoring order while institutionalizing the procedures so that they fitted within the general legal system. While the Yirrkala scheme is specific to a particular Australian community, it represents an important case study in terms of the kinds of issues which any similar scheme would arise in a Canadian context.

The Yirrkala scheme envisages the use of Councils, some of which are already in existence. One, an administrative body (the Dhambul Association) elected by all adult members of the community, is responsible for the day-to-day administration of the community. Another, the Law Council (the Garma Council) comprises two senior persons from each constituent clan chosen by the clans in their own way, and relying as far as possible on the established authority structure. The Garma Council has responsibility for such matters as

\textsuperscript{45} Supra, note 4, vol. 2 at 81-2.
(a) the preservation of friendly relations between the constituent clans which make up the community;
(b) the maintenance of Aboriginal traditional law and custom;
(c) the settlement of disputes between persons, families and clans;
(d) the maintenance of social order and discipline;
(e) the relationship with judicial law enforcement and similar agencies of the Commonwealth and the Northern Territory.46

Although the Garma Council would be responsible for local justice, it would not itself sit as a court, but would specify who should constitute a "community court" in each case. Disputes may be resolved by agreement, but where this could not be achieved, a court would be appointed, the membership being determined by the nature of the issue and the persons involved. There would be no office holders (such as justices of the peace or magistrates) so that no new authority structures would be imposed.

The likely composition of a court where it was needed would be:
- a senior member of the clan or family of the complainant;
- a senior member of the clan or family of the defendant;
- and a senior person or persons from another clan or family chosen for their wisdom or standing in the community.

The composition of the court would vary if an Aboriginal person from outside the community was involved in the dispute or if a non-Aboriginal person was involved. The court would hear matters in public and upon reaching a decision would report to a community meeting for final approval. Court records would be maintained setting out the cases heard, the decisions reached and the penalties imposed.

While the Garma Council and the community court would operate as an independent entity, there would be a considerable degree of interaction with the general legal system.

[I]f a magistrate or judge has before him a case involving a member or members of the Yirrkala community the magistrate or judge should authorise the Council to set up a Community court to conduct a preliminary study of the case and see whether a consensus settlement of the case is practicable by the community's own procedures. The outcome of this preliminary study would be reported to the magistrate or judge. The Council accepts that the magistrate or judge would not necessarily be bound by that outcome but expects that weight would be given to it.47

46 Ibid. at 83-4.
47 Ibid. at 84.
The Garma Council considers that it should have some say in all offences or disputes involving community members. This would not necessarily mean that the Council would itself deal with all such matters. It may prefer to call in the police or refer matters to a magistrate, in which case the general law and procedure would apply. This could occur, for example, where a serious offence was involved (for example, homicide) or an inter-clan conflict was in danger of getting out of control. However, even in these matters the Garma Council would expect to have some continuing consultation with the outside law enforcement authorities.

In addition to having responsibility for constituting a community court, the scheme envisages that the Garma Council would be responsible for appointing persons with police functions within the community boundaries, establishing rules to operate within the community to maintain social order, appointing persons to oversee and carry out any punishments imposed by the community court and advising magistrates in cases involving members of the community.

The range of sanctions that could be imposed by a community court include compensation, fines, compulsory community work, temporary banishment from the community, overnight imprisonment in a lock-up situated in the community or committal for a period to the care of a responsible member of the offender’s clan. The principal difference between the Yirrkala scheme and the larger criminal justice system is that imprisonment, apart from overnight detention, would not anchor the system; rather, in conformity with indigenous dispute resolution processes, compensation, usually in the form of money payments, would be the primary remedy.

In reviewing the Yirrkala scheme the Australian Law Reform Commission referred to some of the issues which would require resolution before the scheme could be implemented. One such issue was whether individual members of the community should have the right to opt out and seek trial in the ordinary courts. Another relates to the right of an appeal to the ordinary courts. As the Commission points out, Article 14(5) of The International Covenant on Civil and Political Rights provides that a person convicted of a criminal offence should have the right to have the conviction and sentence reviewed by a higher tribunal according to law. Both opting out provisions and rights of appeal to outside authorities would tend to undermine the status of the community courts, especially if opting out was common or if appeals were regularly upheld. Nevertheless, the Australian Law

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Reform Commission felt that the Yirrkala scheme held sufficient promise that the scheme should be implemented with legislative backing and tested over a trial period.

C. Aboriginal Justice Systems in a Canadian Context

As one commentator has pointed out, it is something of an historical irony that the contemporary interest in other countries' experiences with Aboriginal court systems comes one century after this concept first obtained a legislative base in Canada in an amendment to the Indian Act in 1881. By virtue of this amendment all Indian agents and their superiors within Indian Affairs were automatically appointed to positions of justice of the peace under the Indian Act. The authority given to these officials was further extended the following year by conferring on the Indian agent the same power as a stipendiary or police magistrate. In 1884 the jurisdiction was expanded by giving the Indian agent authority to hold trials wherever "it is considered by him most conducive to the ends of justice" to conduct the trial. The agent was also allocated jurisdiction over any breaches of the Act regardless of where they occurred. According to Morse, the "apparent intent behind these changes was to empower Indian agents to hold trials off-reserve, if they so chose, and to have authority over offences under the Act that were committed off the reserve". Under this scheme not only was the Indian agent's jurisdiction not limited territorially but he seemingly had authority over both Indian and non-Indian (as defined by the Indian Act) as anyone could breach the Act.

The subject matter jurisdiction conferred upon these justices of the peace has changed frequently over the years. During the first three years of this court's existence, the Indian agent/justice of the peace had authority solely in regard to infractions of the Indian Act itself. From 1884-6 they were empowered to hear "any other matter affecting Indians". For the next four years their authority was once again limited to violations of the Act alone. In 1890 every agent's authority as an ex officio justice of the peace was expanded to include breaches of An Act respecting Offences against Public Morals and Public

49 S.C. 1880, c. 28 (43 Vict.).
51 Ibid. at 133.
Convenience.52 This statute created a number of sex offences including prostitution, seduction of females under sixteen and being found within a house of prostitution. With the passage of Canada's first comprehensive criminal statute in 1892 and the repeal of the former morality statute, the authority of Indian agent justices of the peace was revised and under amendments to the Indian Act of 1894 they were again given authority over sex offences and a range of other offences without any limitations concerning the race of the accused. One such provision related to inciting Indians to riotous acts.

The 1951 overhaul of the Indian Act brought further changes. The jurisdiction of these courts was altered through the addition of authority concerning the robbing of Indian graves, regardless of who committed the offence and charges under the Criminal Code53 relating to cruelty to animals, common assault and breaking and entering where the offence involved an Indian or his property whether as offender or as victim. The court also retained its authority for breaches under the Indian Act and for vagrancy charges under the Criminal Code, although it lost its jurisdiction over the morality provisions of the Code. Further amendments passed in 1956 reflect changes to the Criminal Code whereby the offences relating to robbing of Indian graves and inciting Indians to riot were repealed. Legislation presently in force, consisting of s. 107 of the 1970 revised Indian Act, maintains the situation that has existed since 1956.54

The creation of s. 107 Indian Act justices of the peace did not spring from the federal government's concern to maintain the distinctiveness of Indian societies and communities within a pluralist Canada, quite the reverse. Like the origins of the Indian Courts of Indian Offences, this unique court with its extraordinary jurisdiction was conceived in order to implement the federal government's Indian policy which, until quite recently, has been directed to economic and cultural assimilation. Specific offences created by the Indian Act were designed to further the process of civilizing the Indian population, undermining their central cultural institutions and shifting their traditional tribal economies to agricultural pursuits. The position of Indian agents was created to supervise the Indian people once they were located on reserves and to implement the government's policies.

52 R.S.C. 1886, c. 43, s. 117; An Act to Further Amend the Indian Act, S.C. 1840, c. 29, s. 9.
53 R.S.C. 1927, c. 36.
By, in effect, deputizing and judicializing the office of Indian agent and creating a separate court for offences under the Indian Act, the legislation enhanced the agent's ability to enforce the government's Indian policy. It is not without justification that generations of Indian people came to see the Indian agent as the embodiment of Canadian law within their communities. Although the legislation initially provided for the automatic appointment of every Indian agent as a justice of the peace, from 1894 onward the legislation has conferred discretion on the Governor-in-Council in appointing individuals to the position of justices of the peace under the Indian Act.

In recent years there have only been two functioning s. 107 courts, operating on the St. Regis Indian Reserve and the Caughnawaga Reserve. Of the two courts the latter, located within metropolitan Montreal, had a much larger volume of cases including many involving non-Indian defendants who come before the court on highway traffic offences.

Given the repressive antecedents of s. 107 courts and their association with the power and authority of Indian agents, they hardly appear to be an appropriate model for justice mechanisms which further native self-determination. However, if Indian communities wish to pursue the early implementation of some form of tribal court system the enabling provision of s. 107 may be of some significance. It would be open to the Federal Cabinet to appoint as justices, under s. 107, persons selected by Indian Bands who would then be empowered to hear cases arising under the Indian Act.

One head of jurisdiction would be for violation of Indian Band by-laws made under the Act. Sections 81 and 83 of the Indian Act permit the Band Council to make by-laws not inconsistent with the Act with any regulation for a wide range of purposes, including "the observance of law and order". For many years this by-law power was little used except at the behest of Indian agents and in this way conformed to the general structure of the Indian Act as an instrument of assimilation and colonialism. In recent years, however, Indian Bands, with the benefit of independent legal advice, have sought to use their by-law powers within the limits of the Indian Act to assert a measure of self-government. A principal example of this has been in relation to by-laws dealing with fishing. The jurisprudence to date has held that the effect of a validly enacted Indian by-law in relation

55 Supra, note 50 at 143.
56 Supra, note 54, s. 81 (c).
to fishing has the effect of precluding the operation of general fishing regulations made under the *Fisheries Act*.\(^5^7\)

Under the express provisions of s. 88 of the *Indian Act*, validly enacted by-laws also have the effect of preventing provincial law from applying to Indians where there is any conflict between the two. Thus, an Indian Band could supplant both provincial law and some federal law on subject matters in which it has legislative jurisdiction and could direct the proceedings to a tribal court established under s. 107. It should, however, be pointed out that under the *Indian Act* the Minister of Indian Affairs has the power to disallow by-laws. Clearly, therefore, such an initiative by a Band Council designed to pre-empt provincial or federal legislation and confer jurisdiction on a s. 107 court would require co-operation on the part of the Federal Government.

Quite apart from the operation of s. 107, an Indian Band Council acting pursuant to ss. 81 and 83 could draft by-laws creating a new form of tribal court of its own design. Although this would have the advantage of permitting greater flexibility in the shape and composition of the decision-making body, for example a panel of elders rather than a single judge, the limitations are that the present legislative jurisdiction of Band Councils under ss. 81 and 83 are not framed with a view to form a coherent criminal justice jurisdiction. Relying upon a reference to a general head of power such as “law and order” to deal with matters presently dealt with under the *Criminal Code* would likely be contentious. Attempts by Indian Bands to expand their jurisdiction through large and liberal interpretations of the by-law powers in the area of fishing have already led to bitter rounds of litigation in the face of federal and provincial government resistance. It would not be an auspicious start for an aboriginal justice mechanism to be forged in the crucible of litigation.

A significant limitation of any system established under an *Indian Act* Band by-law is that its jurisdiction would not extend beyond reserve boundaries. Given the tiny size of many reserves, particularly in British Columbia, and their proximity to non-native communities, a jurisdiction limited to the edge of the reserve would significantly diminish what a Band could accomplish with its own system.

There is a further problem of locating a legislative authority for aboriginal justice systems within the *Indian Act* because the Act only deals with status Indians and the by-law power is premised upon the

establishment of a reserve. In the Northwest Territories, with one exception, no reserves have ever been established and therefore the Indian Act has no application to Inuit or Métis communities there. Even for Indian Bands with a reserve base there is a large body of Indian opinion which rejects revising the Indian Act as a route to self-government. This view was shared by the Special Committee on Indian Self-Government who concluded that "[t]he antiquated policy basis and structure of the Indian Act make it completely unacceptable as a blueprint for the future". If such systems are to be developed in Canada, rather than relying upon existing models such as s. 107 courts designed for quite different purposes than Indian self-determination or pushing the limits of delegated power under Indian by-laws, a better approach is to deal with this issue in a principled way through specific legislation drafted to provide the necessary authority and resources to enable such mechanisms to operate, without being embroiled in the cycle of litigation which has characterized the assertion of jurisdiction by the United States tribal courts. This is in accordance with the Penner Report's recommendation that new framework legislation should be enacted by the Federal Government to accommodate the full range of governmental arrangements that are being sought by native communities.

The necessary constitutional authority for native justice initiatives is to be found both in s. 91 (24) of the Constitution Act, 1867, which gives the federal government broad authority over "Indians and Lands Reserved for Indians" and s. 101 which confers jurisdiction on the federal government to "provide for the establishment of any additional courts for the better administration of the laws of Canada".

We have seen how the appointment of s. 107 justices was never intended to "indigenize" the criminal justice system but rather to further Indian assimilation. The principal Canadian experience with indigenization in many ways parallels the Australian experience in the appointment of native justices of the peace in the Northwest Territories and the Yukon Territory and in several provinces, notably Ontario and Saskatchewan. It has been argued that there are a number of benefits that can be expected to flow from this approach. These include a sensitivity to native culture and traditions of social control; a better understanding of the circumstances of native offenders and the problems and needs of native communities; the greater likelihood of decisions of a native justice being accepted by an accused.

58 Supra, note 8 at 47.
59 (U.K.), 30 & 31 Vict., Constitution Act (No. 2), 175, S.C. 1974-75-76, c. 3.
and a native community; the enhanced opportunity of a native justice being able to secure the cooperation of native communities in resolving their own problems rather than expecting a non-native court from outside to do it; and in remote communities the ability to deal with cases in a timely way rather than await the arrival of the circuit territorial or provincial court.

