

Some Problems in the Administration of Justice in Remote and Isolated Communities

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I. NATIVE INCARCERATION RATES: AN INDICATOR OF AN UNDERLYING PROBLEM

It is not the purpose of this paper to provide a comprehensive analysis of northern justice statistics or of those pertaining to native people — that has been done elsewhere.¹ And while native justice inquiries have recently become an important growth industry in Canada, they will not be dealt with in this paper.

Certain basic facts need to be stated, if only to emphasize the stark reality of the problems faced by the justice system in the North, and society's response to those problems. They are set out here in summary form to indicate that the criminal justice system impacts disproportionately on natives as compared to non-natives in Canada as a whole, and also in the many small isolated communities in the North where Indian and Inuit populations are significant.

The following excerpt from a recent Canadian Bar Association Report provides an instructive summary of the statistics pertaining to native peoples in our justice system:²

... aboriginal people represent perhaps as many as one million Canadians (or 4% of the national population), yet they

— constitute 10% of the federal penitentiary population;

— make up almost all of the inmates in certain women's prisons in Yukon and Labrador, and over 70% in the Northwest Territories, Manitoba and Saskatchewan;

— account for 14% of all admissions to provincial correctional institutions across Canada (Manitoba: 52%, Saskatchewan: 61%, Alberta: 25% and British Columbia: 17%), with extraordinary over-representation in some provinces (Newfoundland: 4 times, Prince Edward Island: 12 times, New Brunswick: 6 times);

— are 8 times more likely to be apprehended by the child welfare system than non-aboriginal children in British Columbia and Ontario, represent 30% of the children in care in Alberta, over 60% of the children in care in Saskatchewan, up to 60% in Manitoba, and so on across the country;

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1. Comparative data on the Canadian justice system, including numbers of charges, types of offences, conviction rates, classification of offenders by age, sex and other identifying characteristics can be found in a number of publications such as: Canada Year books, a variety of census publications and articles and studies based on census data, and a number of articles concerned with native peoples and northern justice. In addition, the *Yukon Statistical Profile*, published by the Yukon Bureau of Statistics contains a comprehensive summary and comparison of Canadian justice related information for the years 1980 — 1986.
 2. The Canadian Bar Association Committee Report, *Aboriginal Rights in Canada: An Agenda for Action* (1988) at 12. These figures are consistent with data published by J.C. Hathaway, "Native Canadians and the Criminal Justice System" (1984) 49 Sask. L. Rev. 201 at 222.

— have a young offender crime rate three times higher than their percentage of the national population.

In the Yukon, the percentage of native people in the general population is approximately 18%. Recent data indicate an over-representation of natives in the prison system by a factor of 3.3. Table 1 reflects 1986-87 admissions to the Whitehorse Correctional Centre on sentence:³

TABLE 1
1986-87 ADMISSIONS TO WHITEHORSE CORRECTIONAL
CENTRE ON SENTENCE

	Native	Non-Native	Total
Male	309	218	527
Female	28	5	33
Total	337	223	560
Percentage	60%	40%	100%

As this Table also shows, non-natives are under-represented by a factor of 1/2. Therefore, a native person is almost 7 times more likely to be imprisoned on sentence than a white person is.

While native incarceration rates have been the subject of recent comment, both in the legal literature and the media, it is not often appreciated that a significant percentage of individuals who find themselves in Canadian prisons are there only indirectly, because they refused or were unable to pay a fine.

Section 718(3) of the *Criminal Code* provides that where a court imposes a fine, "... a term of imprisonment *may* be imposed in default of payment of the fine ..." (emphasis added). Some provinces and territories provide for imprisonment in default of fines for provincial or territorial offences,⁴ while others, like British Columbia, prohibit incarceration in default of fine payment.⁵ The Ontario legislation attempts to prevent the imprisonment of

3. Adult Correctional Services in Canada, Fiscal year 1986-87, Part. 1, Question 11, Admissions by Ethnicity.

4. In Yukon, s. 7(1) of the *Summary Convictions Act*, R.S.Y.T. 1986, c. 164, adopts the enforcement provisions of the Code *mutatis mutandis*; similarly, the Northwest Territories *Summary Convictions Procedures Ordinance*, O.N.W.T. 1978 (1) c. 3, as amended in 1986 by the addition of s. 2.1.(1), has the same effect.

