

THE STATE OF THE JUSTICE SYSTEM  
FOR ABORIGINAL PEOPLES IN ONTARIO

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# THE STATE OF THE JUSTICE SYSTEM FOR ABORIGINAL PEOPLES IN ONTARIO

## 1.0 INTRODUCTION

### 1.1 Purpose of Study

In August, 1991 the Royal Commission on Aboriginal Peoples was established. Each province and Territory is included in the Commission's review. The last of the Commission's sixteen proposed terms of reference was a mandate to explore "justice issues of concern to Aboriginal peoples". Specifically, the Commission is interested in investigating:

"...the relationships between Aboriginal people and the police (with the policing function broadly conceived to include dispute resolution and community service); the promotion of respect for Aboriginal people and culture within the justice system; techniques to aid Aboriginal people in comprehending court processes especially through the provision of interpretation services; means to decrease the rate of incarceration of Aboriginal offenders; methods to improve conditions of incarceration for Aboriginal offenders; and, the potential to elaborate Aboriginal justice systems and to incorporate principles of Aboriginal legal culture into the Canadian justice system."

In Ontario, the Ontario Native Council on Justice (ONCJ) was supported by the Commission in the preparation of a report which addressed these issues.

This study is particularly concerned with initiatives and programs which have been undertaken or supported by the ONCJ, its members, and provincial government sponsors. This focus, however, does not exclude references to relevant contributions made outside of the ONCJ.

In the main, this is a descriptive report, encompassing significant areas of criminal justice with respect to First Nations people in Ontario. It serves to provide a summary of key developments within the area of Native justice over the past decade or so. The report overviews the range of programs within existing criminal justice mechanisms, leading up to the relatively recent development of proposals and pilot projects which anticipate alternative, autonomous and/or parallel Native justice models.

## Ontario Native Council on Justice

The Ontario Native Council on Justice, now in its 17th year of existence, is unique in Canada. As an Aboriginal body, it has made key contributions in identifying areas of inequality and need for Aboriginal peoples with respect to the Canadian justice system. The ONCJ has been widely active in developing, reviewing and refining strategies for addressing such needs. Most recently, it has been particularly involved in exploring the development and implementation of Native-specific justice models.

In 1975 a Federal-Provincial Conference on Native Peoples and the Criminal Justice System was held in Edmonton, Alberta. One of the recommendations passed at that time stated that:

"Native people should be closely involved in the planning and delivery of services associated with criminal justice and Native people". (1)

In Ontario, the commitment to this recommendation resulted in formation of the Ontario Native Advisory Committee to the Criminal Justice System. In 1977 this committee received funding from the Indian Community Secretariat (on behalf of the Provincial Secretariat for Justice), and became known as the Ontario Native Council on Justice. This initial grant enabled the Council to open and staff an office, and to conduct its own research on justice issues. In 1987 the Council became an incorporated body. An independent review of the Council was completed in 1988.

Core funding for the operation of the ONCJ now comes entirely from the Province of Ontario. The costs are shared by the Ministries of the Attorney General, Correctional Services, Community and Social Services, Solicitor General and the Ontario Native Affairs Secretariat.

The mandate of the ONCJ, as determined in 1988 by all member organizations, is best described in its mission statement:

"The mission of the Council is to support Aboriginal organizations and their representatives in the development of initiatives to address justice matters for their people, and, while the development of these initiatives occurs, to ensure that those Aboriginal people involved in the existing justice system have their needs met in a culturally meaningful manner".

The Ontario Native Council on Justice is comprised of Aboriginal organizations of both a regional and provincial base. In an effort to recognize justice issues as part of the broader social and political issues facing Native people, participation is sought from those organizations which address a variety of policy, program, and service issues. Currently, the membership includes representatives

from: the Union of Ontario Indians; Ontario Metis and Aboriginal Association; Ontario Native Womens' Association; Grand Council Treaty #3; Independent First Nations; Ontario Federation of Indian Friendship Centres; Native Law Students Association; and Native inmates from provincial correctional institutions.

Delegates to the Council come from a variety of backgrounds and include both employees of member organizations, and individuals who are active in, but are not directly employed by member organizations, such as board members and band councillors.

A number of senior-level liaison persons from supporting Ministries meet regularly with the ONCJ in an effort to ensure continuity of direct Ministry contact, communication between government and Council concerning specific topics, and to provide a means for pursuing implementation of recommendations. In addition, a number of representatives from the Federal government attend Council meetings on occasion for information sharing and input on special issues. These representatives include the Chief of Native Programs from the Department of Justice; the Ontario Regional Consultant and the National Consultant on Natives from the Solicitor General of Canada; and, the Co-ordinator of Native Programs from Correctional Services of Canada.

Since its inception, the Ontario Native Council on Justice has maintained a focus in Ontario on Aboriginal justice issues, and provided both a forum and a formal mechanism for addressing these issues.

The extensive publications of the Council on a range of justice issues serve as a resource to both Aboriginal organizations and to governments. Province-wide conferences presented by the Council have produced numerous recommendations from Aboriginal people to guide the progress of Aboriginal justice.

### **1.3 Ontario Aboriginal Population**

The province of Ontario has the largest Native population in Canada. According to (1986) census figures, Ontario's total aboriginal population is 167,385. This includes 46,725 registered Indians, 2,270 Inuit and 118,390 persons with Native origins. Approximately 40% of the Indian population is between the ages of fifteen and thirty five. Census figures typically under-report total Native populations because of difficulties encountered in data collection.

Ontario has the second largest number of Bands in Canada: 126, with a total population of 112,826 (as of December 31st, 1990). Of these registered Indians, over half (53%) live on reserve, or on Crown Lands.

Ontario's First Nation populations are organized, politically, through membership in regional associations. There are four such organizations: Grand Council Treaty # 3, Nishnawbe Aski Nation, Union of Ontario Indians, and the Association of Iroquois and Allied Indians. In addition, there are currently 9 independent First Nations.

While Native peoples represent approximately two percent of Ontario's general population, statistics taken from the Ministry of Correctional Services show a disproportionate rate of involvement in the provinces' criminal justice system.

There is a wide range in the proportion of Native inmates within Ontario jails and detention centres. It may be generally noted that the proportion of Native admissions to institutions in the Northern part of the province is much higher than in other parts of Ontario. Overall statistics, however, continue to show that Aboriginal people in Ontario are incarcerated at a disproportionate rate i.e. four times the rate of non-Natives. During the 1988-89 fiscal year, 8% of all Ontario admissions to correctional facilities were Native (ONCJ, 1990b). This number is consistent with comparable studies done in 1981-82 and 1983-84, by the Ontario Native Council on Justice.

Liquor Control Act violations continue to be the leading offence category resulting in incarceration for Native men and women. According to data collected during a study of The Native Inmate in Ontario (Birkenmayer & Jolly, 1981), 21% of all liquor offenses committed by males living in Ontario involved Native men. Seventy percent of all liquor offenses registered against females in Ontario were attributed to Native women. Of the total convictions accumulated by Native persons in Ontario during 1979/80, 55% were liquor-related. Eighty percent of the total Native inmate population (regardless of type of charges) cited alcohol as a contributing factor to their difficulties with the law (Birkenmayer & Jolly, 1981).

From that same study it is reported that 90% of all Native male admissions to a correctional facility in Ontario, and 97% of all Native female admissions were for periods of less than six months. Sixty one percent of Native male admissions and 69% of Native female admissions were for periods of less than thirty days. Seventy five percent of these inmates were recidivists. Two thirds of these were fine defaulters (Birkenmayer & Jolly, 1981).

From research done by the ONCJ, it would appear that typically, the average Native inmate is single and has no dependents. In most cases, his offence was committed off the reserve.

Native inmates who do have dependents (primarily single mothers), state that while they were in jail their child was cared for by maternal grandmothers or the local Children's Aid Society.

The economic background of the average Native inmate, prior to incarceration is characterized by a high unemployment rate, with dependency on family or friends, and, most often, social assistance.

The average Native inmate has completed 7 1/2 years of school. Most have negative experiences in residential schools, and many actually cite these experiences as the reason for their early exposure to the law. The average age at the time of the typical Native offender's first offence was 16 1/2 years.

The majority of Native incarcerates felt very isolated, both socially and culturally, having little contact with their families or with outside agencies. (Distance, time and cost of travel proved to be the major contributing factors to this problem, again, more prevalent in Northern Ontario than in southern areas of the province). (See Seymour & Jolly, 1983; Birkenmayer & Jolly, 1991; ONCJ, 1990b).

#### **1.4 Method of Study**

Work on the study commenced in January, 1993. The Ontario Native Council on Justice reviewed the first draft of the report in early June.

During the course of this study, all reports produced by the ONCJ since its inception have been reviewed. In addition, interviews have been conducted with representatives from government ministries responsible for Native justice policy and programs, as well as representatives from organizations which deliver or administer justice-related services to First Nation peoples. Where available, relevant reports and program-specific documentation have also been examined. In total, over 60 documents have been reviewed, and approximately 20 individuals were interviewed.