The Canadian experience with this form of indigenization has revealed several problematic features. In the Northwest Territories, in Dene and Inuit communities, the designation of an individual with unilateral powers of decision-making over others runs counter to deeply held concepts of egalitarianism and social structures built upon complex diffusion rather than concentration of authority. Native justices find themselves in a situation of cultural dissonance where it becomes impossible for them to combine the expectations of their role within native society with their assigned role as an agent of the criminal justice system. In many communities the control exercised over the criminal process by the R.C.M.P., who not only lay the charge but act as prosecutor and as court clerk, undermines the apparent authority of the justice and the respect accorded to the office.

In Saskatchewan, where native justices of the peace were introduced in the 1970s and operated for several years, the system was bedevilled by the lack of adequate training for justices, little or no support staff, inadequate facilities for holding hearings and a lack of consensus among native communities on the appropriateness of an Indian justice of the peace holding court on the reserve in which he or she was residing. The experience was also that in some communities a native accused, given the option of appearing before a native justice of the peace or a white magistrate, chose the latter. An evaluation of the Saskatchewan experience by the Federation of Saskatchewan Indians concluded that the success of any future programme was dependent upon these kinds of problems being thoroughly worked out before the reintroduction of a system of native justices. The Federation recommended that native justices, in addition to having a provincial appointment, should have their limited jurisdiction augmented by being designated by the Federal Government as s. 107 justices under the Indian Act.60

In Ontario, the Native Council on Justice in its review of the Ontario experience has recommended that an expanded role for

60 J. Prégent, Historique et Analyse des Systèmes Judiciaires Autochtones dans Divers Pays (Department of Justice of Quebec, 1986) at 143-60.
native justices of the peace be conditioned upon a number of significant changes. These include the appointment of an officer to be in charge of an Ontario Native Justice of the Peace Program, the development of a rigorous training and apprenticeship programme and the establishment of a reserve circuit court project. Some of these reforms have now been implemented. The Native Council also recommended that native justices should have trilateral appointments from the province, the federal government and the Band Council. This is advocated not only to avoid a "jurisdictional quagmire" which might otherwise arise but also to give Indian communities the right to approve judicial appointments which affect law and order in their own communities.61

Paralleling the concept of a single justice of the peace, the Native Council also recommended that a community justice council be established in which a presiding native justice of the peace from outside the community would sit with two elders chosen by the Band Council, and appointed as justices of the peace, to hear and pass judgment on cases brought to the Council which are within the jurisdiction of a justice of the peace. The rationale behind this proposal is that there would be greater accountability of such a council to the local community and that the collegial approach would afford better protection to those making difficult decisions.

While efforts to improve native justice of the peace systems should be encouraged, particularly where they have the support and commitment of local communities, the very limited jurisdiction of justices of the peace (even if augmented by s. 107 powers) means that only those cases at the minor end of the offence spectrum are subject to native adjudication. This, of course, parallels the experience in Australia and the United States and as in those jurisdictions, these schemes can do little to redress the problem of the over-representation of native offenders serving substantial terms of imprisonment. To have an impact on this overshadowing reality we must look to other more far-reaching models.

As we have seen from a review of the experience with tribal and aboriginal courts in the United States and Australia, and with native justice of the peace and s. 107 courts in Canada, the development of native justice systems has been one directional in the sense that these systems have been an adaptation of our common law concept of a court applying our law and our sanctions. What is now being

61 Ibid. at 132-42.
sought by native people is the right to revitalize their indigenous institutions and develop and adapt them to respond to the contemporary problems which their communities face. As the Penner Report made very clear, there is not any single model of self-government which can do justice to the diversity of native communities and their distinctive cultural and political institutions. There is, therefore, in Canada an historic opportunity to develop legal and political mechanisms which build upon and reflect this distinctiveness of the original peoples. This has particular application in relation to the criminal justice system.

It will be recalled that the Australian Law Reform Commission, while not favouring the extension of the system of Aboriginal courts developed in Queensland or Western Australia, did respond favourably to the justice model developed by the Yirrkala community. This was a model based upon traditional decision-making. Within certain Canadian native communities there also exist well-developed and complex traditional decision-making structures which can serve as alternatives to our concept of a court. Thus, amongst several Indian Nations the potlatch or feast system continues to function as a vital part of community decision-making, notwithstanding the fact that for almost seventy years, from 1884 until 1951, its practice constituted an offence under the Indian Act and despite the fact that Indian people were sent to prison for participating in its ceremonies.

At the present time, in the landmark case instituted in the British Columbia Supreme Court by the Gitksan and Wet’suwet’en in which these two Indian Nations are seeking declarations that their ownership of and jurisdiction over their traditional territory continues to exist, a wealth of evidence has been presented for the first time to a Canadian court regarding “the feast system”. This is how the Chiefs in their opening statement to Chief Justice McEachern explained the system.

When today, as in the past, the hereditary chiefs of the Gitksan and Wet’suwet’en Houses gather in the Feast Hall, the events that unfold are at one and the same time political, legal, economic, social, spiritual, ceremonial and educational. The logistics of accumulating and borrowing to make ready for a Feast, and the process of paying debts in the course of the Feast, have many dimensions; they are economic in that the Feast is the nexus of the management of credit and debt; they are social in that the Feast gives impetus to the ongoing network of reciprocity, and renews social contracts and alliances between kinship groups. The Feast is a legal forum for the witnessing of the trans-
mission of chiefs' names, the public delineation of territorial and fishing sites and the confirmation of those territories and sites with the names of the hereditary chiefs. The public recognition of title and authority before an assembly of other chiefs affirms in the minds of all, the legitimacy of succession to the name and transmission of property rights. The Feast can also operate as a dispute resolution process and orders peaceful relationships both nationally, that is, within and between Houses, and internationally with other neighbouring peoples.

Evidence has been presented in court on the hereditary chiefs' use of their authority both within and outside the context of the feast system to resolve disputes. Evidence is also being presented regarding the nature of Gitksan and Wet’suwet’en laws and traditional methods of sanctioning those who do not comply with the laws. The Gitksan and Wet’suwet’en, as part of their research preparatory to the litigation and land claims negotiation, have started to codify their traditional law and, at the same time, have sought to adapt this to a contemporary context in such areas as fishery regulation. There is here the nucleus of a native justice system which, while it does not mirror the normal Canadian model of adjudication, may hold far more promise in responding to problems facing members of the Gitksan and Wet’suwet’en Nations.

This is not to say that the traditional system stands ready and able to respond to the full range of problems presently dealt with within the criminal justice system, nor is it to say that the ordinary court system is not appropriate to deal with some of these problems. What is being suggested here is that there is a real possibility of developing distinctively Gitksan and Wet’suwet’en responses based upon a realistic assessment of the strength and limitations of both their own institutions and those of the larger Canadian society. Other native communities are similarly engaged in the development in a contemporary context of their customary law.

Building new responses to criminal justice, starting with an indigenous system and seeking flexible and creative ways to adapt and incorporate it into a contemporary dispute resolution mechanism, opens up a whole range of possibilities. One obstacle to instituting a separate native justice system is the fact that the majority of Indian, Métis and Inuit communities have very small populations and the low level of expertise and resources available to these communities


64 A review of some of these can be found in B. W. Morse and G. R. Woodman, eds., Indigenous Law and the State (Providence, R.I.: Foris Publications, 1988).
places real limitations on their efforts to implement a distinct justice system of their own. One commentator has looked at this problem in the context of establishing a separate court system and has responded in this way:

Potential remedies exist which could alleviate these problems. The court system could be established along regional or tribal lines through the co-operation of neighbouring communities. A tribal council or regional council could be created with representation from each community if one does not already exist. Such a council could co-ordinate the administration of justice by selecting judges and court personnel, providing facilities and financing, standardizing the law, obtaining the co-operation of all governments and law enforcement agencies, ensuring that the court and its orders were respected by all, and fulfilling an advisory function to the court. The court would then travel on a circuit to service these communities.65

If discussion shifts to a dispute resolution scheme of a more traditional nature, for example, the Gitksan feast system, there is again a network of relationships between communities which can overcome the problems which would exist if only the small populations of many Indian Bands were considered in isolation from each other. In the same vein, the various forms of political alliances and federations which native people have formed based upon a common national identity could provide regional infrastructures which could administer local justice mechanisms.

In approaching the issue of distinctive aboriginal justice systems there are other issues which must be addressed apart from administrative feasibility. The idea of native justice systems requires us to address the place that legal pluralism should play in Canada, particularly in the context of the criminal law. Legal pluralism has been described as a situation resulting from the existence of distinct laws or legal systems within a particular country. According to Professor Hooker:

[D]espite political and economic pressures, pluralism has shown an amazing vitality as a working system. It may well be that it — and not some imposed unity — should be the proper goal of a national legal system. Indeed, even within developed nations themselves, there are signs that a plurality of law is no longer regarded with quite the abhorrence common a decade ago. This is especially true if one looks at those states which possess indigenous minorities; in the U.S.A., Canada, Australia, and New Zealand the courts are dealing with a spate of claims by the native minorities to land rights and for the

65 Morse, supra, note 20 at 28.
recognition of their own laws. One must seriously question whether policies aimed at specifying a single source of law are really necessary; perhaps indigenous laws, somewhat modified, are more suitable as expressing unique cultural values.66

The central importance of grappling with the issue of legal pluralism in the context of the criminal justice system has been well expressed by one scholar reviewing the Australian, Canadian and American experience. This is how he framed the crucial questions:

In assessing social activity and the resolution of disputes, whose standards are to be applied, those of the native community involved, or those of the majority community? When assessing what is right or wrong, condoned or condemned, humane or inhumane, legal or illegal, or just or unjust, should one be ethnocentric and apply Western notions; should one attempt to see things as natives see them and judge accordingly; should one have "a bet each way" according to circumstances; or is the only realistic approach to accept that you have no choice in the matter? These are intransigent problems, but they are vital, for once a stance is adopted, all else follows. . . .

These questions are perhaps most acutely raised, in the three jurisdictions under study, in the context of indigenous minority populations and the "Anglo-based" criminal justice system. The response to date of the three jurisdictions has been very much concerned with limiting, or avoiding altogether, legal pluralism in the sense of accepting parallel, separate systems of law, as between native and non-native populations. This analysis, it is suggested, also applies to what might be perceived as a major exception, the American Indian Reservation justice systems, for these systems are considered to be no more than a pale mirror-image of the regular American justice system. Some reforms and inquiries . . . are underway, but there remains a deeply ingrained reluctance in all three countries to cut the Gordian knots and allow separate, parallel native justice systems to develop. This tension between social theory and legal administration continues to cause problems. It is suggested when dealing with indigenous peoples, policies of social pluralism should be complemented by legal separatism. It is also suggested that the brutal and bloody facts of history show that the alternative has rarely achieved native justice.67

Related to the issue of legal pluralism is the question of whether separate Aboriginal justice systems raise constitutional issues of equality before the law. The U.S. Supreme Court in addressing the issue of equal protection in relation to Federal Indian legislation has had this to say:


Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the Bureau of Indian Affairs, singles out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code would be effectively erased and solemn commitments of the Government to Indians would be jeopardized. On numerous occasions this court specifically has upheld legislation that singles out Indians for particular and special treatment. As long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation towards the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress's classification violates due process.68

Within the Canadian constitutional framework, the federal government under its s. 91(24) jurisdiction also stands in a unique fiduciary relationship to aboriginal peoples.69 The pattern of judicial deference to the constitutional mandate for special treatment of Indians has been confirmed by the Supreme Court of Canada in its recent decision upholding provincial funding of Roman Catholic secondary schools in Ontario. The constitutional recognition of denominational schools was analogized by Mr. Justice Estey with the special federal legislative mandate for Indians.70

In light of s. 91(24), legislation designed to implement self-government in the form of separate justice systems would not, in my view, be open to challenge under s. 15 of the Canadian Charter of Rights & Freedoms.71 In any event, a challenge almost certainly would be precluded by the express terms of s. 15(2) which protects any law which has as its object the amelioration of conditions of disadvantaged individuals or groups, including those that are disadvantaged because of race. As we have seen, one of the principal reasons for considering aboriginal justice systems is that the existing criminal justice system has created a condition of disadvantage, particularly in terms of the number of native people in Canada's prisons.

There is another and perhaps more important basis upon which any recognition of aboriginal justice systems would be constitutionally protected from a s. 15 challenge. Section 35 of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11.

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1982 specifically recognizes and affirms "the existing aboriginal and treaty rights of the aboriginal peoples of Canada". Section 25 further provides that the guarantees in the Charter "may not be construed so as to abrogate or derogate from any aboriginal treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada". An argument can be made that within ss. 25 and 35 there are the constitutional seeds of the recognition for the right to self-government as an existing aboriginal and treaty right. Governmental affirmation of such a right reflected in framework legislation for aboriginal justice systems would, in my view, preclude any challenge that these systems violate guarantees against equality.

This is not to say that other constitutional issues arising under the Charter may not arise in the context of recognition of aboriginal justice systems. The Charter, in setting out the rights which must be accorded an individual charged with an offence, is built upon the existing adversary model of criminal procedure. Can these rights be accommodated within a justice system which is built on different premises? If a community court composed of a council of elders is required to operate within the context of a set of procedural rights and rules which are inconsistent with the community's processes, the very objective which is being sought through the recognition of such community courts could be undermined. Again, the concept of an independent and impartial tribunal for the adjudication of offences may pose special problems where an indigenous system locates primary responsibility for offenders with senior members of the offenders' tribal or kinship group.

It is important that these kinds of issues be grappled with and resolved by aboriginal communities before the introduction of any separate justice systems in order to avoid the situation which has occurred in the United States where tribal courts have had unilaterally imposed upon them the requirement that they recognize certain procedural rights set out in the U.S. Bill of Rights regardless of the impact they may have on the court's operation. The task of accommodating aboriginal justice systems with individual rights is a necessary part of recognizing legal pluralism in the criminal justice system. It should not be beyond our legal imagination to reach such an accommodation. The tension between collective and individual rights in the criminal justice system is not a new one. What is new, however, is a search for an accommodation which is founded on an understanding that justice as we have come to see it within the common law tradition has from the perspective of native people all too often a different and darker mirror image. It is not unrealistic to anticipate
that models of aboriginal justice systems can be worked out in a Canadian context which, cognizant of the experience of other jurisdictions, can reflect the accumulated wisdom of both aboriginal law and the common law.

