CANADIAN INSTITUTE FOR THE ADMINISTRATION OF JUSTICE
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THE SENTENCING PROCESS

THE NATIVE OFFENDER

prepared for the

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OUTLINE OF CONSIDERATIONS IN SENTENCING THE NATIVE OFFENDER

1. General Principles of Sentencing.

The existing principles of sentencing [1] which have been discussed in earlier sessions at this seminar permit the sentencing judge to consider all factors and circumstances relevant both to the offence and to the offender when assessing the appropriate sentence. While the same general principles of sentencing apply to aboriginal people, the cultural background of the offender is one of the factors that may be considered by the sentencing judge.

2. Cultural Background as a Factor in Sentencing.

The recognition of this factor in the sentencing process was succinctly stated by Brooke J.A., on behalf of the Ontario Court of Appeal, in R. v. Fireman, 4 C.C.C.(2d) 82 at 85:

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[1] R.v. Morrissette et al 12 C.R.N.S. 392; R. v. Kissick (1969) 70 W.W.R.365; R. v. Hinch and Salanski, 62 W.W.R.205; R. v. Rohr (1978) 44 C.C.C.(2d) 353

> In my opinion, one can only proceed to consider the fitness of the sentence meted out to this man upon a proper appreciation of his cultural background and of his character, as it is only then that the full effect of the sentence upon him will be clear. When one considers these things, it is my opinion that even a short term of imprisonment in the penitentiary is substantial punishment to him.

I expressed similar views when speaking to a Sentencing Conference [2] in Saskatoon on sentencing in the North. At that time I had this to say:

> In dealing with the question of sentencing, courts in the Northwest Territories cannot overlook the fact that society has the basic roots of the three cultures that I mentioned. When the common law was exported or transported to various lands across the sea it proved to be very flexible but often overlooked the fact that native people, whether Inuit or Indian, did have a system of laws, tribunals, penalties and in effect their own justice system. Furthermore, we often overlook the fact that such cultures did not have jails. This was a new concept introduced from the white man's world. It continues to be little understood by many of the elders in the Indian and Inuit communities.
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> I hope to speak for all of the courts of the Northwest Territories and particularly on behalf of the Territorial Court Judges when I say that a great deal of consideration is given to the possibility of imposing a non-custodial sentence with terms of probation on community service orders. With approximately 50% of the population being 18 years or under this is particularly important. In the case of youthful first offenders custodial sentences are generally avoided.

[2] Conference on New Directions in Sentencing sponsored by University of Saskatchewan and the College of Law May 16-18, 1979, in Saskatoon, Saskatchewan.

3. What Aspects of an Offenders Cultural Background have Operated in Mitigation of Sentence.

(a) The shock of acculturation was recognized by my predecessor in the Northwest Territories, the late Mr. Justice William Morrow, as a mitigating factor in sentence. In a speech to the Faculty of Law at the University of Ottawa in 1977, he had this to say:

> Reference has already been made to the ever increasing intrusion of the "so-called" white man's culture from the south. The rapidity with which this transformation, as I choose to call it, is taking place, promises to completely overwhelm Canada's original inhabitants of the north. They are hardly being given enough time to make the transition.
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> In an effort to alleviate this situation and to help in preparing these people for the oncoming changes, the authorities have in recent years carried out what might be called a concerted crash programme to prepare these fine people for the new way of life. This "civilizing" process has not always brought about the hoped-for result. Recently the native people, as well as other northern residents, have been brought into close association with alcohol with devastating results in some areas. And more recently there has been some sign of drugs coming north. I have no hesitation in saying that the liquor problem stands out above all others. Without the high incidence of alcohol it would hardly be necessary to have a Judge in the Arctic. Certainly in sentencing, it was my practice to emphasize the deterrent effect when any drug-trafficking offence came before me. It would be a tragedy indeed if this added burden was to be permitted to become a general thing.
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> While the younger generation of Eskimos and Indians are becoming quite sophisticated and are

> showing tremendous strides forward in assuming control of their destiny in the north, for many of the people, their veneer of civilization, i.e. the degree to which they have made the transition into the southern way of life, is still quite thin and incomplete."

(b) The differential impact of incarceration upon aboriginal peoples from remote areas has been taken into account in appropriate cases. In R. v. Fireman (supra) Brooke J.A., speaking for the Court said:

> ...In the appellant's case, despite the best efforts of those who must be responsible for his care, the effect of his removal from his environment and his imprisonment would be no doubt dull every sense by which he has lived in the north.
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> He can speak no English. It is not the language that he will use in his daily life upon his return to his home. There is no necessity for his knowing English there. There is little likelihood that he will learn English in the institution when one considers the restrictions on his ability to learn. With the difficulty in communication it is improbable that useful instruction would be available to him and, of some importance, how frustrating his existence when all those around him do not speak his language nor he theirs. I would think his imprisonment would produce a loneliness that would be greater than that in isolation.