#### **1.5 Organization of Report**

Findings from the review have been organized according to basic components of criminal justice administration, followed by a summary of alternative program initiatives and proposals. The sections of the report are ordered as follows:

- policing services
- court-based and legal services
- probation and parole services
- prison-based services
- services to young offenders
- Native awareness training
- alternate justice programs
- future directions of Native justice

## **2.0 POLICE SERVICES**

Ontario currently supports three forms of policing programs geared specifically to Aboriginal people. These include specialized units within regular police forces, such as the North-West and North-East Fly-in Patrols by the Ontario Provincial Police; the OPP First Nation Constable Program; and, self-policing programs. Recently, there has been a significant trend towards the establishment of policing services which are directed by First Nation communities. This transition process has seen, and is anticipated to perpetuate, the transfer of responsibility for policing from the OPP to the authorities which govern First Nations.

### **2.1 Ontario Provincial Police Fly-in Patrols**

A total of 22 OPP officers have been assigned to operate flying patrols to 31 remote reserves in northern Ontario. The North-West Patrol is based in Sioux Lookout (14 officers), and the North-East Patrol is based in South Porcupine (8 officers). None of the communities served currently have First Nation constables.

At present, the Nishnawbe-Aski Nation are negotiating with the Ministry of the Solicitor General and the federal government to create a regional stand-alone police service and police commission which would eventually replace the policing services presently provided through the OPP fly-in patrols.

### **2.2 Ontario First Nations Constable Program**

Begun in 1975, this program was designed to provide on-reserve policing services by First Nation police officers under the auspices of the OPP. First Nation constables have duties similar to regular OPP officers, and are empowered to enforce federal and provincial laws, as well as band by-laws. They work with counterpart liaison officers stationed in local OPP detachments. At present, there are 132 First Nation constables working in 67 (of a total of 129) reserves, representing about 80% of the total on-reserve population.

Constables are recruited and hired by the bands, and are accountable to the OPP Commissioner, except in the case of band by-law infractions, which are governed by the band council.

### **2.3 Ontario First Nations Policing Agreement**

The Ontario First Nations Policing Agreement (OFNPA) first came into effect in 1988. Its purpose was largely concerned with guidelines for OPP-operated Native policing programs. Since then, it has been significantly revised to reflect an explicit movement

towards the development of First Nation self-policing programs. Represented in the Agreement are: Grand Council Treaty #3; Nishnawbe-Aski Nation; Association of Iroquois and Allied Indians; Six Nations of the Grand River; plus, the governments of Ontario and Canada.

The current Agreement is for five years, from 1991 to 1996. Among it's main substantive points are included:

- the expectation that First Nations covered in the Agreement will establish and administer their own police governance committees by the end of 1996;
- the endorsement to review and choose between a number of policing service models which range in their degree of autonomy from existing policing services;
- the provision that First Nations may elect to establish policing services which are independent of the OFNPA;
- the composition and duties of the Ontario First Nations Police Commission (first established in 1983), which is a Native-dominated advisory body supporting the effective development of First Nation policing programs;
- the standards associated with officer training, compensation and other matters affecting the First Nation Constable Program, many of which ensure that First Nation constables will be treated equally with OPP officers. The OFNPA also authorizes an increase of up to 313 First Nation constables by the end of the Agreement period, dependent upon the types of policing services models adopted by First Nations; and
- an emphasis on the practice of community policing strategies, which include prevention activities.

#### **2.4 Akwesasne Policing Agreement 1990 to 1993**

The Mohawks of Akwesasne are an independent First Nation which has boundaries within Ontario, Quebec, and New York State. There has been an Akwesasne Mohawk police force since the mid 1970's. However, increasing tensions and difficulties in this community resulted in a government task force investigation in 1988. Following considerable community input, means for enhancing policing at Akwesasne were recommended, leading to the current 3-year Policing Agreement.

This agreement was negotiated fully outside of the OFNPA. It is a "stand alone" arrangement between the Mohawk Council of Akwesasne and the governments of Ontario, Quebec and Canada. The Agreement supports a complement of 15 Special Constables (an increase of 5),

each of whom receives full training in either Quebec or Ontario police colleges. Special Constables are empowered to enforce all laws within Akwesasne jurisdiction, and the Mohawk police force will be overseen by a newly created police commission (8 member maximum) which is independent of the Mohawk Council of Akwesasne. An important role of the Police Commission is to act as a buffer between police and political functions.

## **2.5 Six Nations Regional Policing Agreement 1991 to 1996**

The Six Nations of the Grand River Tract first negotiated a separate policing agreement with the federal and provincial governments in 1989. This arrangement was subsequently updated as a sub-agreement under the umbrella of the Ontario First Nations Policing Agreement. As such, the Six Nations Police Service is the first (and thus far only) First Nation Policing Service program to be developed within the framework provided by the OFNPA.

Serving a population of approximately 7,000, the Six Nation Police Service has a maximum complement of 16 constables (including a Chief of Police). Overall management is the responsibility of the Six Nations Police Commission, comprised of 6 community members- no more than 2 of which are elected officials of Six Nations Council.

Prior to this agreement, police services were provided by the Brantford OPP, supplemented by 4 First Nation constables. During the transition period since 1989, the Six Nations Police Service and Police Commission have gradually taken over all duties previously provided by the OPP.

## **2.6 Ongoing First Nations Policing Negotiations**

The Ontario Ministry of the Solicitor General is currently negotiating with the following for the establishment of regional First Nation Policing Service programs:

- Nishnawbe-Aski Nation (46 communities)
- Anishinabek Nation (4 communities)
- Wikwemikong First Nation (Manitoulin Island)

In each of these areas, it is anticipated that the OPP would phase out their current responsibilities, such as the North-East and North-West Fly-in Patrols throughout the Nishnawbe-Aski Nation (NAN) territories.

Negotiations have been under way for some time (commencing in 1989 for NAN), and there is little indication on when settlements may be reached. The Ministry has, however, provided some resources towards the research and groundwork required for proposal development. For example, an OPP sergeant has been seconded to act in an advisory

capacity to the NAN policing negotiator and Police Committee. Another OPP sergeant has been seconded to act as Interim Chief of Police for Wikwemikong, for the purpose of assisting in the transition to independent policing services.

## **2.7 Metropolitan Toronto Police Aboriginal Peacekeeping Unit**

Depending upon the source of the estimate, there are between 40,000 to 60,000 Native people living in Toronto. Some 43 Native-service agencies are based in Toronto. One of the newer services to be initiated for this population is the Aboriginal Peacekeeping Unit of the Metropolitan Toronto Police.

Officially opened in 1993, this unit of 3 Native officers has a mandate to create and maintain better relations between policing services and the Aboriginal community. Their activities include: police staff training concerning Native issues; educating Natives about police procedure and individual rights; representing the police on Native agency boards and committees; and, recruiting other Natives to the police force. Future plans of the Unit are to open a storefront Aboriginal police unit, and to focus on crime prevention among Native youth.

## **3.0 COURT BASED PROGRAMS AND LEGAL SERVICES**

Historically, Native people have experienced a much higher rate of conflict with the law and involvement with the criminal justice system than the general population. The mechanics of the justice process, however, are as foreign to the Native way of life as the (English) language in which the proceedings are conducted.

A number of programs and services have been introduced at virtually all phases of involvement in an effort to buffer the impacts of the justice system. In general terms, such services are intended to reduce the sense of alienation experienced by Native persons within the legal system, to bridge cultural and linguistic gaps, and to ensure that legal rights are known and understood. These include:

### **3.1 Aboriginal Legal Services of Toronto**

Aboriginal Legal Services of Toronto (ALST), founded in 1991, is a "one stop" Native legal service agency available to Toronto's Native residents in need of legal advice or assistance.

ALST's legal clinic provides a wide range of services to Native people in areas of the law including landlord/tenant disputes, welfare rights, consumer protection and workers' compensation claims. As well, ALST offers assistance with matters of specific

Native concern such as application for Indian status.

The services of the Community Council (which can be found discussed in detail in Section 8 of this report) are also available through ALST.

In addition, ALST operates the Native Criminal, Family and YOA Courtworkers, as well as the Native Inmate Liaison Workers programs for Toronto (described in Sections 5 and 6 of this report).

### **3.2 Nishnawbe-Aski Legal Services Corporation**

The Nishnawbe-Aski Legal Services Corporation was established following negotiations between the Nishnawbe-Aski Nation and the Governments of Ontario and Canada. The organization was incorporated in February 1990.

The mandate of the service is three-fold, covering legal services, public legal education and law reform.

The corporation employs eight community legal workers. It has also established "clinic days" within its area, where lawyers spend the day in a particular community. These lawyers give legal advice where needed to residents, as well as facilitating workshops and visiting schools.

The corporation, as it is mandated, supports research into law reform issues.