There are already hopeful signs in this direction. Research projects at the University of British Columbia's Law School, at the University of Saskatchewan's Native Law Centre and at Queen's University Institute of Intergovernmental Relations are exploring the terrain. The increasing number of native people entering law schools and the legal profession are playing an important role, not only in charting the course of legal research, but also in developing models of justice which will be able to resolve rather than compound the injuries of the past.

D. THE SENTENCING OF NATIVE PEOPLE — ACCOMMODATION WITHIN THE EXISTING STRUCTURES

Within the last ten years in Canada there have been a number of initiatives designed to make the criminal justice system more responsive to the concerns of native communities and more sensitive to the special circumstances of native offenders. A review of some of these will highlight both the potential they offer and the problems they have encountered.

I. THE NATIVE COURTWORKER PROGRAM

The Native Courtworker Program was the first and remains the only national programme that provides special services specifically to native people in conflict with the legal system. In any discussion of self-government and criminal justice services, the courtworker programme is an important inclusion because: (1) more than fifty percent of the native population does not live under Band jurisdiction; (2) the majority of offences committed by native offenders are committed out of Band jurisdiction; (3) the process of taking over criminal justice services, whatever their eventual form may be, is in its early stages and interim services are needed; (4) some bands do not have the financial or administrative resources to support criminal justice programmes; and (5) unlike Band-based criminal justice programmes, sensitizing criminal justice personnel to native culture(s) and issues is an important part of the courtworker mandate.

The Native Courtworker Program was designed to assist native people coming into conflict with the dominant legal system by providing them with a variety of services centred in the courtroom. These
services include providing legal information, explaining legal documents, procedures and terminology, assisting clients to obtain legal assistance such as lawyers and Legal Aid, making referrals to other resources such as treatment programmes, various social services or psychological counselling, providing emotional support and some counselling, providing public legal education and providing information to criminal justice personnel about native clients, issues and culture. In some regions courtworkers also prepare pre-sentence reports, speak to sentence, provide translation services, provide bail, probation and parole supervision and provide all of the above and other services to native young offenders. In some communities, particularly remote communities, courtworkers assist non-native people as well.

The Courtworker Program grew out of the volunteer work performed in the mid-1960s by staff at the Edmonton and Winnipeg Native Friendship Centres. The impetus was the high native incarceration rate which concerned native community members and criminal justice staff alike. The first programme began in Alberta in 1970. Programmes have since been implemented in every Canadian province and territory, although four of the programmes — in Prince Edward Island, Nova Scotia, New Brunswick and Saskatchewan — were later discontinued. (The latest to be terminated was the one in Saskatchewan, which, after 15 years, became a casualty of a cost-cutting measure by the provincial government.) All courtworker programmes are funded on a cost-shared basis by the federal Department of Justice and the appropriate provincial department. This means that all courtworker services are provided to clients free of charge.

The courtworker programmes provide services to all native people — Treaty, non-Treaty, Métis and Inuit. Native courtworkers have the mandate to assist these people to deal with the special difficulties they face in the criminal justice system, such as lack of knowledge about the system, language difficulties, lack of knowledge about their rights and responsibilities, lack of information about resources available and fear of the system. In many ways, courtworkers provide a bridge between native people and the dominant criminal justice system.

In Alberta, where Native Counselling Services of Alberta (NCSA) operates the largest and longest-running of the courtworker programmes, the provision of court services gave native people an “in” to the criminal justice system. The agency, after establishing its credibility, found it was able to take over dominant system programmes as well as find funding to develop new, more native-oriented ones. The agency, for example, became the first private and first native organi-
zation to operate correctional programmes such as a native liaison officer programme, a forestry camp, a minimum security correctional centre, a native parole supervision programme, a native probation supervision programme and two young offender open-custody group homes. It is fair to say that NCSA is the leading native organization involved in making the criminal justice system responsive to native communities. NCSA's native culture-oriented programmes include family living skills programmes in ten communities, a youth group, a parenting home and youth workers in five communities. Most of these programmes have been developed in cooperation with the local communities. In regions where self-government is an issue, the programmes have been developed with the understanding that they would eventually be taken over by the community. From providing "bandaid" assistance in courts, NCSA has moved to attacking the underlying causes of native conflict with the justice system.

2. THE JAMES BAY AND NORTHERN QUEBEC EXPERIENCE

In 1975 the first modern land claims settlement was negotiated between the James Bay Cree and the Inuit of Northern Quebec, the provincial government of Quebec and the federal government of Canada. This Agreement, in addition to dealing with land rights and hunting and fishing rights, also contains detailed provisions which recognize Cree and Inuit self-government within the framework of Quebec's system of regional government. Although the Agreement affirms Quebec's jurisdiction in relation to administration of justice, the Agreement and the subsequent legislation giving it the force of law contains important provisions which are designed to reflect the distinctive nature of the Cree and Inuit populations who live within the area covered by the Agreement. Article 18.0.7 of the Agreement provides the following:

The Minister of Justice of Québec shall designate one or more judges or other persons required to dispense justice in the "judicial district of Abitibi". The said judges or persons must be cognizant with the usages, customs and psychology of the Crees.

Other provisions of the Agreement provide for the recognition of Cree language rights in the form of requiring that all proceedings, judgments and decisions shall be translated into Cree, that special facilities

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73 Ibid. at 291.
be provided for young Cree offenders, that Cree sentenced to imprisonment shall be detained in northern institutions after consultation with the Cree local authority and that studies for the revision of the sentencing and detention of Cree be undertaken, taking into account their culture and way of life.

The implementation of the James Bay Agreement has been the subject of considerable research by the Cree, the Inuit and the province of Quebec. The James Bay Cree in their evaluation have pointed to the failure to implement important parts of the Agreement, particularly in relation to the recognition of Cree language rights and access to legal services, but overarching their criticism is the view that the major change brought about by the Agreement — the establishment of the Abitibi District Circuit Court — is perceived by the Cree as an instrument of white society and as such does not contribute to the strengthening of Cree self-government.

A 1985 evaluation prepared for the Cree Board of Health and Social Services focused on the way the Quebec Youth Protection Act\(^\text{74}\) and the federal Young Offenders Act\(^\text{75}\) were applied within the James Bay region. The evaluation also drew upon a parallel study done by Norbert Rouland on the impact of the James Bay and Northern Quebec Agreement on the Inuit communities. The following extracts from the Cree's evaluation is reflective of their experience:

Pursuant to the study effected amongst the Inuit, Rouland said the following: "The legal system in itself has undergone some touch-ups. The most important for Nouveau-Québec consists of the creation of the Itinerant Court in the district of Abitibi which has been operating over the past twelve year." I think the word "touch-ups" used by Norbert Rouland very well illustrates the vastness of the changes which have been made.... Because of the sporadic passages of the Itinerant Court in the Cree Communities, the members and parties working for the Itinerant Court will always remain strangers in the eyes of the residents of our territory....

Norbert Rouland goes on to say the following, ... "the system does not appear to be operating in a satisfactory manner: the attorney does not speak the same language as the accused and meets with him only a few hours before the trial (because as he is part of the Itinerant Court he follows it when it travels to the communities)." The attorneys frequently complain that the clients themselves often neglect to obtain a consultation during the little time that is made available to them. What better evidence can be provided about the way the Inuit feel concerning the failure of the system to adapt the legal procedures with which they find themselves involved. If we rely upon the observa-

\(^{74}\) *Youth Protection Act*, R.S.Q. 1984, c. 4.

tions of . . . the Honorable Justice Coutu [the presiding judge of the District Circuit Court], it appears that all the adjustment measures within the legal system to [sic] not have the results hoped for; the Inuit appear to passively resist legal assimilation: “Upon our return from our first trips (in northern Québec), we repeatedly questioned what we were doing there. In fact, facing people with a mentality and way of life so different from our own, we feel like intruders and wonder whether it wouldn't be better to let these people care for settling their own problems of a criminal nature [sic] which were submitted to us . . . ; very often, the communities instead of becoming involved in the legal process submit to it as though they do not care. The ‘whiteman’ implements ‘his justice’ and the natives consider it another miscarriage of justice”.

The Cree’s response to their experience with the Circuit Court has not led to their urging that more Cree be hired to work within the system — what they refer to as the “autochtonization” of the legal system — because those native people will still be seeking to implement a justice system the substance and procedure of which does not reflect Cree values, customs and traditions. The Cree have proposed that in relation to matters presently dealt with under the Youth Protection and the Young Offenders Acts, jurisdiction should be transferred to a “Youth Office” established by Cree local governments. The procedures adopted by the Cree Youth Office would reflect the spirit of conciliation rather than the adversary context within which matters are currently resolved.

The view that the provisions of the James Bay and Northern Québec Agreement have had limited impact on adapting the criminal justice system to Cree and Inuit societies is one which is shared by those involved in the Abitibi District Circuit Court. Like the Cree, those administering the system see a basic problem lying in the different perceptions of justice. His Honour Judge Coutu has offered these reflections:

Our system is one of confrontation. . . . In the native tradition, the main objective of legal systems is to try and restore harmony between individuals, or between an individual and the community. (James W. Zion, Harmony among the people: Torts and Indian Courts) This harmony is usually achieved by the adhesion of both parties to a solution, whereas under the euro-canadian system, someone must be condemned, whether it be for rehabilitative, dissuasive or punitive purposes.

Any conflict, be it private or public in nature, disrupts harmony in

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the community. The ultimate aim of a justice system should be to help restore order, which gives rise to notions of conciliation and reparation. In order to restore harmony, the judge should be able to go beyond the conflict which is put before him. If, for example, two people come to blows over the ownership of a certain object, the judge would not only rule on the assault but would try to solve the property problem in order to prevent any further conflict. Our system rarely allows for such an extension of a judge's power.

In light of these facts, it seems evident that if we apply our system as is in native communities, we would continue to offer a sort of justice, which would lack the ingredients needed to achieve a positive effect and inspire the respect that it should.\footnote{J. C. Coutu, \textit{Native Justice Committees: A Proposal for a More Active Participation of Native Peoples in the Administration of Justice} (1985) [unpublished] at 8-9.}

Judge Coutu, in attempting to address the limited achievements of the court, has proposed that there be established native justice committees consisting of five members to be appointed by the Cree or Inuit local government body. These committees would have jurisdiction over a wide range of offences dealt with by the Circuit Court. This jurisdiction would be significantly greater than that which is exercised by native justices of the peace. The jurisdiction would, however, be conditioned upon the consent of the accused and an admission of responsibility for the offence and the consent of the Crown prosecutor. In these respects the proposal bears many of the hallmarks of a diversion program although it would significantly extend the usual definition of diversionable offences. Under this proposal the justice committees would be able to develop their own procedures and be innovative as to the kinds of dispositions they might make in order to take into account the customs and social rules prevailing in the communities.

The lessons from James Bay are clear to this extent. Statements of principle — whether contained in land claims agreements or legislation — that the criminal justice system should take into account the distinctive values of native societies, do not easily translate into significant change in the administration of criminal justice. While the Cree and those administering the system point to different solutions, there is a common and shared perception of the inadequacy of the measure of reform that has been achieved to date.

3. \textsc{The Inumarit of Arctic Bay, Northwest Territories}

The attempt to accommodate the Canadian criminal justice system to aboriginal communities has a long history in the Northwest Terri-
Territorial judges of the stature of Mr. Justice Sissons and Mr. Justice Morrow, in taking justice to the far flung communities of the Northwest Territories on circuits covering many thousands of miles, have in the course of their judgments analyzed certain aspects of the indigenous and customary law of the Inuit and Dene. To some extent there has also been incorporation of this law in the context of family law, such as the recognition of the Inuit custom of adoption as being a legal adoption within the meaning of the *Child Welfare Ordinance*.78

More recent attention has, however, focused on Inuit law in relation to criminal issues. A recent case which arose in the community of Arctic Bay before His Honour Judge Bourassa of the Territorial Court provides a unique opportunity to see an aboriginal justice system in operation and how a judge working within the context of the Canadian system sought to reach an accommodation between them.

As a case study, *R. v. Naqitarvik*79 is important because it raises some of the central issues with which we have to grapple in order to understand the meaning of justice in the context of native people. The accused, who was twenty-one years of age, pleaded guilty to a charge of sexual assault of his fourteen year old cousin. The evidence before the Court showed that the complainant had had sexual intercourse before with the accused and had always consented but that on this occasion she had resisted. A distinctive feature of the sentencing hearing was the evidence Judge Bourassa heard regarding the role played by the “Inumarit” — a Council of Elders — and its traditional treatment of offenders within the community. The nature of the sentencing hearing is well described in the judgment of Belzil J.A.:

Judge Bourassa held a special sentencing hearing at Arctic Bay which attracted great community interest. About half the citizens of a community of some 400 people were in attendance throughout the 12 hours of evidence and submissions. In passing sentence at the end of this long hearing, Judge Bourassa delivered extensive oral reasons addressed as much to the community as to the accused. He pointed out the gravity of the offence and the long term of imprisonment which it would have attracted elsewhere in Canada. He discussed all the factors properly to be taken into account in imposing sentence. In arriving at the sentence which he imposed, he gave weight to the concerns of the community expressed to him by its elders known as

the "Inumarit" and he took into account the unquestioned effectiveness of its traditional treatment of offenders.