(c) The cultural factor is, however, personal to the accused. This point was emphasized by the Saskatchewan Court of Appeal in R. v. Beatty, 17 Sask.R. 91 at 99-100:

> During the course of the argument this court was invited to consider R. v. Fireman, 4

> C.C.C.(2d) 82, as authority for the proposition that the different cultural background of the respondent would traditionally warrant a sentence of two years or less for the offence of manslaughter. I agree that the cultural background of the defendant in R. v. Fireman (supra) was a proper factor to be considered in the sentencing process. Each case must be considered on its own merits and one must bear in mind that the respondent is a sophisticated and articulate young man who has enjoyed many opportunities that were not available to Fireman. I must say that no general sentencing principle exists to support the proposition that manslaughter committed by a person of native ancestry should traditionally be dealt with on the basis of a sentence of two years or less. I specifically mention this branch of the argument because numerous cases were cited from the trial courts in which such sentences were imposed. Furthermore, I categorically reject any suggestion that the ancestry of the victim should be considered a mitigating factor because it is axiomatic that the life of a person of native ancestry is just as sacred as that of any other resident of Saskatchewan.

4. Intercultural Communication and the Administration of Justice.

A sentencing court, and particularly one that travels to small communities, must be sensitive to the communities perspective of the justice system. I emphasize this point by referring to the observations of a native lawyer, Mr. N. Sibbeston, as paraphrased in Circuit and Rural Court Justice

in the North at p.1-6; [3]

> Speaking from the perspective of a small Dene community and from his experience as a defence counsel in the Territorial Court of the Northwest Territories, Nick Sibbeston discussed the community's perspective of the circuit court.
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> First of all, the people in the small Dene communities often tended to view the circuit court and the police as one entity. The criminal justice process in the village is begun when the police become involved in an incident and advise the person(s) that they must appear in court on a charge. When the circuit court arrives, either the police from the village meet the court party or the police travel to the village with the court party itself and thus there is little or no understanding of the distinction between the various people in the court party and their specific roles. When the court proceedings begin, it is generally a very tense situation for the individuals charged and for the community, as the procedure of the court is not familiar to the people. When the court begins, someone yells "Order" and everyone must stand. The police are all dressed up, and the people involved with the court party all have suits, briefcases and piles of books. All of the proceedings occur in English in a community where most people speak only the Dene language. This situation is eased somewhat when Judges come to particular communities on a regular basis and when there are native people involved in the court system, as a defence lawyer or courtworker.
> While the general impression of the community is that some justice is done, there is often the feeling among the people that only a very small part of the event that brought the court into the community has been seen by the court and that the real story, all of the background of the case, has not been available to the judge. What was the relationship between the people involved in the incident? What was the effect of the incident on the community? Why did the person do what he did?

[3] Published by Northern Conference and Simon Fraser University 1985.

> Sometimes Indian or Dene beliefs are involved in the incidents. More native people must participate in the court system, so that the procedure will become more familiar to the people and can occur in native languages.

5. Aboriginal Involvement in the Delivery of Justice Services.

In my opinion Courts will benefit greatly from increasing aboriginal involvement in the delivery of justice services. As Mr. Sibbeston mentioned in his remarks quoted above, the involvement of native people helps to overcome the perceived shortcomings of the system.

The following are but a few examples of the type of participation that I have in mind:

(a) Court Clerks and other support staff;

(b) Native court workers and counsellors;

(c) Interpreters;

(d) Special and regular police officers of native extraction;

(e) Native Justices of the Peace.

For my part I always found that Native court workers and counsellors were very helpful in preparing pre-sentence reports and furnishing relevant information on a native offender and his relationship to the members of the community.

6. Sentencing Alternatives

In many native communities there is now a real desire for community involvement in the justice system. If this trend continues, the Courts will find that sentencing options are available in many cases. Community Service Orders, where possible, have advantages for both the community and the offender. Of course, we must recognize that in some cases, the community cannot cope with a violent offender. We should not overlook the fact that aboriginal people controlled anti-social behaviour before the establishment of a formal Canadian Justice system. In the Northwest Territories the Courts have on appropriate occasions recognized traditional sanctions with respect to offenders by banishing the offender from the community: See Saila v. R. (1984) N.W.T.R. 176. Such a condition would only be included in a probation order after having a full pre-sentence report outlining the community's views and the likely effect of the sanction on the offender. In other cases the probation order may contain a condition requiring the offender to report monthly to the Chiefs or Elders of his community.

I wish to stress that in many parts of our country, Courts must consider cultural factors in assessing sentence.[4] Other disciplines also have difficulty in grasping cultural differences. I can do no better then conclude my remarks by quoting from an address by Dr. J.D. Atcheson, a practicing psychiatrist with wide experience in treating Inuit people, when he had this to say in concluding an address entitled "Canadian Native Peoples and Psychiatric Justice" as follows:

> "The Psychiatrist, however, in his desire to treat and heal, cannot ignore the social determinants of human behavior. The justice system as well cannot afford to ignore the social determinants, or cannot afford to administer justice in a vacuum divorced of concern over cultural differences. We need to seek the opinion of native people as to the application of our justice system to meet their needs. I would hope that a partnership between our discipline and those who may receive our services can be achieved."

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[4]See for example, Polarity in Sentencing - an analysis of Sentencing Practices in the Northwest Territories by Patricia L.Lindsey-Peck April 1985 (University of Windsor - Faculty of Law) and Submissions of the Government of Northwest Territories to the Canadian Sentencing Commission, April, 1985.