Most recently, as stated in their 1991-1992 Annual Report the Nishnawbe-Aski Legal Services have been deemed as an area office through the Ontario Legal Aid Plan. This gives the organization the authority to issue legal aid certificates to its residents as required. In conjunction with this, the organization has undertaken to establish panels of lawyers to attend the more remote fly-in courts, and to provide duty counsel for these as well.

### **3.3 Ontario Native Justice of the Peace Program**

The primary purpose of the Ontario Native Justice of the Peace program is to promote the appointment of Justices of the Peace with native ancestry in areas of the province where substantial numbers of Natives reside, or appear before the courts.

Native Justices of the Peace do not service solely Native clientele, but deal with whoever comes before them in the course of their duties. As such, the program does not operate a separate or autonomous justice system run by and for Natives, rather, it brings Aboriginal people into the mainstream of current judicial decision-making.

Depending on their level of authority, Native Justices of the Peace can preside over Provincial Offenses Court, hear and determine certain federal summary conviction matters, conduct bail hearings, issue search warrants, arrest warrants and summonses, as well as license suspensions.

When the Ontario Native Justice of the Peace Program was established in 1984 there were twelve Native Justices in the system. Today there are thirty-nine (six full-time and thirty-three part-time). Following a recent regional needs assessment, it is expected that approximately thirty more will be appointed. (Jolly, 1993)

### **3.4 Special Public Intoxication Courts**

This program began in 1991 in Kenora in an attempt to deal more appropriately with the number of Provincial Offenses (Liquor Control Act) involving public intoxication.

Under this system, which has been adopted in Red Lake and Sioux Lookout as well, anyone found in a state of public intoxication is arrested and taken to the detoxification centre, the hospital or the police station (whichever is deemed necessary), where he will remain until sober. At no time are charges laid, the offender is simply held until sober, and then released.

In the cases of chronic public abusers, or people who need sustained assistance to deal with their problems, charges are laid. The offender is then brought to the Special Court to appear before the Native Justice of the Peace. At that time, rehabilitation is addressed directly and the sentence usually involves forced treatment in a local facility.

As noted by the Ministry of the Attorney General's Northwest Directorate, this process assists in eliminating both default proceedings and the imposition of fines in absentia. It also reduces jail-time which would normally be imposed.

### **3.5 Fine Options Program**

According to an Activity Summary of the Provincial Court (Criminal Division) in the 1982 fiscal year, 36.7% of Liquor License Act charges in the province of Ontario were settled by pre-payment of a fine. In Kenora, the percentage was 13.4. Following a survey of Native inmates who had been incarcerated for fine default, three-quarters of the inmates indicated an inability to pay the fine due to their economic situation. Two-thirds of these inmates stated that they would have preferred to do some sort of community service instead of serving jail time. (Seymour & Jolly, 1983)

In a Fine Options Program, an individual who owes a fine is permitted to pay it by performing community service (of a suitable nature) at the minimum wage rate.

Currently, in Ontario, one Fine Options Program geared to Native people is in place. This operates in Kenora and is run by Probation Services and supported by Community Corrections workers.

### **3.6 Ontario Native Criminal Courtworker Program**

This program originally began in the 1960's on an experimental basis and has evolved to the current Ontario Native Criminal Courtworker Program.

Presently, 14 such programs operate in Ontario under the auspices of the Ontario Federation of Indian Friendship Centres. There are also three "independent" programs operating in Toronto, St. Catharines and Thunder Bay. In 1988 the number of adult clients served ranged from 165 (Sioux Lookout) to 943 (London). Demands for service continue to increase.

The mandate of the Criminal Courtworker is "to provide a program of counselling, other than matters of law, delivered only in accordance with the 'approved submission' to Natives charged with an offence under any Federal or Provincial statute or municipal by-law, in order that such persons may receive information about Court procedures, be appraised of their rights, and be referred to Legal Aid or other resources". (McCaskill & Warry, 1989)

Criminal Courtworkers serve as liaisons between accused and their families, lawyers, Crown Attorneys, Judges and Police. Generally speaking, a Criminal Courtworker's duties include ensuring accused Native persons are aware of their rights, that they understand how to obtain a lawyer, providing assistance with translation and transportation where necessary, as well as assisting clients in meeting bail requirements. They are also responsible for clarifying the rights of accused to Counsel, providing input for Pre-Sentence Reports, and varying degrees of counselling, family contact, social service referrals and community follow-up, depending upon project site. Approximately 70% of their time is spent in court. (McCaskill & Warry, 1989)

### **4.0 PROBATION AND PAROLE SERVICES**

In a survey of Native inmates undertaken by the Ministry of Correctional Services and the ONCJ, 94% of the sample indicated a willingness to perform community service as an alternative to serving time in prison. (Birkenmayer & Jolly, 1981)

In addition, when asked if there were any problems that they needed assistance with, 15% of the sample centred on problems surrounding release, such as parole supervision. When questioned, 72% of the total sample indicated that, if they were to go on probation, they would prefer to be supervised by a Native staff. Programs described below are intended to be responsive to these kinds of concerns.

#### **4.1 Community Service Order Project**

The project was initiated in the London and Kenora areas to provide suitable work placements for individuals on probation with a condition that they perform a specific number of hours of community service. It was intended that community service orders would be used by the courts as an alternative to imprisonment for Native offenders.

Arrangements are made for participants in the program to complete their community service requirements on their home reserves or with an organization in a nearby town.

As a result of the Community Service Order Program, Native offenders (who have committed less serious offenses) can make amends for their crime by providing some form of service to their home community rather than serving time in jail. This program also affords an opportunity for community members to be active participants in the selection of CSO options, and in monitoring the completion of service.

Community Service Orders are supervised by Band Councils of Wabaseemong Independent Nation, Fort Hope First Nation, and the Six Nations of the River Territory. Local corrections committees are used to supervise CSOs in Marathon, Heron Bay, Rossport, Schreiber, Terrace Bay and Jackfish.

#### **4.2 Akwesasne Probation and Parole Officer**

The Akwesasne Justice Department was formed as part of the Mohawk Council of Akwesasne's Justice Portfolio, which oversees the administration of various commissions within the Akwesasne Mohawk Council, such as the Police Commission and the Court Commission.

Following an agreement between the Ministry of Correctional Services and the Akwesasne Mohawk Council in April 1991, the Probation and Parole Officer program came into effect. It allows the Akwesasne Justice Department to provide probation and parole services for clients who reside within the Akwesasne Mohawk community. This program replaces services which would normally be provided by the Ministry of Correctional Services, including supervision, counselling, report writing, and identification of community placements.

#### **4.3 Native Community Corrections Program**

Under this program, the Ministry of Correctional Services has contracted with 40 (this number is due to expand considerably in 1992-1993 in remote, Northern communities) Aboriginal people who assist in the supervision of Native probationers in their home communities.

These Community Corrections workers operate under the guidance of a Probation Officer from the Ministry of Correctional Services. The Community Corrections worker, however, resides in the same reserve (or in the same area) as the probationer, able to speak his language. This program enhances offenders' accessibility to the justice system (and vice versa), enables the delivery of culturally relevant services, and involves the community directly in the justice process.

#### **4.4 "Preparing Yourself for Parole"**

The Ontario Ministry of Correctional Services and the Ontario Board of Parole have produced a series of parole orientation videos in the Cree and Oji-Cree languages which have been distributed throughout correctional facilities in Ontario.

### **5.0 PRISON BASED SERVICES**

In 1981, the ONCJ report entitled The Native Inmate in Ontario concluded that Native inmates experience a high degree of personal and cultural isolation while incarcerated. This was based on survey results from 513 Native inmates within 34 correctional facilities.

In part, the study sought to determine the degree of involvement with institutional self-help organizations. Through interviews with the inmate sample, participation in Native inmate self-help groups was described as a positive experience. It was noted however, that at the time of the report such groups were only available to or utilized by a small minority of inmates. Since then, there has been a considerable increase in the development and popularity of prison-based programs for Natives. Programs currently available are outlined below.

#### **5.1 Native Sons**

There are several Native Sons groups operating within the province. At the Guelph Correctional Centre, a group has been in place since 1976. Native Sons groups have also formed in the Ontario Correctional Institute, the Monteith Correctional Centre, plus at least six other institutions.

The objectives of the Native Sons revolve around improving the time (served) of inmates and easing re-entry into society through mutual aid and support. Native Sons believe that the inmate's stay in prison and his lifestyle outside can be improved by enhancing self esteem and dignity through a better understanding of Native culture and spirituality.

These groups meet 1 to 3 times weekly, usually during the evening, at a place designated within the correctional facility. Their time is spent conversing, doing traditional craftwork, sports activities, and participating in spiritual ceremonies.

## **5.2 Vanier Centre For Women**

The Vanier Native Group is essentially a weekly meeting period within the institutions schedule where Native women meet and participate in beading and craftwork. Occasionally, more formal programming is implemented, including the use of the Sudbury Native Studies program.