It will be seen... that the primary concern of the community had been and still is to maintain its harmony and cohesiveness, a concern undoubtedly traditionally considered crucial to the very survival of a small group in a harsh and isolated environment and now considered crucial to the survival of its cultural identity in the face of intrusion by a civilization foreign to it. Imprisonment, even banishment, were historically unknown as forms of punishment. Imprisonment is viewed not only as destructive of the accused himself but as containing the seed of disharmony and division and hence destructive of the community itself. The traditional method of handling an offender is forced confrontation by the elders even to the point of denying him food or other amenities until a willingness to change for the better is manifested, and this is followed by relentless counselling until the offender is considered rehabilitated. The treatment is shown by the evidence to have achieved what must be the ultimate purpose in all punishment for crime, that is to say, protection of the community and rehabilitation of the offender. It has had the added benefit of effecting reconciliation between victim and offender, a concept only now being advanced in our society by some criminologists.\textsuperscript{80}

The views of the Inumarit expressed to Judge Bourassa were that the community wished to have the accused remain within the community to undergo his punishment, that they were confident that he had already started on the road to rehabilitation and that sending him away to prison would be destructive not only for his future but also be the cause for resentment in the community, including resentment against the victim. They did not see imprisonment to be in the best interests of the community, the victim or the accused. Judge Bourassa, in imposing a sentence of ninety days imprisonment to be served intermittently at the local detachment of the R.C.M.P. at Arctic Bay plus two years probation and one hundred hours of community work, gave as his reasons the following:

It is obvious to me that what has been said in evidence today that the community is willing to act, the Inumarit is willing to act and social services are willing to act in this case is not an empty promise. It is true. It is a fact. It is proven in the past by the very absence of crime or disturbance. This special part of Arctic Bay is something that I would be very sad to see in any way taken away or diminished. The very things that the Inumarit are trying to do is what the Court is trying to do: rehabilitating an offender, reconciling the offender, the victim and the community so that there is unity in the community and a programme of education. Can any of us really say that jails do that?

\textsuperscript{80} Ibid. at 199-200.
For the person that responds, the Inumarit, the social services committee and the whole community together can obviously heal; they can unite; they can reconcile, and they can reform.

I am impressed with the Inumarit. They promise and appear in the past to have delivered more than what jails can do. I accept what they say without reservation because, as I say, for the last three years that I have been here we hardly ever come to Arctic Bay, because there is simply no trouble in this community.

So the issue is, what do I do with this group of people in this community that is so eager to be involved and to take care of the problems within the community, and at the same time do what is right in the law. If the Court can do something to help the community to continue to solve its own problems, to help those, whoever they are, and however they work to continue to keep Arctic Bay the good community that it is then I think the Court should do it. If whatever it is in Arctic Bay that keeps this community crime-free continues to function and work with respect to this man then everybody is served and the people in this community will be protected.⁸¹

Judge Bourassa's sentence was appealed. The Alberta Court of Appeal, sitting in its capacity as the Northwest Territories Court of Appeal, substituted a sentence of eighteen months imprisonment. Mr. Justice Balzil, in his dissent, after setting out the passages cited above, affirmed Judge Bourassa's sentence on the following grounds:

The trial judge properly took into account the special circumstances disclosed in evidence of a small isolated group striving to preserve its cultural heritage by maintaining its cultural unity, not for the purpose of blocking the imposition of criminal law but by gradually introducing it by bridging the gap between traditional law and the new law. The crime-free record of the community obviously satisfied the trial judge that this community was much more successful in this than had generally been the unfortunate case in too many communities in the far North.

I am unable to detect any error in principle in the reasons of the sentencing judge. The preservation of cultural heritage is given new recognition by the Canadian Charter of Rights and Freedoms and it was proper to take it into account. The Trial Judge weighed this and all other factors and imposed a sentence which in my view was fit in the circumstances disclosed by the evidence before him.⁸²

The majority of the Court of Appeal in holding that Judge Bourassa's sentence was "wholly inadequate" confirmed its own "starting point" approach to sentencing. In the case of major sexual assaults

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it had ruled in Sandercock\textsuperscript{83} that three years was the proper starting point for this offence. The Court held that in light of the mitigating factors in the case before Judge Bourassa — particularly the public apology the accused had made to his victim, the genuine remorse he had shown and the positive response to counselling which he had demonstrated — the appropriate sentence was eighteen months imprisonment. The majority of the Court of Appeal, in the course of its judgment, made a number of comments on the cultural context in which the crime had been committed and on the role of the Inumarit.

There is no doubt but that for the last quarter century, much of Northern Canada, particularly its more remote region, has been a land in transition. The traditional institutions and the old cultures of its people are being replaced or modified, in collision with influences from the south. But while the community of Arctic Bay is remote in distance from other parts of Canada, being situated on the northern coast of Baffin Island, it has many of the facilities of other towns and cities in other parts of Canada. Its people have been exposed for some time to the same laws and customs as other Canadians.

The witnesses in this case do not describe a culture markedly different than that in the rest of Canada. Rather, the incident itself arose as the victim and her sister played music on a modern player for which there was an electric cord. The complaint of sexual assault was conveyed to the police by telephone and the victim was taken to a modern nursing station for examination and treatment. Both victim and accused have at least grade school education. A large and modern mine is in the vicinity and several of the witnesses, including the accused, had worked there at some time.

My brother Belzil has described in his reasons the traditional Inumarit Committee. It is a traditional governing body of the Inuit, consisting of the experienced elders of the community. Among its functions is the counselling of offenders. If required, that counselling was traditionally relentless and continuous until effective. The offender reformed or he was excluded from community life. In a harsh and hostile environment where the offender could no longer be part of community cooperation in hunting and other food gathering, that exclusion could have fatal consequences.

The present Inumarit Committee in Arctic Bay is not a direct successor to the traditional governing body described by the witnesses. The witness Koonoo Ipikirk, the chairperson of the committee, has lived in Arctic Bay since childhood. She did not say when the traditional committee last existed, but the present body was started in 1975. In that year six members were elected by the community. Since that time “anyone who wants to become a member becomes one”.

\textsuperscript{83} (1985) 22 C.C.C. (3d) 79.
The ages of the members range “from 50 and up”, and “a member should have more experience than other people”.

Witnesses who spoke of relentless counselling by a Committee of Inumarit standing in a circle around the offender were describing a tradition rather than the present situation in Arctic Bay. Ms. Ipkirk said that the present membership of the Committee is six and that an individual member was assigned to counsel the respondent. That counselling was done much as it would be done in any other Canadian community. Indeed, one member of the Committee, who gave evidence, brings to his assignments a sophisticated background in counselling.

The modern reincarnation in Arctic Bay of the traditional Inumarit Committee resembles the usual community counselling service rather than the traditional governing and counselling body of earlier times. I am unable to see, given its recent origin, the community which it serves, its methods of operation, and the absence of the traditional ultimate sanction on the offender, that it is a remnant of ancient culture. Its counselling service, admirable as it undoubtedly is, cannot, in my opinion, replace the sentence of imprisonment which is required in virtually all cases of major sexual assault.

The approach taken by the majority of the Court of Appeal in this case quite clearly circumscribes the ability of a native community to reach an accommodation between its own and the larger Canadian justice system. In my view there are a number of serious flaws in the Court of Appeal’s judgment which reflect some common misconceptions about the nature of change and continuity in native societies which must be addressed if we are to take seriously the task of accommodation of native community processes within the existing justice system.

The Court seizes upon the surface realities of the presence of electricity, telephones and the infrastructure of schools, nursing stations and police forces as evidence of the essential similarities between contemporary native communities and other small non-native communities. However, the surface similarities obscure far more than they reveal about Arctic Bay and hundreds of other native communities across the country. The links within these communities between the past and the present, the continuity of deeply held values of sharing and cooperation, the respect for elders and the importance of maintaining community coherence through consensus decision making, are not sign-posted or visible to outside eyes in the same way as the evidence of outside intrusion, in the form of telephones, nursing sta-

84 Supra, note 79 at 195-6.
tions and mines. We have to work much harder to see and understand the inner structure of native communities.

The Court of Appeal judgment falls into the trap of seeing native communities as evolving from an earlier to a modern state of civilization, with the ineluctable conclusion that their old "traditional" ways will inevitably wither as they assume the values, institutions and trappings of our civilization. I have already alluded to this in the introductory comments and have suggested that it is part of the colonialist and superiorist stereotype with which many Canadians have typically viewed aboriginal peoples. There is also another part of this stereotyped thinking about native peoples which requires that if they wish to assert rights to aboriginality, they must demonstrate that their "traditional" practices and laws have remained intact and unchanged. The assumption behind this thinking is that native societies are inherently static and non-adaptive; hence, they provide a corollary to the assumption that necessarily any change will be in favour of the incorporation and adoption of non-native practices and laws.

The judgment of the Court of Appeal in *Naqitarvik*\(^\text{55}\) illustrates the combined effect of this thinking. The role of the Inumarit is seen as evolving from its "traditional" role as governing body of the Inuit to a specialized counselling service similar to that operating in any other small Canadian community. At the same time, because the membership of the Inumarit includes individuals who have experience in "modern" counselling and there have been changes in its methods and sanctions, it is no longer part of "traditional" culture. It is easy to understand the implications of this sort of reasoning. Essentially it denies native people the right to be contemporary, the right to develop their indigenous systems of government and decision making to cope with the realities of contemporary life, without acknowledging their own demise as distinctively native societies.

In the case of Arctic Bay we have an example of an Inuit community which over the past forty years has experienced major changes in their social and economic organization: from a life in which small hunting groups moved from camp to camp across the tundra, they now live within a central community while still spending a considerable part of the year on the land; their economy has become a mixed one where wage employment and transfer payment now provide supplements and, for some people, replacements for hunting, fishing and trapping. In the same way the old political processes have had new layers added to them in the form of community councils elected

\(^{55}\) *Supra,* note 79.
under territorial legislation; new religions have been introduced and incorporated into Inuit spiritual values; there has also been introduced a new language and an educational system modelled on the non-Inuit society's values.

The cumulative effect of these changes was reviewed by Mr. Justice Berger in the Report of the Mackenzie Valley Pipeline Inquiry. He noted that it seemed to many in government that the old way of life was disappearing and that it was appropriate that government policies be geared to helping native people make as rapid an adjustment as possible to a new economy, a new political system, a new way of seeing themselves in the world. However, the evidence placed before the Inquiry, not only by the Inuit but by the other native peoples of the North, made it clear that they were not prepared, as others were, to consign their way of life to the past. Instead they aspired to the development of their distinctive societies in ways which were consistent with their values, social structures and economic systems. What they sought was the acknowledgment by the larger society of their rights to control the scale and pace of development in the North so that it did not overwhelm them. It was during the 1970s that Inuit communities and other native communities across the country (with the benefit of a generation of young people who had been to the white man's schools and universities and had observed how Canadian political institutions functioned and the extent to which they diverged from those of aboriginal communities) started to develop initiatives which sought to make the old values and processes work in a modern context in order to provide the balance of continuity and change.86

It is within this wider context that the formal introduction of the Inumarit Committee in Arctic Bay must be placed. The assumptions which underlie the role and responsibilities of the Inumarit are entirely different from those of a "counselling service". The elders in a native community are not seen as they typically are in the larger society, as those whose productive life has ended, but as the guardians of the society's history and the repository of its collective wisdom. There is respect accorded the elders which has no counterpart in a mere counselling service. The concern for the healing of collective wounds and of ensuring community cohesion is a mandate which private or state counselling services do not have. To equate the two is to fail to comprehend, as the Court of Appeal did, the respect afforded elders in Inuit society and the constructive ways in which that respect is channelled back by the elders in producing and maintaining social

86 Supra, note 9, vol. 1.
order. The implications of such lack of comprehension are equally self-evident in the judgment of the Court. A substantial sentence of imprisonment, judged by the community after due deliberation to be unnecessary from the perspective of the community, the victim and the accused, is imposed with the clear message to the community that our non-native elders, or at least some of them, know better than theirs as to what will contribute to a just and orderly society.

It is important to ask why the majority of the Court of Appeal in *Naqitarvik* felt that they could not respect the wishes of the community, as expressed through the Inumarit, to have the accused dealt with by the community and not be subjected to punishment by imprisonment far removed from the community. The Court does not clearly articulate this but it may be inferred from their reference to the *Sandercock* case that a substantial sentence of imprisonment is deemed to be necessary in order to further general deterrence and to reflect appropriately the denunciation of society for sexual assault. In making judgments about deterrence and denunciation, however, the Court is seeking to reflect Alberta or Canadian society in general. Clearly, it was not focusing on native communities. The judgments of Judge Bourassa and Mr. Justice Belzil did refocus the inquiry in this way and concluded that the intermittent sentence plus the community service order was adequate for general deterrence, and reflected the denunciation of the Inuit of Arctic Bay. At the same time, it was consistent with the reconciliation between the victim and the offender and the reintegration of the offender into the community.

This issue of the extent to which the Court should focus the sentencing of a native person so that it is an expression of the native community's values and attitudes is one which was considered by the Australian Law Reform Commission:

> The attitude of the local community to the defendant and to the offence is relevant in sentencing (within the general range of sentences applicable), especially where the offence was committed within that community and the victim was from that community. But the courts cannot disregard the values and views of the wider Australian community. There may be general community concerns over the prevalence of certain offences. The gravity of the particular offence may be such that other considerations are secondary. In some cases courts may be, for these kinds of reasons, unable to accede to the wishes of the local Aboriginal communities or to take full account of local customary laws. This is a reflection of the established rule that

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87 *Supra*, note 79.

88 *Supra*, note 83.
Australian law applies to all persons within Australia, including traditionally oriented Aborigines in their dealings with each other. The general law may impose further punishments upon offenders even though their local community may be satisfied or reconciled through traditional processes.

Obviously the courts are having to balance the expression of concern and deterrence on the part of the general law with respect for the offender's (and victim's) backgrounds and traditions, and the expectations of the community or communities from which they come. The relative weight attached to these considerations varies, as the cases show. But the fact that the dispute within the local community is resolved by the infliction of traditional punishments or otherwise through customary law processes, although relevant, does not preclude further punishment by the court. The Australian community has an interest in the maintenance of law and order in Aboriginal communities.