5. *Offence Act*, R.S.B.C. 1979, c. 305, s. 72(1), though note that s. 72, amended in 1982, does allow for imprisonment pursuant to the *Small Claims Act* and the *Motor Vehicle Act*.

persons unable to pay fines until all reasonable methods of collecting the fines have been tried and failed or would not likely result in the payment within a reasonable time.⁶

Jobson and Atkins reported that in 1983 fine defaults accounted for significant groups of prisoners admitted to local prisons, ranging from 14% in British Columbia to 32% in Ontario and 48% in Quebec.⁷ Table 2 shows the statistics for the year 1986:⁸

TABLE 2
PERCENTAGE OF INMATES INCARCERATED FOR FINE DEFAULT

Yukon	Canada	Lowest in Canada	Highest in Canada
40%	32%	16% (B.C.)	65% (P.E.I.)

In an attempt to provide an alternative to incarceration for fine defaults, the *Criminal Code* permits the Lieutenant Governor in Council of each province or territory to establish Fine Option Programs, whereby the offender can "work off" his fine by doing work, along the lines of community service work.⁹

Notwithstanding the existence of a fine-option program, for the period April 1, 1986 to March 31, 1987, 42% of all admissions to the Whitehorse Correctional Centre were for fine defaults.¹⁰ A more detailed analysis of default incarcerations was conducted in the Yukon for the period April 1, 1988 to March 31, 1989:¹¹

- 70% of fine incarcerations involved natives, although only approximately 18% of the Yukon population is native (therefore a native person is 10 times more likely to experience a fine default incarceration than a non-native person living in the Yukon);
- Convictions pursuant to territorial legislation accounted for 59% of native fine default incarcerations, compared to 47% for non-natives;
- 75% of native people had served previous default time compared to 34% of non-natives;

6. Ontario *Provincial Offences Act*, R.S.O. 1980, c. 400, s. 70(3)(b).

7. K. Jobson & A. Atkins, "Imprisonment in Default and Fundamental Justice" (1985) 28 *Crim. L.Q.* 251 at 251.

8. *Yukon Statistical Profile*, *supra* note 1, Table 23.18.

9. S. 718.1 of the *Criminal Code* was proclaimed in 1985.

10. Adult Correctional Services in Canada, Questionnaire, *supra* note 3 Question 15, Fine Default Admissions.

11. R. Cole, *Default Incarcerations* (Yukon, 1989).

- Native offenders averaged 6 previous incarcerations while non-natives averaged 2;
- 20% of the natives, compared to 52% of the non-natives were known to be employed at the time of incarceration.

A related study reported by Cole (*supra*), indicated that in 1988, 88% of those individuals incarcerated for fine defaults were eligible for the Fine Option Programs. However, of those, 78% claimed no awareness of the program. It was concluded that the Fine Option Program appears to have had no significant impact on fine default admissions since it was introduced into the Yukon in 1986.

The high unemployment rates for those incarcerated (particularly in the case of natives) suggest that fines are being imposed in circumstances where the offender has no real means to pay, and probably without an adequate investigation as to financial means. As the Code provisions for ordering default time confer a discretion on the sentencing court, it is clearly wrong to impose a fine where the defendant is impecunious and the result of imposing a fine with default terms is for all practical purposes a jail sentence.¹²

Residents of northern communities, and in particular the native population, are particularly susceptible to being "improperly" incarcerated for fine default. In general, lower levels of education, higher unemployment rates, and lower average incomes characterize our native populations in northern Canada.

The proportionately high incarceration rates for native peoples can be attributed to any or all of the following propositions:

- 1) Natives commit more offences than non-natives;
- 2) Natives who commit offences are more readily identified and arrested;
- 3) Natives are more likely to plead guilty or be convicted than non-natives;
- 4) Natives are incarcerated at a disproportionate rate compared to non-natives.

It is submitted that all of these propositions are true. Operating independently, and in concert, they result in the statistics reported earlier in this paper. Two principal factors underlie these propositions: 1) the social and economic poverty in which many natives live, and 2) a subtle, unintentional, but persistent discrimination by the decision makers in the criminal justice system.

12. See *R. v. Natrall* (1972), 9 C.C.C. (2d) 390, 20 C.R.N.S. 265, 32 D.L.R. (3d) 241 (B.C.C.A.); *R. v. Deeb and Wilson* (1986), 28 C.C.C. (3d) 257 (Ont. Prov. Ct.).