## **5.3 Native Inmate Liaison Worker**

The overall purpose of this project is to reduce the rate of recidivism among Native inmates. (Jolly 1982a)

The specific objectives are to assist Native inmates who wish to:

- apply for transfers, temporary absence passes, and parole;
- develop release plans;
- pursue academic upgrading or job training;
- participate in alcohol or drug treatment programs;
- arrange visits from elders, spiritual advisors, representatives of employment, housing or other relevant social agencies;
- dispose of any outstanding charges; and,
- manage personal problems with institutional staff or other inmates.

The Native Inmate Liaison program has been in operation since 1980 and workers are contracted with Aboriginal agencies through funding from the Ministry of Correctional Services. Their duties are to:

- visit provincial correctional institutions on a regular basis;
- offer counselling to Native inmates individually or in groups;
- act as a resource person during case conferences;
- liaise between Native inmates and management of institution;
- liaise between Native inmates and Probation and Parole staff;
- and,

-to connect with community services which might assist Native inmates to re-integrate into society.

This program is ongoing and currently serves nine correctional facilities throughout Ontario, and is usually administered by local Indian Friendship Centres.

#### **5.4 Native Inmate Liquor Offender Program**

This program was developed by the Ontario Native Council on Justice. It has been in operation since 1987, and currently runs out of the Kenora Jail. It is designed to help inmates achieve a basic understanding of the problems associated with alcohol use and abuse, including the role that alcohol plays in Native people's involvement in the criminal justice system. It serves as a pre-treatment and education program, whose major aim is to encourage inmates to make definite plans for some sort of treatment upon their release.

The Native Inmate Liquor Offender Program is operated through the Nee-Chee Friendship Centre in Kenora. The program takes a holistic approach to the problem of alcohol abuse, where inmates are encouraged to reflect on the nature of their addiction and to review the mental, physical, emotional and spiritual aspects of their lives. The program's philosophy states that "...human volition and personal motivation, specifically the ability to change behaviour, is seen at the core of the medicine wheel and is derived from this balance". Thus, the program attempts to help Native inmates become aware of the reasons why they use alcohol, to help them assess the consequences of their behaviour, and to introduce them to key cultural values and traditions which will assist them in leading a drug free lifestyle. (Warry, 1986)

#### **6.0 SERVICES TO YOUNG OFFENDERS (AND FAMILIES)**

Indian children appear to become involved with the juvenile justice system at an earlier age than do their non-Native counterparts. Specifically, the percentage of Status Indian children who were in conflict with the law is eight times greater than non-Native children. (ONCJ, 1985).

In 1984, Status Indian youth made up .7% of their age group population. However, they accounted for 2.1% of youths placed on probation, 3.4% of youths placed in training schools and 2.6% of youths in detention (ONCJ, 1985). It has also been reported that 37% of Native adult inmates were first convicted of an offence as juveniles. (Birkenmayer & Jolly, 1981).

A recent Ontario study entitled The State of the Child (1991)

provides statistics which continue to indicate a disproportionately high rate of involvement of Native children in the justice system. The study also reports that Aboriginal youth are over-represented in both open and secure custody facilities at a rate of four times their rate in the general population. This figure is consistent with studies done by the Ontario Native Council on Justice in 1981-2 and 1983-4. (ONCJ 1981,1985).

In a series of studies directed by the ONCJ concerning the Young Offenders Act, the need for cultural awareness and sensitivity on the part of those working with young Native offenders (be they judges, social workers or corrections workers) was repeatedly emphasized. Two such reports were Young Offenders Incarceration Issues Paper (Montagnes, 1987) and The Inner Circle (Loucks, 1984), which proposed a number of salient recommendations. These include:

- that every effort be made by the youth court to ensure and require the attendance of parents at hearings;
- that Native awareness training take place for justice personnel involved in the implementation of the Young Offenders Act; and,
- that funds be made available for the research, development and evaluation of innovative youth services such as agricultural and wilderness camps.

Currently, a number of services specifically directed to the Native young offender are in existence. They include the following:

#### **6.1 Wilderness Camps**

Issues related to Native cultural sensitivity within existing institutions have been a concern for some time. Many institutions have regulations which appear to be in direct conflict with Native spiritual ways. One typical example is a case where a young Native inmate was denied access to a Native Elder who carried a pipe, because of the facility's 'no smoking' regulation. If the staff member had been aware of the pipe's special significance, the situation could have been handled more respectfully. (Montagnes, 1987)

The ONCJ has advocated that programs teaching Native young people about their culture, traditions and spiritual ways would be effective means in raising self esteem, and instilling an enduring source of strength and knowledge. However, most detention facilities are located in or near to population centres, rather than areas which are more conducive to learning Native life skills such as hunting and outdoor survival. These issues contributed to the development of alternative programs geared specifically to the needs of Native young Offenders.

There are now three Wilderness Camps in operation, which serve as open custody (YOA) and open detention (CFSA) facilities. These have fully incorporated Native culture into daily routines, and focus on the teaching and practice of hands-on Native life skills. They are:

**6.1.1 Camp Wee-Cha-hin**, which commenced operation in July 1986 and is run by the Payukotayno James and Hudsons Bay Family Service.

**6.1.2 Awashishuk Centre**, in operation since 1984, also run by the Payukotayno James and Hudsons Bay Family Services, and serving the areas of Moose Factory, James and Hudson's Bay.

**6.1.3 Cha-Ka-Besh Wilderness Camp**, which has been in existence since 1986. This facility is located at Big Trout, services Northwestern Ontario and is operated by the Tikinagen Child and Family Youth Services.

## **6.2 Open Custody for Young Offenders (Residential Program)**

This program is in effect to assist those Native youth not housed in Native-run facilities. Through Native Friendship Centres, Natives resident in facilities which serve the wider population are offered specific Native programs. Currently this service is available in Eagle Rock (Sarnia) and Mee-Quam Youth Residence (Cochrane).

## **6.3 Remote Community Access Program**

This new program commenced operation in 1992. It serves to assist with repatriating young offenders to their home communities in order that they may maintain contact with their families in remote areas.

Currently the service is available through the Cecil Facer Centre in Sudbury, and through open custody residences in Cochrane and Kenora.

## **6.4 Probation Services**

### **6.4.1 Walpole Island First Nations Probation Services**

This service has been ongoing since 1976. One staff provides counselling and supervisory service for Native probationers aged 12 to 16 who were residents of Walpole Island at the time of the offence. Staff are also expected to be involved in prevention, alternative measures and community service work. The operation of the service is overseen by the Ministry of Community and Social Services in co-ordination with the Band Council.

#### **6.4.2 Native Probation Services**

The Native Probation service began in 1987, and provides a full range of probation services for Native youth. This program is a front line service, which (like the Walpole Island service, would normally be run by the Ministry of Community and Social Services) has been divested to the Payukotayno James and Hudsons Bay Family Services. Their areas of service include Moosenee, Moose Factory and James Bay.

### **6.5 Court Services**

#### **6.5.1. Native Family Courtworker**

This service commenced in 1985 to assist young offenders (and their families) with court appearances, specifically with respect to language barriers, legal terminology, and in some cases, transportation.

In addition to court centred activities, workers act in a liaison and referral capacity. These workers are available to facilitate interaction of young Natives and their families with the court system concerning both child protection and YOA matters.

Family Courtworkers operate through Friendship Centres in eleven locations throughout Ontario.

#### **6.5.2 Native Inmate Liaison Worker**

Native Inmate Liaison workers are available to young offenders ages 16 and 17 who are incarcerated.

These workers provide counselling and assistance with discharge planning. In addition, they are able to co-ordinate visits to institutions by Native Elders to provide spiritual and lifestyle guidance.

This program operates within nine correctional facilities throughout Ontario.

#### **6.5.3 Native Criminal Courtworker**

The services of the Ontario Native Criminal Courtworker (described previously in Section 3.7) are also available to young offenders faced with criminal charges.

This program is available to young offenders in fourteen courts throughout Ontario (Dept of Justice, 1991). In 1988 the number of young Native offenders serviced ranged from 12 (in Fort Erie) to 130 (in Sault Ste. Marie). As with their adult counterparts, demands for service continue to rise.

## 7 NATIVE AWARENESS TRAINING

The ONCJ has been instrumental in the design, review, and delivery of cross-cultural training for personnel within the criminal justice system. The objective of such training is to increase levels of knowledge and sensitivity with respect to Native traditions, lifestyles, values, and institutions. Training provides an orientation to Native culture which is intended to bridge communication barriers, and enhance the overall quality of criminal justice administration for First Nations people.

Thus far, 3 pilot workshops have been conducted with Crown Attorneys, as well as 17 workshops with Correctional Services personnel. Most recently, the ONCJ has worked jointly with the Ontario Provincial Police (in March, 1993) in the delivery of cross-cultural training to OPP officers and First Nations Constables. A future session is currently being planned for Provincial Court Judges.

Native awareness training has also been incorporated into the regular training regimen for all police officers in Ontario, as specified in the new Police Services Act.