The Commission provides a review of some of the cases in Australia in which this issue has arisen and while in most cases they involve specific aboriginal punishments quite different from those known in Canadian native societies, they are useful in understanding how Australian judges have grappled with this issue. In *R. v. William Davey* the accused, an aborigine from the Northern Territory, pleaded guilty to the manslaughter of another aborigine. The victim interfered during a fight between Davey and his wife and made certain remarks to Davey (which the Crown accepted were provocative) while all three persons were heavily intoxicated. At first instance, Justice Gallup in sentencing Davey referred to the seriousness of the offence of manslaughter and stated:

> [I]t seems to have been the sort of accident where you were forced to take some sort of an action according to your tribal customs and traditions and that [the victim]... should not have interfered in what was essentially an argument between you and your wife.... [O]ne of the things that I take account of always in a case like this, it being something which has happened within the Aboriginal community, is to pay close regard to what your community... thinks about what you did. [I]t is a very important thing that your community has considered what you did and they have decided that mostly it was [the victim's] fault, that you hit him and killed him. It is very important to me that your community thinks that you should come back into the community. It is very important that there is not going to be any payback [traditional tribal retribution], so I am told,

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and that there will be no further trouble if you go back to your community at Borroloola.\(^91\)

Justice Gallup imposed a sentence of three years imprisonment but suspended it upon Davey entering into a three year good behaviour bond. The Crown appealed to the Federal Court against the sentence on the ground of, inter alia, manifest inadequacy. On this issue, Justice Muirhead, while acknowledging the seriousness of the offence and the leniency of the sentence, noted the doubtful deterrent effect of sentencing, especially in respect of alcohol-related offences, the devastating effects of liquor upon Aboriginal society, the need to promote reformation of offenders in appropriate cases as the best form of protection to society, and affirmed the sentence of the trial judge.

In \(R. v. Joseph Murphy Jungarai\)\(^92\) the offence again arose in the course of a domestic dispute at a time when the accused was very drunk. This case in particular illustrates the complex interplay between Aboriginal and Australian justice systems in terms of sentencing. Jungarai was initially refused bail. On an appeal against this refusal, Chief Justice Forster of the Northern Territory Supreme Court, in granting his release, dealt with the issue in this way:

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Whatever may be the defences available to the accused under the law of the land and whether the appropriate verdict after the trial may be guilty of murder, guilty of manslaughter or not guilty, it is plain that according to Aboriginal law and custom the accused is held responsible for [the victim’s] death and must accordingly be punished. The precise tribal punishment appropriate for the accused is not absolutely certain, but the strong probability is that it will consist of a single ceremonial spearing in the leg followed by banishment into the bush for a period to be fixed in order to remove from the community a possible focus for trouble. . . . The extended families of the deceased and the accused are in a state of mutual hostility which will only cease when the whole matter is “finished up” by the accused suffering the appropriate tribal punishment. The accused is willing, indeed anxious, to undergo this punishment and feels deeply his inability to do so in order that peace between the families may be restored. . . . As a result of the court proceedings the accused will either be convicted of murder or manslaughter or will be acquitted. If he is convicted, it is likely that he will be in prison for a period which will satisfy the banishment requirement, even though this is a result of the court’s action rather than the community’s. If he is
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\(^{91}\) Transcript of proceedings at 29-30, cited in A.L.R.C. Report, \(ibid.\) at 355.

acquitted, or, having been convicted, is dealt with in such a way that he is not in prison, the accused will return to the community and may then be banished if it is thought necessary to do so to avoid trouble. Whatever may happen as to this aspect, it is almost certain that until the spearing has taken place the matter of retribution or pay back in Aboriginal terms will be unresolved and the community will be ill at ease and serious trouble may flare up at any time. It is equally certain that once the spearing has occurred, the unease and the probability of serious trouble arising out of the killing will be at an end.

In these circumstances and not withstanding the fact that persons charged with murder are normally not allowed to be released on bail I considered it right to make the order which I did make.93

At a subsequent trial, the Crown accepted a plea of guilty to manslaughter. Justice Muirhead imposed a sentence of six years and six months with a non-parole period of two years and six months. In giving his reasons for sentence, Justice Muirhead stated:

The killing, naturally enough, caused a furore in your own community to the extent that after your arrest you were released on bail by the Chief Justice of this court to undergo tribal punishment. This was apparently necessary to protect your family from pay-back. This took place, and I am told you have been beaten with nulla-nullas and boomerangs until you were unconscious. I am also told there is no likelihood of further pay-back or trouble in the community. . . . Your counsel has urged me to release you under a suspended sentence of imprisonment on the basis that you are unlikely to offend again, on the basis that the Aboriginal community’s anger has been quelled by tribal punishment, but I am afraid I cannot accede to that request. This Court pays regard . . . to tribal lore and customary punishments but the Australian law is designed to protect all Australians and I fear, if I ignore matters such as this — matters which occur between Aboriginal people — it can be said that the law does not extend to the protection of the black people. Furthermore you have illustrated you can be very dangerous in liquor and this crime was committed in a principal centre of the Northern Territory. There was no cultural tinge to the offence itself. It was simply a drunken stabbing which I am afraid is an offence far too prevalent amongst all sections in this Territory. You were carrying a very little, lethal knife and whilst you told the police you did not recognize it clearly you were carrying it for the purpose of violence.04

This sentence was affirmed by the Federal Court of Australia.

In the contemporary Canadian context it does not appear that any native community has sought the right to revive any equivalent tra-

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ditional corporal punishment such as that which has been considered by the Australian courts.

A point of some consequence is raised by the statements of Justice Muirhead in the Jungarai case. His Lordship referred to the fact that the offence took place outside of the Aboriginal community in a principal centre of the Northern Territory and that the accused was dangerous while under the influence of liquor. The clear implication here is that in other circumstances the victim could have been a non-Aborigine and that there is therefore a greater general societal interest in sentencing than would be the case where the offence was self-contained within the Aboriginal community.

In a Canadian context where there is considerable mobility between native and non-native communities and where there has been a certain gravitational pull, particularly of young people, away from their communities to larger urban centres, there is likely to be a broad spectrum of cases in which it is more or less appropriate to permit a native community to have the decisive voice in determining the shape and extent of appropriate sanctions. Relevant factors would be the community's ability to exercise control and influence over an accused, which necessarily would involve the extent to which an accused was likely to respect the sanctions recommended by the community. Where, as in the case of Arctic Bay, the evidence shows that the community has such control and that the accused has this respect, and where the crime is one which is community based, I do not see any basis for the subordination of the community's views to a sentence policy conceived for a larger society, particularly where the application of that policy will have the effect of undermining the native community's cohesion and ability to resolve its own problems.

If native community expectations and opinion are to be taken into account in sentencing an offender from that community, a related issue which was broached by the Australian Law Reform Commission is how those expectations or opinions are to be determined. As the Commission pointed out:

In many cases only a limited number of people within the community will have a direct interest in the matter. Others will regard it as none of their business and will not wish to become directly involved. However, family, friends, kin of the offender and the victim (if there is one) will have a very real interest in the outcome of any proceedings. It has also been argued that the presence in court of members of the offender's family and community has the added effect of bringing

95 Supra, note 92.
‘shame’ to the offender. There may also be offences about which community leaders would wish to make their views known. Particular offences may have major repercussions for a community (for example, if a community store or vehicle is vandalised or other important community facilities are interfered with in some way). What is articulated as ‘community opinion’ in these sorts of cases may involve clan leaders speaking on behalf of their clan either for or against a particular offender, or it may be an expression of generally held concerns about particular offenders. In the former case especially conflicts of interest and of opinion may exist. This is not an argument against attending to the views of members of the community, but it does demonstrate the difficulty that can arise in ascertaining what weight should be given to views that are presented. It is important that in relation to particular offenders the appropriate persons are consulted.

In a Canadian context we have already seen how the Inumarit functions in Arctic Bay and the way in which the Territorial Court looks to their evidence as reflecting the considered views of the community. The Court, by hearing the evidence of the elders in front of the whole community and placing its imprimatur on what is the “voltgeist” of the community, serves to recognize and affirm the community’s collective sentiments and judgments.

4. CHRISTIAN ISLAND

Another Canadian example of seeking to incorporate and accommodate community expectations in the sentencing process can be found in a programme instituted some years ago on Christian Island in Northern Ontario. In the early 1970s, Christian Island, the home of the Beausoleil Indian Band, a community of around seven hundred residents, experienced an increase in juvenile crime, a problem which had been prevalent on the island for some time and appeared to be getting worse. The probation officer in charge of supervising these offenders was a non-native resident in the white community of Middleton and had difficulty relating to these native juveniles. The court which dealt with these cases was also located in Middleton, which was separated from the island by a twenty minute boat ride and a further twenty mile journey by road. These matters were brought to the attention of Judge Golden who, in consultation with the community, decided that a new approach was needed in handling juvenile offenders from Christian Island. The result was the establishment of the Lay Assessors Program in the summer of 1973. One of the primary purposes behind this initiative was to prevent or at least minimize the

96 Supra, note 4, vol. 1 at 383-4.
local native peoples' ill feelings towards white society, particularly in their dealings with the judicial system.

The key features of the program involves holding juvenile court on Christian Island and having two native lay assessors sit on the bench with the judge. Their role is to advise the judge of an appropriate sentence. When the programme first began in 1973 the Band Council selected six men and six women from the community as a panel. Whenever Court is held on the Island, two of the twelve advisors who are not related to the accused are selected. A key feature of Court sessions is that they are open to all members of the community. Although the concept of open court is now part of the Young Offenders Act, in 1973 it represented a major modification of the normal procedure under the old Juvenile Delinquents Act. The lay assessors do not take part in the adjudication of the guilt of the accused juvenile but after a finding or plea of guilty, the sentence is given by the two lay assessors who consult with the duty counsel, the police, the probation officer, the accused and the accused's parents. The judge is not involved in this decision-making process. Once a decision is reached, Judge Golden is informed of that decision so that he may formally announce disposition as required by law. Although Judge Golden retains the right to alter a disposition rendered by the advisors there has been no occasion in which he has ever done this. It was Judge Golden's view that the penalties imposed upon juveniles are viewed by the native community as having been decided entirely by their own people.

Another important aspect of the programme was the hiring of a native assistant probation officer. This person, who lives on Christian Island, was hired to supervise juvenile offenders who were placed on probation.

An evaluation of the Lay Assessors Program on Christian Island was carried out by the Ministry of the Attorney General in 1985. According to the researcher, it is generally felt that since the Lay Assessors Program was established there has been a reduction in the amount of juvenile crime on Christian Island. Since 1973 only seven courts have convened on Christian Island involving a total of thirty-three juveniles. This reduction, however, cannot be attributed definitively to the programme in light of other changes that have taken place: for example, better recreational activities for young people;

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97 S.O. 1929, c. 46.
improved standard of living on the reserve and the greater exercise of discretion by the police. The evaluation concluded that Judge Golden’s willingness to play a lesser role was a key factor in encouraging the native community to feel that they had some control over the court process and this increased the community’s sense of responsibility for reducing crime on their reserve.

A contributing factor to this new attitude may have been the role of the lay assessors, whose high standing in the community meant that natives were deciding what penalties to impose upon other natives. Quite often, juvenile offenders (or their parents) were made to pay restitution to the victims (usually victims of property damage). Community work such as cleaning the Band Office or being banned from social activities, were other popular dispositions handed down by the lay assessors. Quite often, these penalties were given as conditions of a probation order. In Judge Golden’s view, dispositions were generally “high profile” so that the offenders would be known and seen by other community residents. The intention sometimes was to embarrass as well as to teach the offender a lesson in the hopes of preventing future offences. As well, some respondents felt that these high profile dispositions had some value as a general deterrent to others in the community, including both juveniles and adults.99

Another major factor which was thought to be have contributed to the positive community response to the programme and which may have contributed to reduction in juvenile crime was the hiring of a native assistant probation officer. This officer, who lived on the island, was more capable of effectively supervising juvenile offenders and much better able to communicate with offenders and their parents within the context of ongoing community life. In terms of his concern to minimize ill feelings between native people and the criminal justice system, Judge Golden was of the view that the Lay Assessors Program had led to juvenile offenders from Christian Island feeling that they were treated fairly by the Court. While no community survey was conducted by the evaluation study to determine residents’ feelings towards white society and the justice system, the researcher was of the view that the Lay Assessors Program, by virtue of the fact that the judicial system had relinquished some of its control in favour of local decision making, was perceived by the native community as a symbol of the judicial system’s confidence in their ability to handle their own affairs with respect to the administration of justice.

In considering the appropriateness of the Christian Island model for other native communities, the evaluation report concluded that

99 Ibid. at 23-4.
there were three factors essential to the programme's success. The first was the judge. It was imperative that the presiding judge believe in and accept the role of Lay Assessors in determining dispositions. This was necessary in order for the native community to feel that native people are largely in control of the penalties. Secondly, it was important that the community leaders fully believe in and support the programme. The third factor was the arrangement of probation and after care services, particularly using a native probation officer.

It was also felt that the success of the Christian Island programme was, to some extent, made possible by the relative isolation of the Indian community from local non-Indian communities. The authors of the evaluation report expressed concern that a programme similar to that of Christian Island might encounter a strong negative reaction if the native community it served was in close proximity to a non-Indian centre because of a perceived disparity in sentencing practices, a concern which would be less likely where the native community was removed from such centres. This concern should not be viewed as justifying a limitation on native assessor programmes to isolated native communities. In many parts of Canada, native communities in close proximity to non-native centres already carry a heavy burden of being judged through stereotyped images. As already pointed out, such stereotyping has a debilitating effect on native pride and self-worth. The reality under current justice regimes is one of gross inequality of treatment for native people which belies the theoretical model of treating natives equally. It is the real, felt injustice to which new initiatives are being directed. It would be perverse to reject them in the name of an idealized, and for native people, a mythical model of equal justice.

5. PRE-TRIAL DIVERSION

Pre-trial diversion is an innovation which has been introduced into the general criminal justice system, both in Canada and in other jurisdictions in the last decade. As the Australian Law Reform Commission points out: "It is a serious reflection on the criminal justice system that one of the few areas where Aborigines are under-represented in criminal justice statistics involves diversion schemes specifically established to reduce the impact of the system on young offenders or first offenders." The Commission, in reviewing experience outside Australia, was able to point to two experiences with

100 Supra, note 4, vol. i at 350.
diversion for native offenders — one in New Zealand and the other in Canada. The latter, known as the High Level Diversion Scheme, was operated under the auspices of the Native Counselling Service of Alberta (NCSA).