II. SOCIAL AND ECONOMIC CONDITIONS

The social and economic conditions in Canada's northern communities impact directly on the lives of the residents and indirectly on the administration of justice. Moreover, aboriginal peoples are the largest population group in the great majority of small isolated communities. The following observations are applicable to Canada's aboriginal peoples in general,¹³ but are noticeably present in many of the small communities in the Yukon:

A. Education

The level of education attained by native people is much lower than for Canadians as a whole. In 1981, national data indicated that only 26% of status Indians 15 years and older had completed high school compared to 52% of the reference population. The situation in many northern communities is, in all likelihood, more severe. Native culture, which is largely inconsistent with formal education, is stronger in remote northern communities. Strong family ties act as a barrier to high school attendance and completion, because young people must often leave their community and family to attend school. Natives who do succeed in school often leave the community to take advantage of employment opportunities not available in small communities. The "pool" of community leaders and role models is reduced as well by provincial, territorial and federal governments hiring qualified natives away from their home communities, sometimes for no other reason than to be seen to be employing persons from minority and native groups.

B. Employment

Factors affecting employment opportunities and earning capacities of the native population are: educational levels, geographic location, discrimination and cultural barriers.

Historically, unemployment rates for native people have been 2 to 3 times higher than for other Canadians as a whole. These discrepancies are often greater on reserves and in small northern communities. When employed, native people, as well as many non-natives in the north, are more likely to be employed seasonally than other Canadians. Further, native incomes are, on average, substantially less than non-aboriginal incomes. The 1981 Census figures indicated that aboriginal incomes were approximately two thirds of their non-aboriginal counterparts.

It is not surprising to find that native people rely much more heavily on government payments in the form of family allowances, old age security, guaranteed income supplements, welfare payments and unemployment insurance for the income they receive. In 1981, 51% of all status Indians over 15 years of age either had no income or identified government

13. From *Basic Information on Aboriginal Peoples* (Ottawa: First Ministers Conference - Aboriginal Constitutional Matters, 1987). This information is based on statistical data collected from the 1981 Census and is quoted throughout this section of the paper.

transfers as their major source of income. Today, in small communities in the North, this continues to be a chilling reality.

C. Other

It is a fact of life that in small northern communities social and medical resources are either totally absent or severely limited. Services taken for granted in a small centre in southern Ontario are often unavailable in small communities in the Yukon. For instance, family counselling, psychological counselling, family planning, financial counselling, life skills counselling, and medical and dental services are often available only by travelling significant distances to Whitehorse, or out of the Territory to Edmonton or Vancouver. Community based support groups are often non-existent.

The costs in human terms of the social and economic conditions in the North are significant. For instance, the native suicide rate is one of the highest in the world and 10 times the Canadian average.¹⁴

These social and economic factors also impact on the courts on a daily basis: consider the large numbers of youths who are charged with offences, the role of alcohol and drugs in the majority of criminal prosecutions and the large proportion of children taken into care. In 1981, aboriginal children were six times more likely to be taken into care than non-native children. This data is consistent with the experience of the Yukon Territorial Court during the past two years.

The social and economic condition of natives in our northern isolated communities contribute significantly to the observed crime rates and the rates of incarceration for native offenders. Persistent poverty combined with an erosion of traditional and cultural pursuits has resulted in frustration, alcoholism and recidivistic involvement with the criminal justice system. Until these conditions are ameliorated, the native incarceration rate cannot be expected to decline significantly.

14. "Native Suicide Rate at Crisis Level" *Saskatoon Star-Phoenix* (27 May 1989) A18.

III. CROSS-CULTURAL BIAS AND DISCRIMINATION

A. Definition of Problem

Discrimination can be defined as: "A failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored."¹⁵ "Equality" of treatment is a cornerstone in our legal system and is preserved by the *Charter of Rights and Freedoms* in general, and s. 15 more specifically. For the most part, only law professors have concerned themselves with this abstract concept of law, although, with the advent of the *Charter*, courts and judges have become increasingly concerned with the operational aspects of equality.¹⁶

The concept of equality in court proceedings is based on the premise that any law is equally applicable to, understood by and concurred in by all those subject to it.¹⁷ It is, in fact, an assumption of cultural homogeneity; it operates to maintain the existing sociocultural order.

In non-legal terms, this assumption is patently false. It is obviously false in the many small, often isolated communities in the territories and northern parts of the provinces where native peoples have a significant, and often predominant, presence. The "equal" treatment by the justice system of those native people who are culturally and otherwise distinctive is, at best, problematic and, at worst, discriminatory.

The term "criminal justice system" includes many more players and institutions than judges and courts. It is in fact a "decision network" which includes the complainant, police, Crown attorneys, defence counsel, probation officers and youth workers, judges and correctional agencies. The treatment of a defendant, including the sentence imposed by the judge, depends on the decisions made by all persons within the system. It is important to note that people, not institutions, make these critical decisions. Moreover, most of these decisions are not automatic, but involve the interpretation and application of imprecise rules or procedures and the exercise of considerable discretion.