The Race Relations and Policing Unit of the Ministry of the Solicitor General has a mandate to develop a Native Awareness Training Program for the Ontario Police College. Included in the consultation process are Native organizations such as the Ontario First Nations Police Commission and the Ontario Native Council on Justice.

## 8.0 ALTERNATIVE JUSTICE PROGRAMS

Thus far, the programs and initiatives described have involved various means to better accommodate or facilitate Aboriginal people within existing criminal justice mechanisms. In many cases, they serve to address a number of practical barriers (i.e. costs, language, accessibility, legal counsel, etc) posed in the administration of Canadian justice to Aboriginal people. Such services have evolved within a framework of Euro-Canadian laws and legal procedures. They are premised largely upon white society's concepts of policing, punishment, and rehabilitation. And, while significant measures have been undertaken to recognize unique needs and circumstances with respect to Aboriginal people, the Canadian criminal justice system may simply not be compatible with Aboriginal traditions of social order and justice.

Bradford Morse (1980) notes that "Indian, Inuit and Metis peoples of Canada have had throughout their respective histories a legal system of their own and a means for resolving disputes" (2). Such Aboriginal traditions often involve the use of non-adversarial

community forums for settling conflict, and emphasize the need to restore harmony and respect. These values are clearly distinct from common Euro-Canadian legal concepts and practices. A submission by the New Saugeen Nation in 1989 describes their traditional view of justice:

"Crimes were seen as a hurt against a community of people, not against an abstract state. Community meetings of 'calling to account' therefore played an important part in investigation, evaluation, sentencing and even, through the shame they could inspire, punishment. The judicial system...placed much more emphasis on modifying future behaviour than on penalizing wrong-doers for past misdeeds. Counselling, therefore, was far more important than punishment" (3)

In the Table below, adapted from Jefferson (1983), a summary of legal concepts comparing Anglo and Aboriginal traditions illustrate a number of key differences between the two cultural perspectives. A limitation of this table should be noted in that Aboriginal traditions have, for the sake of brevity, been generalized between Indian, Inuit and Metis populations.

### Comparison of Legal Concepts

Euro-Canadian	Traditional Native Indian/Inuit
- Laws formulated by elected representatives	- Laws formulated by the community through tradition and consensus
- Laws tied to man-made economy and therefore complex and numerous	- Laws tied to the natural environment; only a few universally condemned actions in Native Indian/Inuit customary law
- Protestant Ethic and Christianity the moral foundation of the Law	- Traditional Native Indian/Inuit religions the foundation of Native Indian/Inuit codes of behaviour
- Personal offenses seen as transgressions against the state as represented by the monarch	- Personal offenses seen as transgressions against the victim and his/her family; community involved only when the public peace is threatened
- Laws administered by representatives of the state in the form of officially recognized or operated social institutions	- Law usually administered by the offended party; i.e., the family, clan or the tribe, through a process of mediation or negotiation
- Force and punishment used as methods of social control	- Arbitration and ostracism usual peacekeeping methods
- Individualistic basis for society, and the use of the law to protect private property	- Communal basis for society; no legal protection for private property; land held in trust by an individual and protected by the group

(Table adapted from Jefferson, 1983)

The goal of many First Nations in Ontario is to develop and administer a "justice system" which fully reflects their sovereignty, beliefs and customs. In Akwesasne, for example, this would entail "treating all of Akwesasne as one community with a single Mohawk police force, a Mohawk court system governed by appropriate Mohawk procedural rules and applied Mohawk laws" (4)

A number of developments in the past few years have contributed to a growing speculation that separate and autonomous Aboriginal justice systems are indeed a viable option. In 1989, the Canadian Bar Association voiced its endorsement of a parallel Aboriginal justice system in connection with Manitoba's Aboriginal Justice Inquiry. In 1991, the Law Reform Commission of Canada recommended that provincial governments negotiate with First Nations to transfer the necessary authority to establish autonomous Aboriginal justice systems. (Law Reform Commission of Canada, 1991) Perhaps most significantly for Ontario, Premier Bob Rae signed the Statement of Political Relationship with the Chiefs of Ontario in 1991. This document explicitly recognized the inherent right to self-government by First Nations, and committed to facilitate reforms that could enable self-government ambitions to be realized. This, in turn, has helped to open new doors for justice initiatives within First Nations. This is particularly true for programs which empower First Nations communities to assume increased control over areas of criminal justice (see Section 2.0 on Policing Services).

A number of political mechanisms have been created with the intent of facilitating discussion and resolving issues between Aboriginal organizations and the government of Ontario. These include the Cabinet Committee on Justice (Aboriginal Issues Sub-Committee), the Indian Commission of Ontario, and the Ontario Native Affairs Secretariat. To varying degrees, each of these bodies has a role in developing and applying Aboriginal self-government principles to the justice system.

In the following section, a number of current programs, proposals and reviews are outlined, each of which explore alternative means of justice which respect Aboriginal traditions and the right to self determination.

### **8.1 Sandy Lake Community Justice Project**

Started in 1990, this is a demonstration project intended to enhance community involvement and control in the criminal justice system. It is situated in a remote fly-in NAN territory with a population of about 1,700.

The project involves an "Elders' Council" of three community-chosen members. The Council sits in court along with the Judge or Justice of the Peace, and all act as equals in co-presiding over trial proceedings related to the Y.O.A., the Criminal Code, and the Provincial Offenses Act. Proceedings are conducted in English and Oji-Cree. The Council is predominant in the sentencing process of

convicted offenders, ensuring that cultural values and realities are clearly reflected. The value of this approach is seen as follows:

"By utilizing concepts emphasizing remorse, shame, and community respect for the Elders in the sentencing process, the offender would have more of a chance to be rehabilitated within the community. Community members refer to this as a healing process rather than an adversarial process" (5)

Elders are also involved in family counselling, overseeing community service orders, attending at disturbances within the community, pre/post court counselling with youth, as well as other prevention activities. Overall, the project is operating as a hybrid between Native and Euro-Canadian justice systems. The Sandy Lake community sees it as an effective starting point for the development of a comprehensive community-based justice system. A number of activities are under way to establish similarly independent services in community policing and corrections.

The Sandy Lake Community Justice project has received a favourable first year evaluation, and Attorney General personnel expect that funding will be renewed.

## **8.2 Attawapiskat First Nation Justice Project**

Attawapiskat First Nation is a fly-in, Cree-speaking community of about 1,300 people on James Bay. The Attawapiskat First Nation Justice Project was funded at the same time as the Sandy Lake project, and shares similar objectives in terms of providing a community-based justice alternative.

This project, however was based on a somewhat different model than the Sandy Lake project. Here, an Elders' Panel of three are appointed by Chief and Council. The Panel sits independently to hear and pass sentence on adult and young offender cases that have been diverted from the Provincial Court by the Crown Attorney. Although criminal charges may be involved, diverted cases do not include those with more serious charges, where jail is thought to be the most appropriate/likely disposition. Cases are diverted only after the accused agrees to take part in the Elder's Court, has had access to legal counsel, and charges have been stayed. Following the outcome of the Elders' Court, the accused has the option of returning to the regular court system.

The Elders' Court is conducted in the Cree language, with English translation available. There are no defense or prosecuting lawyers present at Court. After hearing from police, witnesses, the accused, family members and others, the Elders have authority to determine guilt or innocence, as well as to pass sentence. Such sentences may involve community service, counselling and

restitution, but not jail. The Project Co-ordinator oversees the completion of sentences.

In addition to the above, Elders also sit with the Provincial Court Judge as a sentencing advisory panel when this Court presides in Attawapiskat.

Evaluation results after one year's operation recommended continuation of funding, which is expected to be approved.

### 8.3 Community Council Project of Toronto

This is an adult diversion project which has no comparable service in any urban centre in Canada. The thrust of the project is similar to that of the Attawapiskat and Sandy Lake projects outlined above - i.e. to keep Aboriginal offenders out of the prison system, and to utilize instead Native-inspired and operated resources to deal with such offenders. The regular criminal justice system in Toronto has been largely a revolving door for Native offenders moving in and out of jail, with little hope of reducing rates of incarceration or recidivism.

A particularly unique challenge for the project has been to provide a viable justice alternative to a large diversity of Aboriginal people living off-reserve. As such, this project has aroused considerable attention from other urban centres in Canada interested in the model's potential.

This project was initiated in 1991. Several volunteers from the Native community were selected to sit in groups of four as members of the Council. The role of presiding Council members is to assess an appropriate, non-custodial sentence for the offender. In so doing, members are bidden to consider a wide range of factors relating to the crime, the present and past situation of the offender, the state of the victim, and the available resources within the community which may be used to deal effectively with the offender. Sentencing normally involves some form of fine, restitution, community service and/or mandatory treatment. A major factor determining whether or not the Council will accept the case for sentencing is the availability of Native community services to address the specific problems of the offender. As a matter of policy, the Council sees no useful purpose in taking on project participants who will require resources which are already too overburdened or simply unavailable.