The High Level area was chosen as a pilot project for diversion because of its relative isolation — oil had been discovered and the first liquor outlet opened during the 1960s — and the degree of social cohesiveness of the communities. However, the principal factor in the choice of this area was the high proportion of native people living there and the fact that the community leaders had expressed great concern at the increasing numbers of young people becoming involved with the criminal justice system. The scheme sought to intervene at the pre-trial stage. After a person (initially the scheme was limited to adults, but later juveniles were included) had been charged, an assessment was made as to whether the case was suitable for diversion or should proceed in the ordinary way. At first, the R.C.M.P. had a role in this assessment process with the local Crown prosecutor making the final decision. However, the R.C.M.P. subsequently withdrew from the screening process, with the result that the decision to divert was made by the Court. This changed the nature of the programme in a number of important ways. It became like other sentencing alternatives, and it tied the process to circuit court sessions (which only took place twice a month). This worked against the idea of speedy and relevant resolution of problems by and within the community.

The diversion programme had several stated objectives: (1) short circuiting the law breaking-incarceration cycles of native offenders; (2) giving native people a better understanding of the criminal justice system; (3) increasing community participation in and "ownership" of the criminal justice system and (4) minimizing the penetration of native people into the criminal justice system. In essence, it was a scheme aimed at providing an alternative to imprisonment (or to a fine leading to imprisonment for default) for minor offences through keeping offenders out of the courts. It also required significant community involvement.

The project was intended to involve community members extensively, through their participation in a "Diversion Screening Committee" which would develop, in conjunction with the victim and the offender, a suitable agreement whereby the offender would compensate for his offence. . . . The diversion agreements were to be flexible with the emphasis being on the resolution of the problem to everyone's satisfaction. Agreements might therefore require the offender to make
a written or verbal apology, provide cash restitution, or to perform work for the victim or the community.\textsuperscript{101}

The scheme included only a small range of minor offences including causing a disturbance, common assault, theft under \$200, taking a motor vehicle without consent, false pretences under \$200, fraud (food and lodging) and mischief under \$50. Unfortunately, the High Level Program, although supported by the native communities, failed to get widespread support from the criminal justice professionals involved. There was a low level of referrals based on the view that the objectives of the scheme could be achieved by greater use of other existing mechanisms, for example, a fine-options programme or probation associated with a community work service order. The position taken by NCSA was that the fine-options programs were not being utilized by native offenders and that the relative success of the Diversification Program, in terms of re-offence rates and the community support for the scheme, justified its continuation, although it was recognized that important changes were necessary. Despite these arguments, government funding for the project was withdrawn in 1981. Only recently has NCSA been able to revive government interest in an expanded diversion program for High Level.

A different and less formal diversion scheme has operated in the Maori community of West Auckland, New Zealand for a number of years. The Te Atatu Maori Committee operates a kind of community court and hears cases referred to it by the court, the police, the local school and voluntary community offices. It has thus dealt with cases, mainly involving juveniles, in which offences had been committed (for example, theft) as well as cases involving anti-social behaviour (for example, bullying) and general community problems (for example, inadequate care of children). The Committee has gained the confidence of the police and the courts who are prepared to divert cases to the Committee providing the offender agrees to the matter being dealt with in that way. In hearing a case referred to it, the Committee attempts to get the community involved by requiring the parents, family or others with a direct interest to attend. A description of one Committee hearing referred to by the Australian Law Reform Commission gives an idea of the way matters are dealt with.

Discussions throughout the procedures were concerned with the total behaviour of the accused young persons and not just the offences

\textsuperscript{101} Native Counselling Service of Alberta, "Creating a Monster — Issues in Community Program Control" (paper presented to the Canadian Association for the Prevention of Crime, Winnipeg, 1981) [unpublished] at 5-6.
alleged to have taken place. The result was a great deal of shame, remorse shown, restitution provided for, forgiveness afforded and a whole range of emotion which almost certainly has played a part in the fact that 8 of those 9 young persons have not re-offended.102

The Committee usually orders community work to be done for a period of time (not more than two hundred hours) depending on the seriousness of the offences and extent to which remorse is shown by the offender. Where cases have been directed from the court to the Committee, a report on the outcome of each case is prepared and sent to the court. If the Committee has been unable to satisfactorily deal with an offender, it may recommend that the court proceedings be reactivated.

Returning to the Canadian context, a recent initiative proposed by the First Nations of South Island Tribal Council103 on Vancouver Island reflects an integration of the High Level and the West Auckland programmes. What distinguishes the South Island Tribal Council programme is that it has been developed within a legislative mandate under s. 4 of the Young Offenders Act. Section 4 provides that measures apart from judicial proceedings may be used to deal with a young person alleged to have committed an offence, where the measures are part of a programme of alternative measures authorized by the Attorney General of the province, subject to a number of conditions precedent. These include that the measures are appropriate, having regard to the needs of the young person and the interests of society, that the young person fully and freely consents to participate in the program, having been advised prior to giving their consent of their right to be represented by counsel and that the young person accepts responsibility for the act or omission that forms the basis of the offence.

The purpose of the South Island Tribal Council initiative is set out by them in the following way:

The “Native Alternative Youth Program” under the authority of the Young Offenders’ Act and of First Nations of South Island Tribal Council will provide a unique opportunity to develop a creative and more responsive format of services and counselling to Native young offenders. This program will cater to the special needs of our youth and requirements based upon the customs, traditions and the culture of the South Island region....

102 Supra, note 4, vol. 1 at 346.
103 First Nations of South Island Tribal Council, Native Alternative Youth Program (Corrections and the Ministry of the Attorney General of B.C., 1986) [unpublished].
The *Native Alternative Youth Program* will provide our native communities with the responsibilities for dealing with the behavioural problems of our youth. The problems, that do not require formal criminal sanctions.... The program will ensure the protection of community, the rights of the native youth, the special needs and considerations as per the maturity level of the young person(s). This program will allow Indians to preside over Indians and to exercise a role in the rehabilitation problems of native young offenders. The Elders will once again provide counsel and guidance to correct the youth. It must be further emphasized, in keeping with our traditions, that our program is not one of punishment. It is designed, as a program of education, counselling and a support system that will influence the individuals and families of South Island. The "*Native Alternative Youth Program,*" if accepted will create a unique situation in the use of the *Young Offenders' Act, the diversion concept,* and the application of *Indian (Family) Law.* The implementation of this program will be a major step forward in regard to working relations between a provincial agency and the Tribal Council. This move into the justice arena takes place with considerable fore-thought, in particular because of the general native regard for the present legal system. Hopefully, the program will serve the needs of our youth and of our divergent communities (First Nations and the non-native).\(^{104}\)

The South Island project specifically sets out to design a process which uses a combination of "contemporary" and "traditional" concepts in the counselling of troubled native youth. The process is one which seeks to reflect the respective role and responsibilities of the Elders, the Tribal Council, the Band councils that make up the Tribal Council and, most importantly, the families which make up the native communities. The program establishes what is called a Tribal Court consisting of five members selected from amongst prominent and respected Elders of the South Island region. In addition to these five, there is provision for three alternates who will sit where one of the Board members is required to excuse himself or herself because of conflict of interest, particularly because of close family relations which might cause bias. Two members of the Tribal Court together with the "diversion coordinator" conduct an initial interview with the diversion candidate who has been referred by Crown counsel. A candidate will be advised prior to the interview of his right to the presence of legal counsel and both he and his parents or guardians may have the services of a "spokesman and witness" pursuant to the rights of the family under the traditions and customs of Coast Salish Indian law. If the interview committee deems the candidate acceptable for diversion it submits a report and recommendations to the Tribal

\(^{104}\) *Ibid.* at 1.
Court which will then consider the case. Any interested individual or agency recognized by the Tribal Court may make representations to the Court on behalf of the diversion candidate on concerns relating to the diversion candidate. The victim therefore is given the right to participate in the process. The Tribal Court must then decide whether to accept the candidate for diversion and determine the length and terms of the diversion contract which is limited to no more than six months. The Tribal Court must also select an Elder to act as sponsor for the young person. This Elder must be acceptable to the young person's parents or guardians. The sponsoring Elder will then work with the young person on a one-to-one basis and report on progress to the diversion coordinator.

Although the South Island proposal has initially been set up to deal with young offenders charged with summary offences, the expectation is that the same process could be expanded so that the jurisdiction of the Tribal Court could encompass young offenders charged with indictable offences and then further extended to deal with adult offenders.

There are a number of observations which can be made about the South Island proposal. Perhaps most important, it illustrates how native communities can devise justice mechanisms which integrate traditional processes into a contemporary social context in ways which are distinctively native, rather than versions of non-native programs where the only variation is that natives sit in the seats or offices ordinarily occupied by non-natives. This is probably best illustrated by comparing the role an Elder would be expected to play to that usually played by a probation officer. A probation officer trained in a University School of Social Work will bring counselling and case work methodologies based on individual responsibility and individual change. An Elder, while understanding the importance and need for individual change, is able to locate this within a historical and cultural continuum. An Elder is able to identify the sources of individual strength for a young person in 1987 tracing a spiritual path which has given native communities their collective strength. An Elder is able to recount a history which identifies a young Indian person's responsibility for the future. In these and other ways, Elders are able to show the young person how he or she has a valued place within the context of native society and to learn or rediscover how they can make a contribution to a future in which the native people of Canada can take their rightful place among the native peoples of the world. No non-native probation officer, however well-intentioned and however well-informed, can perform this role.
A further illustration of constructive adaptation in the South Island project is the way in which the project has been organized. The Tribal Court would operate on a regional basis with Board members being selected to reflect the different communities represented by the South Island Tribal Council. Also, the project would accept as diversion candidates both status and non-status native young offenders. The project, therefore, seeks to avoid the divisiveness which is often built into Indian Act based projects which are tied to Band Councils and status Indians; at the same time it draws on native collective energy and talents in ways reflective of how native people perceive themselves and their jurisdiction as First Nations.

Another observation which should be made of the South Island initiative relates to the legislative structure under which it was designed. That structure in s. 4 of the Young Offenders Act sets out a number of parameters, most of which are designed to protect the rights of the young offender. Section 4 was drafted generally, without any particular objective of responding to distinctively native initiatives. Nevertheless, the South Island project has been designed within the parameters of s. 4 without, so it would seem, distorting community values or processes.

There is a great advantage in having such framework legislation, provided that it is broad enough to encompass distinctively native initiatives. Section 4 seems to do this. The advantage of this approach is that native communities can come up with programmes with a realistic expectation that they will be respected by non-native participants in the criminal justice process. Thus, the acceptance of the South Island project by the province of British Columbia would be taken to be a recognition that the project is in the best interests not only of the native communities concerned, but because of its greater likelihood of resolving problems of young native offenders, that it is in the best interests of the larger community of British Columbia. This advanced negotiated validation of an alternative process will minimize the situation observed in the Naqitarvik case where community expectations are frustrated because of the court’s lack of understanding of the dynamics of native conflict resolution systems and the ensuing failure to reconcile native and non-native processes.

III. NATIVE PEOPLE IN PRISON

Most of the initiatives discussed so far are aimed at keeping people out of prison. What of the native offenders who have received a sen-
tence of imprisonment? The Correctional Law Review has, in its Working Paper No. 7, *Correctional Issues Affecting Native Peoples*, focused on the problems faced by natives once admitted into the penitentiary system. From their review of the literature they identify a number of common themes.

First, it is very difficult for non-Native correctional workers to understand the social, cultural, spiritual and religious backgrounds of Native offenders and thus to understand the dimensions which affect many of them most strongly. The greater the lack of mutual understanding, the more compounded become the difficulties of running a correctional program.

Second, even where Native offenders make “model prisoners” in the sense that they cause little or no trouble in the institution, there has been a marked lack of success in persuading Native offenders to participate actively in programs of education and counselling provided for the general population. There appears to be a consensus among correctional authorities and aboriginal groups that a significant problem is that Native offenders appear to be largely unfamiliar with the workings of the correctional system. However, it does appear that Native offenders are most likely to participate in programs if they are run by Native organizations which are not identified as being a part of the system.

Third, there has been modest success at best in recruiting Natives to work in correctional settings, which is especially regrettable since Native offenders appear most likely to participate in regular CSG programs staffed by Natives and having a Native cultural orientation.

All these themes lead many Native and non-Native observers to conclude that Native offenders are an especially disadvantaged group, that Native people should be more closely involved in the planning and delivery of correctional services, and that in some cases special services and programs should be established by and for Native offenders.

There are also marked differences between natives and non-natives in relation to the release system. The problems again have been well summarized by the Correctional Law Review. Native offenders tend to waive their rights to a parole hearing more often than do non-natives, choosing not to be considered for parole. Native prisoners are more unfamiliar with parole regulations than their non-native counterparts. In some regions of the country, native prisoners receive full parole at a significantly lower rate than non-natives. Following

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106 *Supra*, note 1.
release, natives have a higher rate of return to the penitentiary and are more likely to be revoked for "technical violations" than for new criminal offence convictions. As to the reasons for this state of affairs, the Correctional Law Review provides this insight:

Many people who work with Native offenders complain that the small number of Natives among National Parole Board members and staff contribute to a lack of understanding of Native offenders and a lack of parole plans which are suitable for Natives. Some Native representatives claim that parole criteria or the assessments made about individuals in preparation for parole hearings are inappropriate to Natives. It is also claimed that there is little input from Native communities into the parole preparation process and the development of an aftercare plan for Native offenders.

The Correctional Law Review recommends two broad approaches to respond to the unique situation of the native offenders. The first and the most far-reaching would involve the enactment of legislation to enable native people to assume control of correctional processes that affect them. This enabling legislation would transfer to native groups a significant degree of jurisdiction for providing correctional services. The locus of services would rest with such groups as Indian Bands, Tribal Councils, Inuit or Métis communities or native correctional organizations. The legislation would also include provisions to negotiate specific administrative and financial details of the transfer of jurisdictions. After successful completion of the negotiations, the native groups would be mandated to provide a range of services, through the establishment of correctional institutions, parole and after-care facilities or other culturally-appropriate services in their communities. This process must assess the "state of readiness" of native groups to provide these services. Many native communities place a higher priority on other matters and are not ready to address correctional issues at this time, if ever. The diversity of native communities and groups must also be recognized. Legislation would need to be flexible enough to take into account a wide variety of correctional arrangements which might result from negotiations. In an effort to develop a culturally based system, native groups may propose correctional facilities very different from existing structures.