In the remote and isolated communities of northern Canada, these decision-makers generally have a different cultural, social and economic background than the majority of the persons in the communities where they serve. For a number of understandable reasons, they often remain in the community for relatively short periods and leave before they are fully in tune with it and the culture of its residents. In these communities, the probability of systematic cultural bias¹⁸ impacting on decision-making at all stages of the criminal justice system is significantly greater than in larger population centres.

15. *Black's Law Dictionary*, 5th ed. (1983, abridged).

16. *R. v. Hebb*, (7 February 1979) (N.S.S.C.T.D).

17. D.H. Swett, "Cultural Bias in the American Legal System" (1969) 4 L. & Soc'y Rev. 79 at 80.

18. The term "bias" is used to imply an inclination, bent or predisposition to make decisions a certain way, based on the sum total of the individual's own cultural and social experiences.

I use the term "cultural bias" to denote a subconscious proclivity, as opposed to the more obvious preformed judgments implied by the word "prejudice". One author described bias as follows:

Acting upon the same propositions and under the same apparent conditions one individual will decide one way, and another, another way. This runs through all human experience. It means that there is a bias in every personality. The nature of this bias is a composite of hereditary tendencies, parental influences, personal experiences and the particular environmental pressure.¹⁹

B. Cross-Cultural Differences — Value Systems

Significant cultural differences exist between the native people in northern communities and the personnel who are charged with administering the criminal justice system: lawyers, probation officers, police, court staff and judges. These differences are primarily found in the value systems of the two cultures, and are reflected in the observable attitudes, demeanour and actions of individuals appearing in the courts. A misinterpretation of these observable characteristics can result in an inappropriate assessment of the individual and in an inappropriate response by the courts.

It is difficult to generalize about native values, as there are many different and distinct native cultures in Canada. The following general elements apply to many native groups, and it is instructive to compare them with corresponding non-native values:²⁰

19. D.G. McCarty, *Psychology and the Law* (Englewood Cliffs, N.J.: Prentice-Hall, 1960) at 113.

20. As presented by Mary Jane Jim and Diane Moir (Cross-Cultural Workshop for Yukon judges and justices of the peace, 9 May 1989, Yukon College, Whitehorse).

TABLE 3
COMPARISON OF VALUE SYSTEMS

I. Relationship with natural world

<i>Native Peoples</i>	<i>Non-Native Peoples</i>
— people exist in harmony with nature	— man conquers nature and makes it over to suit his needs
— the universe can be explained on a spiritual level	— the universe can be explained through scientific investigation
— material goods are not important	— material things are more real than spiritual things
— nature's gifts should not be wasted	— consuming goods keeps the economy going
— the land should be used carefully so that future generations will be able to enjoy it	— emphasis is on material comfort and convenience

II. Perception of Time

<i>Native Peoples</i>	<i>Non-Native Peoples</i>
— live for the present moment	— decisions anticipate the future
— work to satisfy present needs	— work to get ahead and improve personal status
— there is always plenty of time	— time is precious and must be measured very precisely
— use patience in dealing with situations that arise	— actively attack problems that arise, "don't just sit there, do something"

III. Relationship with Others

<i>Native Peoples</i>	<i>Non-Native Peoples</i>
— follow in the ways of the elders	— aspire and achieve more than your father
— cooperate and share with others for survival	— competition brings out the best efforts of the individual
— give loyalty to the group and the extended family	— the individual is more important than the group; the nuclear family is more important than the extended family

— do not interfere with others or try to tell them what to do	— everyone should be taught how to behave properly
— avoir confrontation	— confront conflict so that it can be solved
— depending on the task to be done, temporary leaders arise without apparent selection process	— leaders are chosen by democratic vote

A number of these differences often profoundly impact people's behaviour. For the non-native person, the "protestant work ethic" is not only a necessary means of earning a living, but a fundamental religious concept. Ownership of land and other property is a measure of success. Moreover, ownership is personal, with emphasis based on the individual. Competition and "keeping up with the Jones" are intrinsic cultural values.

In contrast, traditional Indian values emphasize communality. Historically, competition was restricted to games: work and rewards were shared. The concept of individual ownership of real property was foreign to basic communal values and religious principles - property was to be shared by everyone and to be preserved for future generations. The acquisition of food and goods beyond immediate needs was considered unnecessary. The label "lazy Indian" has been perpetuated to modern times due to a misunderstanding of these basic native values.²¹

Non-natives' misunderstanding of the role and treatment of children in native communities continues to be a source of frustration for all. These cultural differences often become visible in the courtroom during child welfare proceedings. Some bands consider children to belong primarily to the mother and to the clan, and descent is followed through a matrilineal clan system.²² Relationships between the child and the mother's brothers and sisters are very strong, and these "aunts and uncles" often play significant roles in raising the children. In general, the "kinship family" share child raising responsibilities, and even today it is not uncommon for aunts and uncles and grandparents to be referred to as "mother" and "father".²³ Nor is it uncommon for a young child to be given to such a relative at an early age to be raised by them. Non-native society continues to view this as evidence of parental irresponsibility and evidence that the mother does not care about her children's welfare.