Potential candidates for the program are identified by Native Courtworkers and approved by Crown Attorneys. If the offender agrees to plead guilty and appear before the Council, and the Council accepts the case, charges are then stayed and the offender is referred for sentencing to the Council. The case will not be referred back to the Court, regardless of the Council's sentencing

decision or subsequent non-compliance by offenders with the imposed sentence. Should, however, an offender fail to comply without just cause, they are ineligible for future referrals to the Council.

To date, some 94% of referred offenders have agreed to participate in the Council sentencing process. Of these, 3/4 have prior criminal records, and 2/3 have prior jail sentences. One-half of cases diverted were actually in jail at the time of referral to the project. Although a full evaluation of the project has not yet been completed, the interim results (after one year of operation) suggest that overall project objectives are being achieved. Further, only 4 of 68 original participants have failed to comply with the conditions of sentence imposed by the Council. (6)

#### **8.4 Whitefish Bay Justice Project**

Whitefish Bay is a small Ojibway community located south of Kenora. In 1992, funding was received to develop and implement a pilot project involving an Elders Court which would deal with criminal, family, and civil matters.

At present, this project is in a developmental stage, and is closely studying the Attawapiskat and Sandy Lake justice models described above. Project co-ordinators are also reviewing Native social justice models operating in other Provinces, with a view to adopting a prevention-oriented theme to justice matters within their community.

In any case, this project is attempting to undertake a thorough needs assessment before committing their resources to a specific alternative justice strategy.

#### **8.5 Grand Council Treaty #3 Anishinabe Justice System**

The Treaty #3 area includes 25 First Nations communities in Northwestern Ontario (concentrated around Dryden and Kenora). Funding from the Ministry of the Attorney General and the Department of Justice has been recently secured to undertake a 2 year project which will define "...a system of justice based upon traditional Ojibway values, practices and customs..." (7).

The project will involve extensive consultation with Elders, community members and service providers within the justice field. It will undertake to: conduct research of Ojibway justice traditions; to develop (and pilot, resources permitting) a model for self-administered community justice; and, gather information and material for a local resource centre. This initiative is seen by the Grand Council Treaty #3 as "essential to the implementation of our First Nations' inherent right to self-government". (8) Throughout the project, there will be regular liaison between

representatives of Grand Council Treaty #3 and government ministries, as well as consultation with the Ontario Native Council on Justice.

#### 8.6 Osnaburgh/Windigo Tribal Council Justice Review Committee

The Osnaburgh/Windigo Tribal Council Justice Review Committee was appointed in 1989 to investigate the administration of justice in the Windigo Tribal Council area. This followed an incident in which Stanley Shingebis, a resident of Osnaburgh, was arrested on public intoxication charges and was rendered quadriplegic while in police custody.

The mandate of the Committee was to examine and make recommendations on all aspects of policing services, justice administration and social services to Osnaburgh and three other South Windigo communities. The outcome of this review was a set of 43 recommendations which, if implemented, would fundamentally enrich the social and physical environments of affected community members and would see the entrenchment of independent Native justice. The authors state:

"The main goal of these recommendations is to ensure that the four communities are healthy, strong and vibrant. This can be accomplished by identifying both general and specific objectives. The general ones must, in our view, include recognition of:

- a) Sovereignty
- b) Economically viable land bases; and
- c) The development of Aboriginal justice systems, whether traditional or otherwise." (9)

The Ministry of the Attorney General, in responding to the Committee's report, expressed agreement in principle with 31 of the recommendations. These have to do with a number of initiatives which, in varying degrees, have been instituted in other areas of the province, such as: interpretation/translation services; cross-cultural training; and, development of community justice projects. The Ministry also noted the province's limitations in addressing recommendations related to "Indians and lands reserved for Indians", which are under Federal government jurisdiction. (10)

It is expected that negotiations for the changes suggested by the Committee's report will continue for some time. This is because of the complexity of issues involved and the inter-ministerial co-operation which is required. It is also due to the daunting financial costs of reform, estimated to be in the millions of dollars.

## 8. Aboriginal Family (Healing) Strategy

In 1991, a joint committee was established to develop a comprehensive strategy for addressing the problem of family violence within Aboriginal communities. It is a Native-driven undertaking, composed of 8 Aboriginal provincial/territorial organizations, 11 Ministries and 2 Federal departments.

A consultative process reaching over 6,000 Natives in more than 250 communities was completed in 1992. This led to a list of recommendations concerning strategies for prevention, education, support services, and rehabilitation. Reflective of overall resolutions in support of truly meaningful reforms, the committee moved to officially change the name of the initiative from the Aboriginal Family "Violence Strategy" to the "Healing Strategy". The major principles underlying proposed strategies included emphases on holistic, wellness and healing-oriented approaches, and measures to ensure that services are designed and delivered by Aboriginal people. The Steering Committee continues to meet regularly, in order to further articulate needed changes, and to press for co-ordinated reform efforts at the Federal and Provincial levels.

With respect to justice issues, the Steering Committee recommended that existing court processes for dealing with offenders be replaced by community-based Elders Councils. Further, that current correctional measures be replaced with more culturally relevant alternatives such as Aboriginal wilderness and skill development camps, and institutional programming which focuses on cultural teaching and ceremonies, spirituality, and other Native-based counselling. (Aboriginal Family Violence Joint Steering Committee, 1992)

### 8.8 Other Alternative Justice Proposals

At present, several independent proposals are under consideration for funding through the Ministry of the Attorney General. Among these are included the following:

- a study of traditional dispute resolution in Muskrat Dam First Nation;
- a justice survey and study of member communities as a prelude to the design of community justice programs in the Ojibway 1850 Treaty area;
- a customary law and justice review by the Independent First Nations Alliance, and;
- a study of existing systems and design of community-based alternatives in the Wabaseemong Independent Nations.

## 8.9 Justice Review Project

The Ontario Government initiated the Justice Review Project in 1991, with the view of analysing the current justice system in Ontario, and proposing an overall framework for change. The project is particularly interested in addressing identified shortcomings in the existing system such as court delay and inconsistent/ineffective/inappropriate service delivery.

Native justice issues are a special component of the project. Ministries providing service to Aboriginal populations have been consulted for input on current and proposed initiatives relating to the administration of criminal justice for Aboriginal peoples. As a result, a central inventory of Native justice initiatives was compiled.

The development of an overall framework is now complete, and was expected to be submitted in the spring of 1993 for consideration by the Cabinet Committee appointed for the project. Details of the proposed framework have yet to be made public, pending approval by the Cabinet Committee. There is considerable interest in how the framework will address the issue of Native self government within its proposed strategies for Native justice.

## 8.10 Alternative Dispute Resolution Systems

Alternative dispute resolution (ADR) is a broad concept, with a number of models in use. It essentially involves the use of non-adversarial means to resolve conflict between parties. Most commonly, techniques of conciliation, mediation or arbitration are used in lieu of the Anglo-based court process to deal with cases of perceived wrong-doing. This approach to justice is much more consistent with traditional Aboriginal methods, since the outcome is not based upon a win-lose situation. Rather, ADR is often more concerned with achieving harmony than with assessing blame and consequences.

In Akwesasne, there has been a successful ADR program operated by the Skennan Kowa Organization for Peace which was initiated in 1990 (Department of Justice, 1990). To date, however, ADR applications have not been widely tested among First Nation communities in Ontario. One of the barriers has been the government's restrictions on ADR to be used in criminal cases.

In 1991, the ONCJ published a paper entitled "Native Alternative Dispute Resolution Systems: The Canadian Future in Light of the American Past". This report has since been widely circulated to Aboriginal organizations and other interested parties thanks to a Department of Justice grant. One of the report's key premises is that "Native people have the right to self determination, and

included in that right is the right to develop their own dispute resolution mechanisms" (11). It concludes that the much-vaunted American Tribal Court system is an inappropriate and inadequate means of ADR for Ontario First Nations people, and that more regionally acceptable systems should be developed. It further argues that while some aspects of an Aboriginal ADR system may not be compliant with the Canadian Charter of Rights, (citing the example of Akwasasne's Code of Offenses, which does not guarantee the accused's right to legal counsel), that Native community rights are traditionally and legitimately more important than individual rights. (Rudin & Russell, 1991)

## 9.0 FUTURE DIRECTIONS OF NATIVE JUSTICE IN ONTARIO

The Ontario Native Council on Justice recently sponsored a report which examined potential models of justice for Aboriginal communities (Morrow, 1992). The report outlines four basic approaches:

- maintaining existing Euro-Canadian system (enhanced through cross-cultural Native awareness training with non-Native personnel);
- indigenization of existing system (by employing Native people to serve as police, parole/probation officers, judges, etc.);
- developing interface mechanisms (again, supporting the existing system, but adding measures which make the system more accessible and less "mystical". Examples include Native Courtworkers, Native Inmate Liaison workers, interpreters, Native legal services, etc.); and,
- creation of new institutions (covering the range of complete, parallel Native justice systems, to replacing existing components with Aboriginal community justice mechanisms, such as alternative dispute resolution and Elders Sentencing Councils.