This approach seeks to reflect in federal legislation a commitment to native self-government. It is not dependent upon an constitutional amendment and while such provisions could be part of more com-

108 Ibid. at 6-7.
109 Ibid.
Locking Up Natives

Prehensive Native Claims Settlement involving self-government, this approach could be implemented in advance of such settlement. Set out below is a draft of some of the provisions that could be included in such federal enabling legislation.

Objective

1. To ensure the responsiveness of correctional programmes to Aboriginal offenders and to recognize that Aboriginal people should be entitled to provide, wherever possible, their own correctional services.

Definitions

2. “Aboriginal community” is a nation, tribal council, band organization or other group of predominantly Indian, Inuit or Métis people who may be designated to provide correctional services to Aboriginal offenders.

Designation of Aboriginal Correctional Services

3. The Solicitor General may designate a community, with the consent of its representatives, as an Aboriginal community for the purposes of this section.

4. The Solicitor General may make agreements with bands and Aboriginal communities, and any other parties whom the bands or Aboriginal communities choose to involve, for the provision of correctional services.

5. A band or Aboriginal community may designate a body as an Aboriginal correctional authority. Where a band or Aboriginal community has so designated an authority, the Solicitor General shall, at the band or Aboriginal community's request, enter into negotiations for the provision of services by the correctional authority.

6. Aboriginal offenders who are in the custody or control of the Correctional Service of Canada may, with their consent, be placed in the charge of an Aboriginal correctional authority after consultation with the band or tribal council.

7. All institutions, penitentiaries and places of detention established by the Aboriginal correctional authority shall be staffed totally or in part by Aboriginal persons, taking into account the available Aboriginal manpower. For such purposes, programmes shall be established to train Aboriginals as staff, correctional or detention officers and as officers required for probation, parole, rehabilitation and aftercare services.

8. Where a band or Aboriginal community declares that an Aboriginal offender is in the charge of an Aboriginal correctional authority, the Solicitor General may grant a subsidy to the correctional authority taking charge of the offender.
The Correctional Service of Canada shall regularly consult with bands and Aboriginal communities about the correctional services provided, the powers exercised, and other matters affecting the Aboriginal offenders placed in the charge of the Aboriginal correctional authorities.

Although this legislation is drafted in the form of federal legislation, parallel legislation enacted by the provinces would enable multi-lateral negotiations to take place so that the same aboriginal correctional authority could be charged with responsibilities for both federal and provincial prisoners.

The draft legislation is, of course, set out only in its broad contours but there are several observations which should be made. In recognizing the legitimacy of alternative native justice systems there may be a need to balance certain procedural rights with the collective right of a native community to use its distinctive processes. When a decision has been made either by an alternative native justice mechanism or by the regular criminal justice system to subject a person to imprisonment, that person should be afforded the full benefit of the law which has developed to protect prisoners from abuse. In *Justice Behind the Walls,* the argument is made for the crucial role which the rule of law must play in the prisons. This argument is based in large measure upon the consistent experience in every country where prisons exist and of their inherent tendency to undermine basic human rights. Aboriginal societies did not build prisons and to the extent that imprisonment continues to be deemed necessary for some native offenders, it is appropriate that we remain cynical, until evidence accumulates to the contrary, that even prisons run by native people will remain places in which there remains the potential for abuse and hence the necessity for a legal basis to protect prisoners from that abuse. This does not mean that native-run prisons would be deprived of the necessary flexibility to chart new directions. Thus, it is possible to conceive of a disciplinary process in the context of a native prison which seeks to utilize a Council of Elders rather than the normal single chairperson of the Disciplinary Board. In the same way the disciplinary process might well be structured so as to reflect other features of a community-based justice system with its emphasis on conciliation rather than punishment.

The second approach proposed by the Correctional Law Review designed to ameliorate the problems faced by native offenders, in-

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LOOKING UP NATIVES

volves the reform of existing correctional legislation in less fundamental ways, where the focus of control remains with the existing correctional systems. This entails the development of a legislative scheme which recognizes native offenders as a particularly disadvantaged offender group and therefore deserving particular consideration. As the Correctional Law Review points out, the codification of selected aspects of the operation of the correctional system as they pertain to native offenders could ensure that correctional legislation was brought in line with Charter requirements, particularly in relation to a recognition of aboriginal rights, equality rights and fundamental freedoms such as freedom of religion. It is in fact in relation to this last fundamental freedom that much of the initiative directed to special native programming has been focused in recent years. The experience in this area is both illustrative of the problems which native prisoners face, in the context of a prison system which historically has seen them as second class "citizens", and the ways in which native prisoners themselves have sought to initiate significant change in their situation.

That the power of spiritual expression and experience should have emerged as a central issue for native prisoners is a remarkable historical phenomenon. Remarkable, because historically the social reformers of the 18th and 19th centuries who articulated the principles upon which the Penitentiary as a state institution was based, viewed exposure to religious experience, coupled with solitary confinement, as an essential element in the pedagogy of penitentiary discipline. This view has long since disappeared, if it ever really existed in Canadian prisons. Yet, from the accounts of native prisoners themselves, it would appear that an understanding and acceptance of the essential elements of native spirituality may hold more prospect for change in the situation of native prisoners than any other programmes currently available or proposed.

Native prisoners who learn the ways of native spirituality discover, often for the first time, a sense of identity, self-worth and community. Because the path is one which must be taught by those who have special knowledge and who are respected for their spiritual strength and wisdom, the practice of native spirituality requires that prisoners communicate with Elders in the outside native community. Some prisoners, by virtue of their prior training or the training they undergo in prison, are able to lead certain ceremonies and provide spiritual counselling to other prisoners. There develops, therefore, a continuum in which those who are more experienced in spiritual ways are able to help those less experienced. In this way a sense of community
emerges based not on the common element of criminality, but rather on a search for spiritual truths. In place of the alienation which prison typically engenders, native prisoners are able to experience a sense of belonging and sharing in a core set of values and experiences which link them with the outside native community. Native prisoners are able to experience feelings of value and self-worth not only through their spiritual training but also in the work they are able to do in helping other prisoners along the same path. Native spirituality, therefore, provides native prisoners not only with constructive links to each other but also with native people outside of prison and with their collective heritage. Native spirituality is seen by many native people, both inside and outside the prison, as an important element in dealing with problems of alcohol and drug dependency, violence and other forms of anti-social behaviour. Some of the alternative responses to crime which are being fashioned by native communities on the outside, whether in the form of diversion or community counselling, have built into them an element of exposure to native spirituality.

Respecting and recognizing, both in law and practice, the right of native people to exercise their spiritual ways inside prison poses a threshold problem, in terms of the way in which non-native society categorizes experience. We are used to distinguishing between the sacred and the secular: between religion, politics and medicine. North American native societies are characterized by their holistic worldview. As one Elder has expressed it:

> It is a total way of life, a way of life rooted in a direct experience of a Creator, ever involved in and unfolding in creation. A range of ceremonial activities provide the setting within which such experience is initiated, sustained, repeated.... Individual and group ritual brings one ultimately into a direct relationship with "Life Force", a relationship which, over time, grows in vitality and meaningfulness.

Traditionally, the experience springs from the life situation of the community. There is no codification, dogma or doctrine. What is primal is the ceremony — it provides the people's response to the direct action of Spirit and Its agents. The ceremonial leader assures authenticity and integrity of the religious modes or observances, thereby assuring the sacred bond of oneness between culture and spirituality.111

The distinctiveness of native spirituality makes it difficult for non-natives to accord due respect to native spiritual beliefs and practices. Although there are native men and women who have special powers

and responsibilities in spiritual matters, they are not distinguished by clerical collars or degrees from schools of divinity. Native spirituality has its own ceremonies and rituals which are not those familiar to Judeo-Christian orthodoxy. There are places of special spiritual significance, but churches and temples of worship are not part of the architecture of native spirituality. This is not to say that the practice of native spirituality has no specific form in the particular context of the prison system. The ceremony of the sacred pipe and the sweat lodge are two of the distinctive ways in which native prisoners have sought to express their spiritual traditions. The sacred pipe ceremony is one common to many Indian nations and represents the unifying bonds of the Indian ethos. Through smoking the pipe within a ritual circle, the prayers of Indian suppliants rise with the smoke and mingle with all living creatures. The Great Spirit evoked by the pipe enters and connects native people with all their relations in the living world. The pipe contains animal, vegetable and mineral matter. The different materials used in the ceremony — sweetgrass, sage, red willow and cedar bark — all have symbolic importance. In the same way, the use of eagle feathers and certain articles of personal adornment are integrally related to matters of the spirit. The sweat lodge ceremony, like the pipe, is widely distributed across native cultural and geographic lines and it is primarily an act of purification. Each component of the sweat lodge structure symbolizes the elemental forces of the universe and the cycles of nature.

Within the context of the prison system, native prisoners have experienced great difficulty in getting their practices taken seriously. Native spirituality is seen by many staff as being pagan or cultist. The smoking of the pipe is equated with drug use; the cloistering of native prisoners inside a small sweat lodge is viewed with suspicion in terms of the machinations and security breaches which are envisaged as taking place therein. In the context of the federal prison system, however, efforts have been made through the formulation of Commissioner’s Directives to facilitate the practice of native spirituality and in a number of institutions these practices are now becoming well established. But many difficulties still exist and native prisoners feel that their religious observances are not given the full measure of recognition and respect afforded mainstream religions. Native prisoners find that their medicine bundles, which contain personal items of spiritual significance, are subject to security searches in ways which desecrate the contents. Complaints are also made regarding the lack of respect with which Elders and their medicine bundles are treated.
when they come into the prison to help officiate and conduct ceremonies.

The Correctional Law Review grappled with these issues and has proposed that the recognition of native spirituality be elevated from administrative recognition in Commissioner's Directives to legal recognition in binding legislation or regulations. Such guarantees are necessary in light of the problems so far experienced with securing protection under administrative directives, and could take the following form:

Aboriginal spirituality shall be accorded the same status, protection and privileges as other religions. Native Elders, spiritual advisors and ceremonial leaders shall be recognized as having the same status, protection and privileges as religious officials of other religions for the purposes of providing religious counselling, performing spiritual ceremonies and other related duties.

Where numbers warrant, correctional institutions shall provide an Aboriginal Elder with the same status, protection and privileges as an institutional Chaplain.

The correctional service shall recognize the spiritual rights of individual Aboriginal offenders, such as group spiritual and cultural ceremonies and rituals, including pipe ceremonies, religious fasting, sweat lodge ceremonies, potlaches and the burning of sweetgrass, sage and cedar.112

Although it might seem to be an unlikely source for initiative in native self-government, the work which has been done by some of the Native Brotherhoods and Sisterhoods in Canadian prisons is a concrete expression of native peoples' determination to regain control of their own lives, and to shape their future in terms which have meaning and coherence within their own cultural framework. In some federal prisons native prisoners have formed cultural and spiritual societies to give legal shape to their aspirations. In some cases these initiatives have been perceived by correctional administrators as exercises in "red power" and as such potentially undermining of institutional good order and security. Properly viewed, the initiatives are rather an effort to create order out of disorder, to develop self-respect and pride where now only alienation and bitterness prevail.

The necessity to understand native prisoner initiatives as legitimate exercises in self-government can be seen in a recent experience in one federal penitentiary, Matsqui Institution, where the native community inside the walls took it upon itself to develop a native cultural

112 Supra, note 1 at 34.
and educational programme using the services of a community-based native educational society. This programme was conceived from a holistic perspective and sought to provide opportunities for native prisoners to improve their educational levels, develop skills in native arts such as carving and the making of ceremonial artifacts such as drums, deal with political issues arising from constitutional talks and negotiations on land claims and to deepen appreciation for the values of native society. The native prisoners at Matsqui felt that they had control over this programme and saw it as reflective of their needs and aspirations. They were able to call upon a wide range of members of the outside native community to help them, to teach them and to listen to their concerns.

Just recently, as a result of national policy initiatives designed to increase the educational and literacy components in all life skill programs within federal penitentiaries, the educational/literacy component of the Matsqui programme was increased to a level where it became the primary focus. The programme was then put out to tender and the contract of delivery was awarded to a local non-native community college which was felt by the prison administration to be better equipped to deliver the educational/literacy component. The effect of this decision on the native prisoners is not difficult to imagine. The prisoners feel that their initiative has been undermined and that they have lost control of the programme. The combination of a sense of undermining and powerlessness can spell the death knell of any programme, however well conceived its individual components may have been. In some ways this experience parallels the experience of the people in Arctic Bay in the *Naqitarvik* case where a local initiative designed to give back to the community control over its social order was thwarted by the application of sentencing guidelines which were derived from the perspective of the larger non-native community.

The Correctional Law Review, in approaching the issue of whether correctional legislation should make particular reference to native programming needs, suggests the following form of wording to supplement the more general provisions which at the moment cover native and non-native prisoners:

> The correctional system shall make available programs which are particularly suited to serving the spiritual and cultural needs of Aboriginal offenders and, where numbers warrant, programs for the treat-

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113 *Supra*, note 79.
ment, training and reintegation of Aboriginal offenders which take into account their culture and way of life.\textsuperscript{114}

This draft wording would allow these programmes to be delivered by private native groups and individuals. The provision would not require correctional authorities to offer programmes directly but only to make them available. Any such provision should, however, require that the design and delivery of such native programmes be done in consultation with both native prisoner groups and native organizations involved in corrections; furthermore, that the delivery and implementation of any such program shall wherever possible be contracted to a community-based native organization or agency, acceptable to the particular native prisoner community for whom the programme is intended.

