JUDICIAL REASONING IN THE NORTHWEST TERRITORIES: AN EXPLORATORY STUDY OF SEXUAL ASSAULT SENTENCING DECISIONS, 1983-1986.

by

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Judicial Reasoning in the Northwest Territories: An Exploratory Study of Sexual Assault Sentencing Decisions 1983-1986

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ABSTRACT

Notwithstanding substantial commentary on sentencing in the Northwest Territories, there is a marked absence of methodologically guided and data based research to support the assertion that factors specific to the "north" are considered in the criminal sentencing context. In seeking to redress this gap in the literature and with particular reference to the judicial accommodation of the extraordinary geographic and demographic requirements of the Northwest Territories within existent criminal justice structures, the thesis is focussed on exploring the criminal sentencing process in the Northwest Territories.

Based on the analysis of corrections data and transcribed sentencing decisions relative to 57 adult male offenders sentenced by either the Territorial or Supreme Court between 1983 and 1986 for the commission of at least one sexual assault offence contrary to section 246.1, 246.2 or 246.3 of the Criminal Code (since revised) the researcher sought to answer the question - do the courts in the Northwest Territories accommodate extraordinary geographic and demographic requirements in the criminal sentencing context?

Following a review of the literature relative to historical and contemporary sentencing practices in the Northwest Territories (Chapter II), the methodology used for the study is outlined in Chapter III. Because "all of the circumstances relating to both the offence and the offender" are relevant to the judicial assessment of sentence, findings relative to the offender sample and their offences are presented in Chapter IV. The manner in which all of these "circumstances" are drawn together within the legal framework for sentencing is the subject matter of

Chapter V wherein the sentencing process relative to the offender sample is examined.

The findings of the study suggest that although the courts in the Northwest Territories are on occasion willing to accommodate extraordinary geographic and demographic requirements in matters of sentencing, such accommodation is not axiomatic to the establishment of ethnicity or geographic isolation. It is suggested further that there are a number of attendant problems in accommodating "geograhic and cultural factors" within existent criminal justice structures insofar as such a posture does not overcome systemic discrimination nor does it effect "substantive justice".

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Last, to my friends and family - the ordeal is over!

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CHAPTER I

INTRODUCTION

Statement of Purpose

The purpose of the thesis is to examine, on an exploratory level, the sentencing process in the Northwest Territories with particular reference to the judicial accommodation of the extraordinary geographic and demographic requirements of this jurisdiction in matters of sentencing. The thesis is based on a review of the literature as well as field research conducted in Yellowknife, Northwest Territories between September and December 1986.

For the purposes of the thesis, it is assumed that the reader has some familiarity with sentencing in Canada, the relationship of Canada's aboriginal peoples to the criminal justice system, and the administration and delivery of criminal justice in the northern context. These subject areas have been extensively canvassed elsewhere and an adequate discussion of each is well beyond the scope of the present analysis.[1]

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[1]For discussion of sentencing in Canada, see Jaffary 1963; Hogarth 1971; Ruby 1976; Grosman 1980; Gross and Von-Hirsch 1981; Nadin-Davis 1982; Canadian Sentencing Commission 1987; Griffiths and Verdun-Jones 1989; for discussion of the relationship of Canada's aboriginal peoples to the criminal justice system, see Verdun-Jones and Muirhead 1980; Griffiths and Yerbury 1983, 1984; Morse 1983; Havemann 1983; Havemann, Couse, Foster and Matonovich 1984; Griffiths, Yerbury and Weafer 1987; Jackson 1989; and, Griffiths and Verdun-Jones 1989; for discussion of the delivery of justice services in the North, see Cowie 1977; Morrow 1981; Finkler 1982a, 1982c; Delisle 1983; Nelms-Matzke 1983: Griffiths 1985; NWT Data Book 1986; and, Griffiths and Patenaude 1988.

Conceptual and Operational Definitions

The phrase "judicial accommodation of extraordinary geographic and demographic requirements in matters of sentencing" is worthy of elaboration. For the purposes of the present analysis, the term "judicial" is literally defined as "of or by a court of law" (Allen 1986:398) and is used to refer to the trial courts, exclusive of Justice of the Peace Courts, in and outside of the Northwest Territories. "Accommodation" also is literally defined as "adaptation" or "adjustment" (Allen 1986:5) and is used to refer to the "adaptation" of criminal law and procedure to the extraordinary geographic and demographic requirements of the Northwest Territories. Sentencing is operationalized as the "judicial determination of a legal sanction to be imposed on a person found guilty of an offence" (Canadian Sentencing Commission 1987:xxvii), with emphasis on the conceptualization of sentencing as a "human process" (see Hogarth 1971; Canadian Sentencing Commission 1987; Griffiths and Verdun-Jones 1989; Lilles 1989).

Defining the precise meaning of "extraordinary geographic and demographic requirements" is somewhat more difficult because of the numerous and complex factors that can be subsumed under these broad terms. At its most basic level, the term "geographic" is used to refer to the physical composition of the Northwest Territories, namely its vast land mass, climatic variation, and small and dispersed population. Demographic is literally defined as "illustrating conditions of life in communities" (Allen 1986:193) and is used to refer to the population characteristics of the Northwest Territories with particular reference to the sociocultural

composition of this jurisdiction.[2] Because the thesis is exploratory, an exhaustive definition of the "extraordinary geographic and demographic" requirements of the Northwest Territories is not provided.