In Ontario, there are now many examples of each of these models, as well as hybrids of different models, which are currently in practice. Being free to choose the most desirable option -one that is most responsive to local or regional circumstances- is a major objective among Ontario Aboriginal peoples.

The majority of Aboriginal associations and federations would appear to favour the creation of autonomous, Native-designed and operated justice functions which are consistent with Aboriginal

●● cultural traditions and values. This is driven in part by the depressingly stark evidence that externally imposed regimes of mainstream cultural assimilation and social control have failed. It is also clear that separate justice administration is an integral facet of Native self-government aspirations.

It is well documented, however, that the development of fully autonomous Native justice systems is ultimately dependent upon amendments to existing Canadian legislation. The incompatibilities between the Akwasasne Code of Offenses and the Canadian Charter of Rights is a ready example of the onerous technical barriers faced in creating parallel justice systems.

There is no shortage of arguments which have lauded the feasibility and viability of legislative change, and the co-existence of legal pluralities (see Rudin and Russell, 1991; Osnaburgh-Windigo Report, 1991). Also, Ontario has a formidable infrastructure of First Nation and provincial government representatives with which to sustain and advance Aboriginal self-government negotiations. In the meantime, the current direction and development of Aboriginal community justice initiatives in Ontario is highly congruent with the ultimate goals of Aboriginal self determination.

## FOOTNOTES

- (1) Jolly, S. 1982 Native People in Conflict with the Criminal Justice System: The Impact of the Ontario Native Council on Justice, page 6
- (2) Morse, B. 1980 "Indian Tribal Courts in the United States: A Model for Canada", Saskatoon, University of Saskatchewan, page 19
- (3) Submission, New Saugeen Nation, dated October 26th, 1989 as cited in Tay Bway Win: Truth, Justice and First Nations, Osnaburgh/Windigo Tribal Council Justice Review Committee Report, 1990, Grant, A., Bader, M. & Cromarty, D., page 36
- (4) Ontario Native Council on Justice 1990 Native Peacekeeping: Challenges and Opportunities of the '90s, "A Report on the Native Peoples and Policing Symposium, ONCJ, Toronto
- (5) Obonsawin-Irwin Consulting Inc. 1992 "An Evaluation of the Sandy Lake First Nation Justice Pilot Project", page 1
- (6) Personal communication with Program Director, April 24th, 1993
- (7) Grand Council Treaty # 3 1992 "Grand Council Treaty # 3 Resolution: Schedule 'A'"
- (8) ibid
- (9) Grant, A., Bader, M. & Cromarty, D. 1990 Tay Bway Win: Truth Justice and First Nations, "Osnaburgh/Windigo Tribal Council Justice Review Committee Report", page 36
- (10) Ministry of the Attorney General 1991 "Response from the Ministry of the Attorney General to Recommendations in the Osnaburgh/Windigo Tribal Council Justice Review Committee"
- (11) Rudin, J. & Russell, D. 1991 Native Alternative Dispute Resolution Systems: The Canadian Future in Light of the American Past, page 133

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Ontario Native Council on Justice Submission  
to the  
Royal Commission on Aboriginal Peoples  
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June 1992

Ontario Native Council on Justice  
Submission to the Royal Commission on  
Aboriginal Peoples Regarding Inmate Issues

Members of the Royal Commission:

The Ontario Native Council on Justice appreciates the opportunity of addressing the Royal Commission on Aboriginal Peoples.

Our submission relates to the Commission's final term of reference, justice issues of concern to Aboriginal peoples. It is the intention of the Ontario Native Council on Justice to make a series of presentations to the Commission, each dealing with a different aspect of justice in Ontario.

In our presentation today, we would like to begin with a brief description of the Ontario Native Council on Justice and then proceed to Native inmate issues.

Sixteen years ago a Federal-Provincial conference on Aboriginal justice issues was held. The Federal-Provincial Conference on Native Peoples and the Criminal Justice System took place in 1975 in Edmonton. Native people from across Canada gathered to express their concerns with the disproportionate numbers of status and non-status Indians and Metis who were in conflict with the law.

At the conference many recommendations were made and commitments given. One recommendation was that Native people should be closely involved in the planning and delivery of services associated with criminal justice and Native people. It was suggested that a Native advisory committee to the criminal justice system be established in each province. Only one was established that still exists.

The Ontario Native Advisory Committee to the criminal justice system was created in April 1975. At that time the advisory committee had Native members and government members as well. The following year this advisory committee was restructured to ensure Native control, and in 1977 the name was changed to the Ontario Native Council on Justice.

The Council is unique in Canada. Its members sit not as individuals but as representatives of their organization. The Council provides an ongoing focus and forum on criminal justice issues of concern to Native people in Ontario. Representatives of 6 major Native organizations make up the Council; each member organization sends 2 delegates.

The following organizations currently have membership on the Council, giving wide representation: the Ontario Federation of Indian Friendship Centres, the Union of Ontario Indians, the Ontario Metis and Aboriginal Association, Grand Council Treaty #3, the Ontario Native Women's Association, and the Native Law Student's Association. Nishnawbe Aski Nation and the Association of Iroquois and Allied Indians are past members.

In addition, the Council arranges for the participation of two Native inmates from Provincial correctional institutions as full voting delegates at Council meetings.

The full Council meets three times a year, with special-purpose committees meeting to carry on work in the interim.

The Presidents and Grand Chiefs of the Council's member organizations constitute the Council's political arm.

The objectives of the Council were established by its member organizations on behalf of the Native peoples of Ontario, and by government liaison persons, on behalf of the Government of Ontario. The original objectives were:

- To act in the development of justice policy pertaining to Native people and in so doing to identify problems and propose solutions;
- To encourage and facilitate the initiation, development and funding of justice-related programs which are designed and operated by and for Native people;
- To conduct and publish research on justice-related areas of concern to Native people;
- To make recommendations and presentations to individual ministries in the Justice Policy Field, the Cabinet Committee on Justice and any other provincial and federal ministries or departments or organizations on justice-related issues;
- To provide consultation on a regular and formal basis among the organizations representing Native people throughout Ontario and between those organizations and the ministries and agencies which form and control the justice system; and
- To initiate and maintain contacts between the Native people and government representatives for the purpose of enabling two way communication and sharing of information.

These objectives have now been expanded by the Council to include (1) the fostering of an environment within the justice system that recognizes and supports Native cultural distinctiveness and (2) the exploration of alternative justice delivery systems.

The mission statement of the Council speaks as well to the development of alternative justice systems. It also, however, ensures that the needs of the people currently in the existing justice system are not ignored.


The mission of the Council is to support the Aboriginal organizations and their representatives in the development of initiatives to address justice matters for their people, and while the development of these initiatives occurs, to ensure that those Aboriginal people involved in the existing justice system have their needs met in a culturally meaningful manner.

It is fitting that the Ontario Native Council on Justice should have as the focus for its initial presentation to the Royal Commission on Aboriginal Peoples, "the man inside". It is the man - or woman - inside the prison who has experienced the full weight of the criminal justice system and who is its captive.

The disproportionate imprisonment of Native people in Ontario, as well as in other provinces across Canada, is well documented. Studies by the Ontario Native Council on Justice have demonstrated the disproportionate representation of Native people in Ontario's correctional institutions. Warehousing Indians: Fact Sheet on the Disproportionate Imprisonment of Native People in Ontario, 1981-82, the Fact Sheet on the Disproportionate Imprisonment of Native People in Ontario, 1984-85 and the Fact Sheet on the Disproportionate Incarceration of Native People in Ontario, 1988-89 all found the rate of imprisonment of Native persons to be almost 4 times that of non-Natives. Nearly 2% of Ontario's Native population were admitted to provincial correctional institutions in 1988-89; still the same proportion as in 1981-1982.

The most recent study indicated that Native males accounted for 9% of the total males serving sentences in provincial jails and detention centres, and Native females accounted for 17% of females serving sentences in these institutions. In certain institutions however, this proportion is much higher. In the Kenora Jail, for example, in 1988-89 85% of the males serving sentences were Native men, and 97% of the females serving sentences were Native women.

According to the Council's research, the most common offences for which Native men served sentences in 1988-89 were:

- 
1. Liquor Violations
  2. Assault and Related
  3. Drinking and Driving
  4. Theft/Possession

The most common for which Native women served sentences were:

1. Liquor Violations
2. Assault and Related
3. Theft/Possession
4. Breach Court Order/Escape

The Ontario Native Council on Justice's joint study (with the Ministry of Correctional Services) of The Native Inmate in Ontario (1981) indicated similar findings. For the 513 Native inmates interviewed, the most common offence leading to their incarceration was liquor violations (Intoxication plus Liquor Control Act/Other).

A document entitled, "Aboriginal People and Ontario Corrections", prepared by the Ministry of Correctional Services states that in 1990-91, Natives in Ontario accounted for 7.7% of all sentenced admissions. Fine default admissions accounted for 47% of Native sentenced admissions. Overall, liquor offences accounted for nearly 37% of all Natives sentenced to imprisonment; among Native females, 40% of sentenced admissions were for liquor offences.