Natives' basic belief in non-confrontation and non-interference extends to the discipline of children. Traditionally, corporal punishment was viewed as brutal and was never employed. Children were instructed by example - they learned by observing parents in their

21. A thorough historical review of the treatment of natives in America due to a misunderstanding of native culture and values can be found in L.J. Lacey, "The White Man's Law and the American Indian Family in the Assimilation Era" (1946) 40 Ark. L.R. 326.

22. This is the case in the Yukon, where the principal clans are the *Crow* and the *Wolf*.

23. One can understand the skepticism of a non-native employer when approached by a native employee for time off to attend the funeral of his "mother" — when a similar request had been made a year earlier.

tasks and by imitating their actions. Today, such Indian methods of child-rearing are considered overly permissive and unstructured. Police, child welfare workers and youth workers often perceive this as inadequate parenting, requiring some form of intervention.

In accordance with basic native values, Indian children are taught to be non-competitive and to learn from group participation. These values often conflict with the expectation of teachers in our classrooms today, and can result in confusion, frustration and failure on the part of native children.

IV. IMPLICATIONS OF CROSS-CULTURAL FACTORS IN THE CRIMINAL JUSTICE SYSTEM

The criminal justice system has been described as a decision network involving a number of participants, initially the complainant and ultimately the judge. Within this system, a considerable amount of discretion is granted to each decision-maker, and the decision of one participant can impact significantly on the exercise of discretion by another. For example, the decision by the police to lay a charge of "assault causing bodily harm" instead of "assault" may impact on the sentencing decision of the judge. The recommendations in a pre-sentence report will often impact on the final disposition which is made by a court.

While discretion is an essential part of the administration of justice, it is often associated with disparity in treatment of individuals. Nowhere is discretion more evident than in the sentencing process. In every instance where discretion exists, the intrusion of bias is probable. A composite of age, religion, social class, parental influences, personal experiences and environmental pressure will affect the exercise of discretion and thus the making of decisions. So too will the information which is available, but in the criminal justice system it is often collected or presented by others whose sense of priorities and relevance is determined by their own personal backgrounds, experiences and bias. Moreover, the objective information that is available may be misinterpreted where the cultural values of the decision-maker differ from those of the person about whom the decision is being made.

The literature is replete with articles, studies and books identifying the degree and impact of discretion among all decision-makers within the criminal justice system.²⁴ It is intended here only to mention some of those decision-makers in order to identify factors which are important in small isolated northern communities.

A. The Complainant

24. See, for example, T.S. Palys & S. Divorski, "Explaining Sentence Disparity" (1986) 28 Can. J. Crim. 347, the seminal work by Hogarth, *Sentencing as a Human Process* (Toronto: University of Toronto Press, 1971) and W. Gaylin, *Partial Justice* (New York: Alfred Knopf Publications, 1974) and in particular Chapter II: The Sentencing Process, and Chapter III: The Intrusion of Bias.

A complaint is usually initiated by an aggrieved person by contacting the police. However, in the case of lesser offences involving property, and other offences involving acquaintances or family members, the complainant often decides not to involve the police or the courts. For example, a person who is the victim of a mischief charge, small theft, or even a break and enter by a neighbour's son, may be content to mediate or settle the matter without police involvement. Such a settlement may be dependent on the perceived attitude of the offender or his parents, the ability of the offender or parents to compensate the victim for his loss, the availability of counselling and other resources in the community and the willingness of the offender to seek assistance from such resources.

Cross-cultural differences between the victim and the offender may impact negatively on settlement opportunities. Moreover, the dearth of counselling and other support resources in those small communities often precludes the resolution of family problems without the involvement of the police. This invariably leads to charges being laid, followed by court involvement.

B. The Police

With the exception of Ontario and Quebec, policing duties in northern communities are carried out by the Royal Canadian Mounted Police (RCMP). The following description, although made in relation to the American experience, is relevant:

*The police, however, are more than a group of individuals organized into a bureaucratic, paramilitary structure to perform a technical on- and off-duty mission. Entry requirements, training, on- and off-duty behavioral standards, and operational exigencies and goals combine to produce a homogeneity of attitudes, values, and life ways such that members of police forces constitute a distinct subculture within their societies.*²⁵

Homogeneous as they are, these attitudes and values are not geared to native values and culture, as a general rule. General policy and procedural directives for the RCMP come from Ottawa, and may not be appropriate to small northern communities. The paramilitary structure of the RCMP does not lend itself to the adaptation of rules and procedures to accommodate local needs and cultural differences.