These provisions are intended to achieve a rearrangement in the present relationships between correctional authorities, native organizations and native prison communities. The correctional authorities would have a legislative obligation to provide programmes. Native organizations would be recognized as having the responsibility for developing and implementing such programmes and, more significantly, the native prison community would be recognized as having a right both to shape programmes and to ensure that they are implemented by agencies which are responsive to their needs.

This last matter is one which has been raised by a number of native prisoner communities. They perceive that initiatives developed by the native prisoner community, and reflecting the experiences of that community, tend to become transformed when they go through the process of fitting into a proposal advanced by an outside native organization. Further refraction occurs during the negotiations between that organization and federal or provincial correctional bureaucracies. The result may be a programme which has changed significantly from that which was advanced by the native prisoner community.

It is important that the role and right of these native prisoner communities to help determine special native programmes be recognized. The issue of who speaks for the prisoner community is one which native prisoners themselves are resolving through the formation of cultural societies with clearly defined procedures for making decisions and advancing initiatives. This work in many ways mirrors the work that is being done in outside native communities and is the heartbeat of native self-determination in the prison.

\textsuperscript{114} \textit{Supra}, note 1 at 34.
The issue of the prisoner communities' role in shaping life in prison and in programmes for reintegration into the community is an important one, with implications for changing the balance of power and addressing some of the sources of abuse of human rights in Canadian prisons. It is an issue developed in *Justice Behind the Walls.* An example of a prisoner community initiative which spans both non-native and native demands for greater recognition as animators, rather than passive recipients of prison programmes, is that taken by prisoners at Mastqui Institution in British Columbia. There a group of prisoners organized a series of colloquia, the first of which dealt with the issue of capital punishment, the second with sentencing and parole and the third with rehabilitation programmes. The colloquia were attended by Members of Parliament and the Senate representing all three political parties, representatives of native organizations and other groups and individuals involved in the shaping of correctional law and policy. The second colloquium was attended by over fifty prisoners, many of whom were members of the native prison community. One of the papers which was addressed to the legislators was drafted by the Four Winds Native Society. Among the proposals they made were the following:

We want to begin training our people in counselling skills for work on the reserves and in the inner cities where Indians run into trouble with the law — we would be the best people for the job for you must walk the walk to talk the talk. For this we need trainers that we have confidence in — other Indians and Elders — but they must be Indian and we must choose them.

We feel our spiritual leaders should work independent of the prison chaplaincy. They should be paid an equivalent salary and have the same benefits and rights as any existing prison chaplain. We have the numbers, we have the need; we must have this to grow and help our people both within the prison system and on the reserves and inner cities.

The Four Winds Native Society want to design, develop, staff and operate an all native halfway house program, run by Indians taken from this prison counselling program and responsible to our own people...

We need a visiting program to bring into the private family visit area of this institution families of prisoners who are too poor to afford the cost of travel, poor families from reserves and inner cities. We want to teach these families the skills they need to survive. This program we would design, develop and supervise with our pipe carriers and spiritual Elders...
We would like to see the native life skills program in this institution returned to the previous organization that was doing a good job before the present contract was awarded to a non-Indian organization. The group that used to run the program, the group that we Indians were happy with was the Native Education Centre in Vancouver. This program we are proud of and it is making a difference in our lives. It should be returned to the Native Education Centre in Vancouver and expanded to other institutions. This is not an arts and crafts production centre. It is teaching us real skills we can use to discover who we are. Skills we can employ to put food on the table when we leave prison. The learning to read and write will always be a part of the program but let's be honest here for once, even if an Indian can read and write, who will hire him; we must be in control of our own destiny.

All of these things would help the Indian to return to his or her society with the skills to live and never return to these prisons again.\textsuperscript{116}

Native prisoners, in developing these sorts of initiatives are not only seeking to forge links with each other and with their collective traditions, they are also seeking to forge links with native communities and with their future life outside of prison. They point to the fact that very little exists in the community in the form of halfway houses which are responsive to the needs of native prisoners. Although in the major centres there are some halfway houses run by native agencies, they conform by and large to the mainstream model of such a facility. What distinguishes them is the fact that all of the residents are native, not the nature of the programme or services they offer.

In Alberta, the Native Counselling Services Association, a pioneer in terms of innovative programming for native people, has put forward a proposal whereby it would take over an existing community correctional facility (the Grierson Centre in downtown Edmonton) and run it according to a different model, one which responds directly to the needs of native offenders and their families.\textsuperscript{117} The project proposal documents the almost doubling of the number of native prisoners within federal correctional institutions in Alberta over the past decade and the limited ability under existing programmes for NCSA to provide services for native prisoners. The NCSA proposes that the correctional centre provide residency for native prisoners who intend to make Edmonton or Northern Alberta their place of residence upon release from either federal or provincial institutions. The

\textsuperscript{116} Paper presented at Matsqui Institution by the Four Winds Native Society, 13 November 1987 [unpublished].

\textsuperscript{117} Native Counselling Services of Alberta, Proposal for the Operation of the Grierson Centre Complex (10 August 1987) [unpublished].
specific components of the programmes and services reflect its distinctively native orientation. Part of the programme is devoted to family life improvement. It is to be made available to all residents and their family members who live within a reasonable distance of the centre. The programme will be aimed at people who are experiencing a breakdown in their family relationships and those who are lacking in parenting or basic life skills. Another aspect of the programme would focus on dealing with alcohol and drug abuse and would involve close cooperation with the Nechi Institute on Alcohol and Drug Education and the Poundmaker Treatment Centre. These programmes are based on the principal of:

awakening in native alcoholics a pride in their heritage and of using this heightened cultural awareness and feeling of group solidarity to combat dependence on alcohol as a means of escape from the sordid and brutal realities so often characteristic of their lives. Religious observances and venerated customs ... are important themes in the Nechi program and so extend it beyond the limits of conventional therapeutic approaches.\(^{118}\)

A third part of the programme is employment oriented and designed to prepare and provide employment opportunities. The fourth component is cross-cultural awareness and involves the use of native Elders. The fifth part focuses on physical fitness.

The proposal is clearly meant to provide a bridge for native offenders from the prison back into the community. By involving the outside community in the development of the programmes, the proposal recognizes that breaking the cycle of imprisonment requires harnessing the collective strengths of the native community.

It is not difficult to see that the Grierson proposal, while inspired by the need to help native prisoners find their way back into the community, has many elements in common with some of the other proposals that have been looked at, which are designed to provide constructive alternatives for persons who have come into conflict with the law before they are sent to prison. A native community resource such as the Grierson Centre could, in time, shape and develop alternative justice mechanisms for native people in an urban setting such as Edmonton. The wealth of experience that organizations such as the Native Counselling Service of Alberta have developed over the past decade and their understanding of the needs and resources of the communities they serve, provide the best evidence that native organi-

izations have the knowledge and the capacity to redirect the criminal justice system so that it works for, not against, native people.

The Grierson proposal clearly seeks to harness community resources within the urban setting to which many native offenders return. But what of those offenders who come from small communities far removed from such centres? There remains the dilemma that, in some cases, a native community may not wish to have one of its members, who has been disruptive, return to the community. However, in many other cases, the potential for reintegration exists. A common complaint from native organizations involved in this area is that the paroling authorities do not give sufficient consideration to the resources of an offender’s home community, often because there is no person or agency deemed capable of exercising appropriate supervision. One way to respond to this would be to have a legislative requirement that where an individual expresses an interest in a return to his home community, subject to his consent, his community will receive notice of his parole or mandatory supervision plan. The Correctional Law Review has suggested that such a provision might read as follows:

With the offender’s consent, and where he or she has expressed an interest in being released to his or her reserve, the correctional authority shall give adequate notice to the Aboriginal community of a band member’s parole application or approaching date of release on mandatory supervision, and shall give the band the opportunity to present a plan for the return of the offender to the reserve, and his or her re-integration into the community.¹¹⁹

This would parallel the kind of requirement that now appears in the legislation of several provincial Child Welfare Acts¹²⁰ in which any apprehension of an Indian child requires notice to the Band Council or to an Indian child welfare agency established by the Band.

In relation to the issue of providing appropriate parole or mandatory supervision on reserves or in native communities, it is possible under existing legislation to designate private agencies or individuals as parole supervisors. The Native Counselling Services of Alberta has several of its staff so designated, although the numbers are inadequate to deal with the great number of communities which the agency serves. Several provinces have gone some way to deal with this problem in relation to probation by providing funds for the training of

¹¹⁹ Supra, note 1 at 36.
community members on reserves to act as probation officers. Clearly, there is a need for parallel efforts in relation to parole supervisors.

The issue of native people acting in capacities such as parole officers or supervisors is not confined to the reserve context. Native prisoners on parole or mandatory supervision in urban areas with large native populations find that there are no native parole officers with whom they can communicate effectively. This, in turn, raises another important issue relating to the hiring of native correctional staff by both federal and provincial systems. The federal system has in place what is, in effect, an affirmative action programme for the hiring of new staff members of native origin, but it appears that this has had a very limited impact on the number of native persons working within the system. The thrust of affirmative action programmes for native staff should be conceived in a different way than the programmes which are presently in place in relation to women working within the correctional service. Although there is every reason to believe that the presence of a greater number of women working in prisons may have beneficial effects upon the correctional regime, the primary thrust of this affirmative action programme is equality of opportunity for women. While it is possible to justify affirmative action programmes for native people on the same basis of equality of opportunity, there is another compelling objective underlying this programme. This is to redress the problems which exist where native prisoners must communicate with non-native staff across a cultural divide, a difficult enough task under the best of circumstances. Given that life in prison is characterized by the worst of circumstances, with the customary antipathy between prisoners and guards compounding stereotyped perceptions of native people, it is not unexpected to find that many native prisoners perceive their custodians as the embodiment of a racist society. Under these circumstances, communication typically becomes confrontation. The presence of native staff members does not guarantee surmounting the customary prisoner/custodian distrust but there is the realistic prospect that the interests of native prisoners, in terms of prison programmes or release plans, will be better served where communication takes place within a common cultural framework rather than across a cultural divide.

The Correctional Law Review, while noting that affirmative action programmes aimed at increasing the numbers of native staff and administrators need not have a legislative base, raises the question whether, in light of the limited success under current administrative practice, a legislated solution is preferable. Such legislation might require "there shall be an affirmative action programme for the hiring
and promoting of aboriginal professional staff to work with aboriginal offenders." This would encompass Order-in-Council appointments of National Parole Board members. While recognizing that programmes which are designed to "indigenize" some correctional staff positions are but a small part of the spectrum of initiatives that must be undertaken to change the face of imprisonment as it is experienced by native prisoners, such a legislative provision is an appropriate part of correctional legislation.

In order to overcome some of the limitations of existing programmes, any affirmative action programme should be developed with the direct participation of aboriginal organizations involved in the correctional area. One model currently being implemented in Alberta involves the recruiting and training of staff by the Native Counselling Services of Alberta and their placement within the correctional system after this training. Such an approach has the advantages that aboriginal staff, at the time of their initial placement, are familiar with the correctional system and are able to work in accordance with its standards with a legitimate expectation that they can achieve career advancement, yet at the same time make legitimate demands that the system respond to the needs of aboriginal offenders.

A related issue is whether correctional legislation should also impose a legal obligation on correctional authorities to provide native awareness training to all staff coming into contact with native offenders. I believe that it should. The need for such cross-cultural education is one which native organizations and other informed commentators have advocated as a necessary measure to enable other initiatives, such as those based on native spirituality, to be perceived in a positive and constructive way, to be encouraged rather than thwarted. But the issue of cross-cultural awareness is one which extends beyond the prison walls. A space must be made for education and continuing education for those who presently possess power within the criminal justice system and who, through the initiatives advanced by native people, are being asked to exercise it with a greater respect and understanding for native values, to share that power with native communities and in some cases, give their power up in favour of native justice mechanisms.

IV. CONCLUSIONS

This article seeks to contribute to a better understanding by lawyers and judges of why the current system has to change and the

\[121\] Supra, note 1 at 39.
directions in which it can change, if we are to have a criminal justice system which does more than respond to dispossession and deprivation by locking up natives. Some of these directions, particularly in the area of the reform of correctional law, have been charted by the Correctional Law Review and can be reflected in new legislation. The federal government should enact framework legislation to enable native people to assume control of correctional processes that affect them. This enabling legislation would transfer to native groups a significant degree of jurisdiction for providing correctional services including the establishment of correctional institutions, parole and after-care facilities or other culturally-appropriate services in their communities. The locus of services would rest with such groups as Indian Bands, Tribal Councils, Inuit or Métis communities or native correctional organizations and would include provisions to negotiate specific administrative and financial details of the transfer of jurisdiction. The legislation must be open-ended enough to take into account the fact that, in an effort to develop a culturally based system, native groups may propose correctional facilities very different from existing structures. This approach would reflect in federal legislation a commitment to native self-government. Such legislation would not be dependent upon any constitutional amendment and, while possibly part of more comprehensive native claims settlements involving self-government, these particular provisions could be implemented in advance of such settlement.

In many of the other areas discussed, the initiatives of native communities can be implemented within the framework of existing legislation. Examples of this are the diversion programme proposed by the First Nations of South Island Tribal Council and the incorporation of community values in sentencing through community councils such as the Inumarit of Arctic Bay. Because these and other initiatives reflect the consensus of the native communities involved as to the ways in which the criminal justice system can become more responsive to their values, and enhance a sense of community ownership of the system and the assumption of collective responsibility for the reintegration of aboriginal offenders, both federal and provincial governments and the judiciary, whose co-operation is critical to the implementation of these initiatives, are urged to support and encourage them.

In the area of alternative native justice systems, the importance of legal pluralism within Canadian Confederation must be recognized and priority given by governments in their allocation of criminal justice research funds to encourage the development as pilot projects
of working models of contemporary native justice systems. Although there is a sound constitutional basis for the development of parallel native justice systems, it is not appropriate to endorse any particular model, because the particular model chosen will be linked with an Indian nation's or native community's view of its path towards self-determination and ultimately is for them to choose. It is not unrealistic to anticipate that models of aboriginal justice systems can be worked out in a Canadian context which, cognizant of the experience of other jurisdictions, can reflect the accumulated wisdom of both aboriginal law and the common law.