The report also states, "The most obvious problem facing the Ministry of Correctional Services is the large number of Natives in the correctional system, in proportion to the number of Natives in the province. Their small numbers, taken in absolute terms, inhibit the mounting of serious efforts to provide effective programming within the existing correctional system which will be responsive to Native needs."

In 1990-1991, Native people accounted for 3,468 sentenced admissions to Ontario correctional facilities: there were 3,018 Native male admissions and 450 Native female admissions.

The Ontario Native Council on Justice provides an opportunity for Native inmates to voice their concerns, not just from time to time during the course of a special hearing, but on an ongoing basis. The Council's terms of reference provide for two Native inmate representatives from provincial correctional institutions to attend each Council meeting as voting delegates. The Council is therefore made aware of inmate concerns, and seeks to address them.

Reviewing the issues raised with the Council by the Native inmates over the last five years and the recommendations made, several main areas of concern are apparent. These main areas of concern are: the need for Native staff, Native awareness training, culturally-appropriate programming, community ties, Native spiritual practices, and conditional release.

The realization that some of the issues recently raised were the same issues discussed years before at the 1975 Federal-Provincial Conference on Native Peoples and the Criminal Justice System recalls the observation of the Law Reform Commission of Canada that "It is clear that a major difficulty in solving Aboriginal criminal justice problems lies not in finding the solutions, but in instituting them."

### Need for Native Staff

The need for cultural awareness and sensitivity on the part of those working to assist Native offenders is an issue frequently raised and one whose importance cannot be over-estimated. Whether the justice system worker is a judge deciding on disposition, a social worker preparing a progress report for a custodial review, or a correctional worker delivering a program, their understanding (or lack of understanding) of Native people and Native ways affects the decisions they make. These decisions in turn affect the Native offender.

There is a need for more Native people to be employed by the Ministry of Correctional Services to ensure this understanding and sensitivity.

#### a) **Systemic Discrimination**

It has been observed that "The major form of institutionalized racism today is covert and unintentional, through equal treatment and meritocratic standards. For example, by using the meritocratic standard of a high school diploma as necessary for employment, one systematically eliminates a disproportionate number of Native applicants..." This is due to group differences in formal education attainment - which is itself a matter of differential opportunities.

The Ontario Native Council on Justice has approached the Ministry of Correctional Services on this issue, recommending that the Grade 12 requirement for the position of Correctional Officer be altered for Native applicants.

### Native Awareness Training

With regard to Correctional Services generally, there is a need for continued Native Awareness training for probation and parole staff as well as institutional staff. Fifteen 3-day Native Awareness Workshops have been jointly planned by the Council and Ministry of Correctional Services over the years. This increased sensitization is necessary for all members of the justice system; perhaps then we will no longer have instances where the only recommendation coming from a coroner's inquest into the death of a Native inmate is a commendation to the jail staff for doing a good job under difficult circumstances.

The current climate of financial restraint however, threatens to limit the training that is done. Whether the Ministry can afford the training is at issue. The Council reiterates the words of the Report of the Aboriginal Justice Inquiry of Manitoba that "Society cannot afford jails that are not culturally sensitive."

### Culturally-appropriate Programs

There is a need for further expansion of Native-oriented programs in corrections, in recognition of the right to differential treatment due to cultural differences, and in recognition of the increased level of participation by inmates in programs that are culturally-appropriate.

#### a) **Native Inmate Liaison Worker**

The Native Inmate Liaison Worker Program was established in 1980, as a link between the Native community and the institution inmates.

The Native Inmate Liaison Worker's responsibilities include, but are not restricted to:

- supporting self-help or Native Sons groups
- assisting inmates in academic up-grading, pre-release planning, temporary absence passes, Parole Board Hearings and transfers between institutions
- assisting inmates to worship in traditional ways, arranging visits from Elders, spiritual advisors, and relevant social agencies
- helping to manage personal problems with family, friends, other inmates or institutional staff

- helping inmates to participate in alcohol or drug treatment programs.

Inmates in 5 correctional institutions are presently served by Native Inmate Liaison Workers.

b) **Native-oriented Alcohol/Drug Programs**

Alcohol offences have played a major role in the incarceration of Native people. In 1984-85, Native males accounted for 25% of male admissions for liquor violations in Ontario, Native women accounted for 62% of all female admissions for liquor violations in the province. In the Kenora Jail during this same period, Native males accounted for 96% of the total sentences for males for liquor violations. Native females accounted for 99% of the total sentences for women for liquor violations.

However, with regard to programs designed to address the problem of alcohol abuse, the situation is bleak. The Native Inmate in Ontario reported that in spite of the overwhelming prevalence of alcohol use prior to the behaviour leading to incarceration, over 3/4 of the inmates were not participating in an alcohol treatment program of any type while imprisoned. This problem was further investigated in the study by the Council entitled, the Native Inmate Liquor Offender Project. The research findings (reported in Breaking the Cycle) indicated that of the 64 Native inmates and ex-inmates responding, only 6 were participating in alcohol abuse programs; 12 reported, however, that they had previously been involved in an alcohol program while in the community. The limited alcohol abuse programs found to be available in the institutions usually consisted of Alcoholics Anonymous groups, believed by many of the Native inmates to be ineffective and unsuitable for Native people.

As a result of the Council's Native Inmate Liquor Offender Project, a culturally-appropriate alcohol and drug abuse program was developed. This program was tested in two pilot projects, at Kenora Jail and at the Guelph Correctional Centre. The Ministry of Correctional Services funded the implementation of the program, and funded the operational costs of the pilot projects. There was commitment from the Ministry that, given a successful evaluation, the program would be expanded. At the present time, however, the Native Inmate Liquor Offender Program is offered only at the Kenora Jail.

c) **Native Sons/Daughters**

Native Sons or Daughters groups promote cultural revitalization and positive self-concept. It has been observed that the significance of fostering positive group and subsequently self-identify must be understood within the context of the negative self-concept fostered by the larger society on Native people. A principal way of creating these developments within the correctional setting is the formation of self-help groups. In addition to fostering self-worth, the groups serve as a training ground for leadership skills, and promote a commitment by the individual to development activities of the group.

**Community Ties**

The maintaining of ties in the community while incarcerated is a problem for Native inmates. The prison sentence promotes isolation from family and friends. The isolation from family and friends is documented in both Breaking the Cycle and The Native Inmate in Ontario. Breaking the Cycle reported that only 17% of inmates had been visited by family; an additional 16% had been visited by friends. The Native Inmate in Ontario reported that 68% had received no visits by the time of the research interview. In discussing reasons for the lack of visits, distance from home and travel costs were mentioned; in addition, it was noted that the average duration of a return trip to the institution for families wishing to visit inmates would be 24 hours.

The Council has emphasized that Native inmates should be housed as close to their home as possible. In addition, particularly for those Native inmates who do not read or write or those for whom there is a language barrier, the correctional institutions should allow the receiving of phone calls from family or friends and assist in the placing of calls.

**Native Spiritual Practices**

The implementation of the "sweetgrass policy" - the Ministry's "Inmate Spiritual Services: Religious Services For Native People" - is monitored with interest by the Council. The progress of its implementation varies greatly amongst the different institutions.

Some of the concerns brought to the Council's attention indicate that there is not as yet a clear understanding on the part of the Correctional Services officials as to the role of sweetgrass or the other ceremonies. Some of the problems

besides the issue of access to sweetgrass, have been the interruption of a sweat lodge ceremony for a "head count" to occur, and the general disrespect with which items such as the drum have been treated during room searches.

### Conditional Release

Issues pertaining to conditional release have frequently been raised by Native inmates attending meetings of the Ontario Native Council on Justice. Native inmates have stated that they do not understand the conditional release process, i.e. what is expected of them to gain release, and there is little help to be obtained in the development of release plans. They have stated that they "don't bother" to apply for conditional release because they "know" it would not be granted anyway.

The relative lack of benefit by Native inmates from release programs is recognized by the Ministry of Correctional Services.

To ameliorate this situation, the following recommendations are made:

- 1) the administration increase its efforts to explain the process in those institutions not employing a Native Inmate Liaison Worker; for example, by a presentation on the subject from a knowledgeable Native community member;
- 2) a review of the criteria used for granting conditional release;
- 3) education of members of the Ontario Board of Parole regarding Native communities and resources available, especially in the North.

Many of the Native inmate issues raised in this presentation have been raised as well in reports on Aboriginal justice in other provinces. What lies at the base of many of the issues is a lack of understanding - wilful or not - of Native culture, history, and traditions.

In some instances, as in the case of Native spiritual practices, this lack of understanding is coupled with lack of respect.

It is fervently hoped that the work of the Royal Commission on Aboriginal Peoples will contribute to the development of this necessary understanding and respect and result in a new reality for Native inmates.