In Yukon communities, the ratio of police to citizens is extremely high, in some cases as high as 1:70.²⁶ The following schedule, as reported in the Canadian World Almanac and Book of Facts 1989, shows that the Yukon has the greatest police/population ratio in Canada. The Northwest Territories are a close second. Both jurisdictions have a common characteristic: a significant portion of their population is distributed among small and geographically isolated communities.

25. Swett, *supra* note 17 at 81.

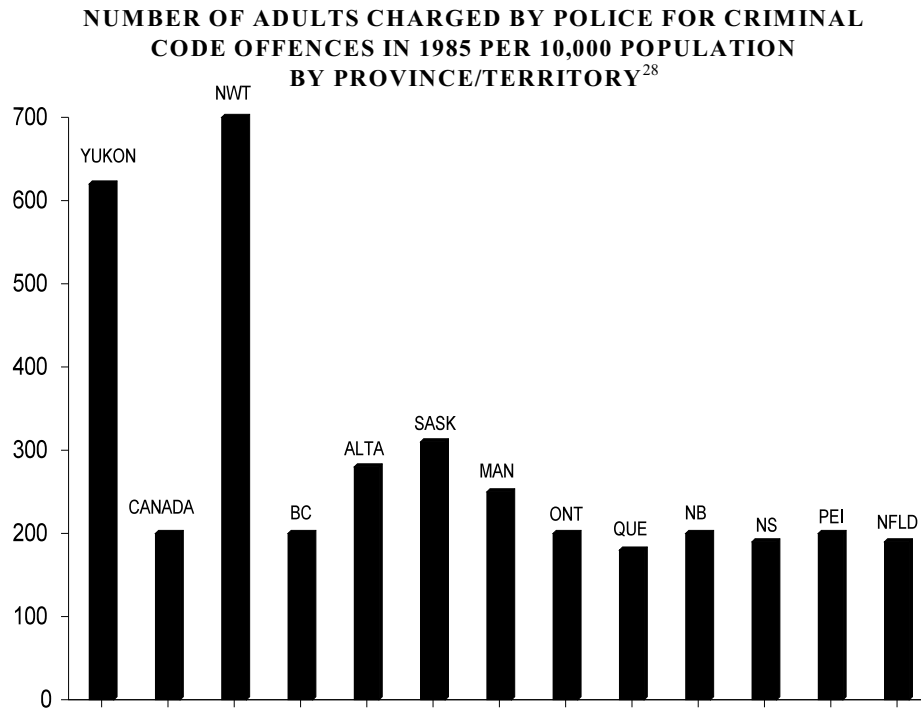
26. In Old Crow, for example, a population of 210 persons is serviced by a resident RCMP detachment of three full-time persons.

TABLE 4
POLICE/POPULATION RATIOS BY PROVINCE, 1985 — 1987²⁷

Province or Territory	Population per Police Officer	
	1985	1987
Northwest Territories	219	256
Yukon	196	242
Alberta	559	553
British Columbia	501	528
Manitoba	516	515
New Brunswick	613	593
Newfoundland	626	620
Nova Scotia	614	606
Ontario	495	492
Prince Edward Island	711	692
Quebec	476	478
Saskatchewan	519	523
Canada	477	488

27. *Canadian World Almanac & Book of Facts* (Toronto: Global Press, 1989) at 393.

It can readily be seen that the level of policing in the northern territories is higher than in the provinces by 200 to 300 percent. This translates directly into proportionately higher levels of crime detection and numbers of charges, as illustrated by the following graph.



The disproportionately high rates of *Criminal Code* charges in the Yukon and Northwest Territories are consistent with the combined numbers of charges under the *Code*, federal and provincial statutes and municipal by-laws:

28. Prepared from Yukon Statistical Profile, *supra* note 1, Charts 2.2 and 23.3.

TABLE 5
TOTAL CHARGES PER 10,000 POPULATION:²⁹

	Canada	Yukon	N.W.T.	Quebec*	Saskatchewan**
1985	327	1073	1034	197	567
1984	357	1414	1648	189	632

* Lowest

** Highest excluding Yukon and N.W.T.

Police statistics (and performance evaluation) generally emphasize the number of offences, investigations and successful convictions, so that there is no individual or institutional incentive to consider alternatives to prosecution. This results in the rapid "criminalization" of young people in the community, and the unnecessary creation of lengthy criminal records, which in turn impact on the subsequent decision making of other participants in the system, including judges.

Table 6 shows the high charge rate for young offenders under federal statute in the Yukon and Northwest Territories as compared to the rest of Canada.³⁰

TABLE 6
FEDERAL STATUTE CHARGE RATES FOR 1983³¹

	Canada	Yukon	N.W.T.	New Brunswick*	Manitoba**
14 yr olds	45.8	105.0	80.0	19.5	86.9
15 yr olds	67.7	226.7	112.0	33.6	120.4

* Lowest

** Highest excluding Yukon and N.W.T.

29. *Ibid.* Chart 23.3.

30. *Ibid.* Chart 23.7. Note that the change rate is determined by taking the change counts by age and dividing by the population estimate (in thousands) of persons in that age jurisdiction of the juvenile court in each jurisdiction".

31. This is based on the subjective observations of the author while sitting as a judge of the Yukon Territorial Court.

The exercise of police discretion whether or not to prosecute minor offences is generally considered to be an important aspect of police work. It does not occur to a noticeable extent in the small Yukon communities. Where it does occur in larger southern centres it may be more likely a function of operational expediency and conservation of resources, than a desire to inject a human touch into policing.

Alternatively, it may be that a combination of youth³² and inexperience on the part of many RCMP officers stationed in these small northern communities, together with the absence of cross-cultural understanding, operate to preclude the exercise of police discretion. Whatever the reason, it has resulted in a high level of involvement by the criminal justice system and an elimination of community participation, which is contrary to traditional methods of dealing with such problems in native communities.

C. Prosecutorial Discretion

Both the Yukon and the Northwest Territories are serviced by federal Crown attorneys, who are employed and appointed by the Department of Justice in Ottawa. In the Yukon, they are very able, usually well-prepared, knowledgeable of the law and handle smaller case loads than in larger urban centres. Surprisingly, they appear to be reluctant to exercise any significant prosecutorial discretion, as evidenced by the aggressive prosecution of relatively minor charges and the reluctance to withdraw or stay charges during a proceeding where it is apparent that the main Crown witness simply has not produced the evidence anticipated.³³

It is not suggested that this results from the lack of appreciation of cross-cultural issues. Rather, it is likely that as career Crowns,³⁴ they are less willing to over-rule or disagree with the police. A career Crown attorney may be reluctant to refuse to prosecute cases prepared and brought forward by the RCMP out of an apprehension that to do so could limit his or her promotion and advancement.³⁵ In the result, Crown prosecutors may be more amenable to taking directions from the police, and to exercising prosecutorial discretion in only rare instances, in the clearest of cases.

If this is in fact the case, then the absence of any significant independent prosecutorial discretion perpetuates police practises and attitudes into the courtroom itself.

32. It is the author's experience that many of the RCMP officers placed in the remote communities are single, without families and with limited experience in policing.

33. Based on the author's limited experience, namely, two years on the Bench as a Territorial Court Judge.

34. In many southern communities, much of the Crown work is done by "ad hoc" prosecutors, who are lawyers in private practice.

35. Anecdotal accounts from former Yukon prosecutors describe instances where complaints were made by the RCMP to Ottawa, resulting in phone calls from the Department of Justice to explain a decision not to prosecute or to enter a stay of proceedings in a particular matter.

D. Defence Lawyers

Cross-cultural bias can also impinge upon the work and decisions of defence lawyers. These factors tend to be more subtle and less visible, but have been documented in the legal literature. For example, Indians are considered by legal professionals to make poor witnesses who often change their testimony when they reach the witness stand.³⁶ Defence counsel may consider the client's cultural background to be a limitation in "winning" the case, and therefore view a guilty plea, perhaps to a lesser offence, or a plea bargain as to sentence, to represent an outcome which is in the client's best interest.

The client whose cultural background is different from the other participants in the justice system, and who has a limited education and inferior verbal skills, is more likely to accept the plea bargained "deal" put forward by his or her defence lawyer. Moreover, he or she is less likely to understand the most fundamental tenet of the criminal justice system; namely, that a person is innocent until the state proves him or her guilty beyond a reasonable doubt.

These factors may be magnified in the "circuit court" environment: dockets may be lengthy, the plane is scheduled to take the court party out at a specific time and there is limited time available to interview clients.

E. Judges and the Sentencing Process

Sentencing is by far the most difficult and complex task required of judges.³⁷ Hogarth has demonstrated that 40% to 70% of the variance in sentencing dispositions could be explained on the basis of judicial attitudes and perceptual variables, which in turn are largely personal and subjective in nature.³⁸ This point was made by Gaylin who stated:

*But it is imperative to admit the bias beyond bigotry; to recognize the individualized and personal values that intrude on the deliberations of any human being; to understand that there is no judgment of human behavior that is not subjective; and to appreciate that objective sentencing is a myth that will never be achieved even if we were capable of elevating to judgeship solely the purest in heart.*³⁹

Cross-cultural bias, or inadvertent discrimination resulting from failure to fully appreciate the value system and resulting actions of native accuseds, can result in inappropriate dispositions or disparity in sentencing. The brief comparison of differences in

36. M. Shephardson, "Navajo Indians and the Eleven Major Crimes" (1986), cited by Swett, *supra* note 17 at 100.

37. Hogarth, *supra* note 24 at 3.

38. Palys & Divorski, *supra* note 24 at 42.

39. Gaylin, *supra* note 24 at 42.

cross-cultural values between natives and non-natives earlier in this paper illustrates how easy it is to misunderstand the actions of someone with a different cultural background.

In small remote communities, the judge relies significantly on the recommendations of probation officers in sentencing. Studies have shown a high correlation between pre-sentence report recommendations and the sentences imposed, particularly in rural areas where the judge is not familiar with the community. Some studies have shown that the influence of probation reports in sentencing is considerable, and in the case of natives, unfavourable.⁴⁰ It is evident that cross-cultural bias on the part of others in the justice system can be incorporated into the sentencing process.

Rupert Ross, a Crown attorney in Kenora, Ontario, has written several articles which reflect on his personal experiences with native peoples in the judicial process.⁴¹ His experiences, recounted in anecdotal fashion, emphasize how easily one can jump to the wrong conclusion by interpreting the actions of others in accordance with one's own cultural values. Some of his observations are incorporated into the following fact situation and the analysis which follows:

Assessing the Prospects for Rehabilitation

A young native accused avoids eye contact with the judge and others in the courtroom. He has nothing to say with regard to sentencing. The accompanying reports describe him as uncommunicative, unresponsive, unable to provide insights into his actions, unwilling to confront his past and unwilling to explore his feelings towards himself or his victim.

The judicial response might very well be different if the court were aware of the following cultural facts:

- in some native cultures, looking another person directly in the eye is taken as a sign of disrespect;
- the observed non-cooperation is based not on lack of motivation or interest in rehabilitation, but lack of understanding of the court system, the white man's process of rehabilitation and fear that he may be removed from his family and community;

40. J. Hagan, *Criminal Justice in Rural and Urban Communities* (Social Forces 55(3), 1977) cited in E.D. Boldt *et al.*, "Pre-sentence Reports and the Incarceration of Natives" (1983) 25 Can. J. Crim. 269 at 270.

41. R. Ross, "Leaving our White Eyes Behind: The Sentencing of Native Accused" (March 1989) [unpublished].

- native culture requires that grief, anger and sorrow should not be expressed, for it only burdens the person who hears it;
- any explanation of the incident which would be critical of another person or family member would run counter to the cultural belief that expressions of anger or criticism towards others should be avoided;
- it is wrong to speak of private emotions, hurts, angers and criticisms;
- the principle of non-interference precludes the giving of advice or constructive criticism to others, as each person is to be left entirely free to make their own choices. It follows that participation in counselling and group therapy are also hindered by the same cultural values;
- in order to speak to the court about past events, or to take the stand to testify against others, a native person is required to overcome significant cultural barriers.

Ross makes the point that refusal by native people to do what one assumes all truly repentent people would do should not lead to the conclusion that they are remorseless individuals with no desire for rehabilitation.

V. CONCLUSION

Many of the observations set out in this paper are neither new or startling, as they have been reported and discussed in the social and legal literature, as well as in numerous government reports and studies over the past decades.⁴² It is of concern, however, that so little progress has been made during this time, a period of economic affluence and progressive law reform.

Native incarceration remains largely unchanged. Poverty and alcoholism remain the underlying causes of family dysfunction and criminal behaviour. Participants in the criminal justice system are only now beginning to talk about the impact of differing cross-cultural values. The criminal justice system continues to "criminalize" and label young people at an early age, increasing the likelihood of early incarcerations, repeated incarceration and incarceration for longer periods of time. In this environment, the threat of yet further incarceration does not provide for effective general or specific deterrence.

Traditional non-native solutions have been tried for the better part of the century with little, if any, success. Perhaps it is time to abandon them, to take a chance, to be risk-takers and to develop new co-operative approaches to the administration of justice in our northern communities. What is there to lose?

42. See, for example, Hathaway, *supra* note 2, and the numerous references contained therein.