The Nature of the Problem

There are a number of rather extraordinary geographic and demographic circumstances in the Northwest Territories that directly affect all aspects of criminal justice from the centralization of criminal justice services and reliance on a system of circuit court justice delivery to the incomplete development of "socio-legal" services (Tallis 1980; Morrow 1981; Finkler 1982b, 1982c; Delisle 1983; Griffiths 1985; Northwest Territories Committee on Law Reform 1987; Griffiths and Patenaude 1988).

Located north of the 60th parallel and encompassing an approximate one-third of the total Canadian land mass, the Northwest Territories presents a physically isolated, climatically inhospitable, and vast geographic expanse in which to administer the criminal law (Drury 1980; Dacks 1981; Zaslow 1984; Griffiths 1985; Northwest Territories Committee on Law Reform 1987; Griffiths and

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[2]For the purposes of the thesis, the terms "aboriginal", "indigenous", and "native" are used to refer to the Indian, Inuit, and Metis peoples of the Northwest Territories. As suggested by Griffiths and Patenaude (1988:3), the Inuit represent an approximate 35%, the Dene an approximate 22% and, the Metis an approximate 18% of the population in the Northwest Territories. It is worthy of note that, while referred to as "aboriginal peoples", there are a multiplicity of Inuit and Dene linguistic and cultural groupings (NWT Data Book 1986; Griffiths and Patenuade 1988). As suggested by Griffiths and Patenaude (1988:3), there are a number of Dene tribal groupings, including the "Chipewyan; Cree; Dogrib; Hare; Loucheaux; Nahanni and Slavey". Similarly there are a number of linguistic and cultural Inuit groupings, including the Ungava, Salliq, South Baffin, Iglulik, Netsilik, Caribou, Copper, and Karngmalit (NWT Data Book 1986).

Patenaude 1988). As physical barriers to the administration and delivery of criminal justice, the geographic enormity and isolation of the Northwest Territories are complicated by a northern populace that is small in size and dispersed across 63 communities that vary in size, relative isolation, political and economic development, ethnic composition and level of acculturation (Morrow 1967, 1971, 1981; Tallis 1980; Griffiths and Yerbury 1983; Griffiths 1985; Griffiths and Patenaude 1988; NWT Data Book 1986).

As the only jurisdiction in Canada with a "culturally diverse and majority indigenous population" (Finkler 1982b:1), there are fundamental ethnic, cultural and linguistic barriers to the administration of criminal justice (Griffiths 1985). There also are significant social cleavages between the native and non-native populace (Brody 1975; Dacks 1981), who "differ markedly on almost all measures of population characteristics including residence, migration, and birth/death rates as well as socioeconomic factors such as education, occupation and income" (NWT Data Book 1986:37). These social cleavages transcend the criminal justice context (see Griffiths 1985).

As a function of the geographic and demographic composition of the Northwest Territories, it is suggested that the uniform application of the criminal law to northern indigenous peoples who are "special in circumstance" may result in culture conflict and injustice (Morrow 1965, 1967, 1971, 1981; Schmeiser 1968; Finkler 1976, 1985; Tallis 1980; Bayly 1985; Lindsey-Peck 1985; Jackson 1985).[3]

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[3]There is, for example, substantial evidence that the cultural systems of the Dene and the Inuit include mechanisms for the prevention and resolution of social conflict (Dacks 1981). Although variable across aboriginal cultures, distinguishing features of indigenous social control mechanisms include the absence of written,

Thesis Rationale

A review of the existing literature suggests that there is both historical and contemporary precedent in the Northwest Territories for the judicial accommodation of extraordinary geographic and demographic requirements, inclusive of the "special circumstances" of northern indigenous accused, in matters of sentencing (Morrow 1965, 1967, 1971, 1981; Bucknall 1967; Schmeiser 1968; Sissons 1968; Finkler 1976; Schuh 1979; Tallis 1980, 1985; Havemann, Couse, Foster and Matonovich 1984; Crawford 1985; Griffiths 1985; Jackson 1985; Lindsey-Peck 1985; Government of the Northwest Territories 1985a; Price 1986; Griffiths and Patenaude 1988; Jackson 1989).

The conclusions that can be drawn from the existent literature, however, are circumscribed by the methodological inadequacy and restrictive parameters of the inquiries that have been conducted to date. Thus, while a number of commentators assert that there are "northern factors" relevant to the sentencing process in the Northwest Territories, the assertion is largely premised on the examination of a select few reported sentencing decisions combined in some instances with the personal experience of the commentator. Indeed, much of the existent literature fails to specify the data gathering and sampling strategies, and the techniques of analysis used (Morrow 1965, 1967, 1971, 1981; Bucknall 1967;

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codified legal norms and sanctions; the absence of formal, institutionalized authority to adjudicate conflict; flexibility in reaction to the conflict situation; and, intervention aimed at the restoration of community peace and harmony (see Graburn 1969; Finkler 1976, 1983, 1985; Jefferson 1980; Carswell 1984; Dickson-Gilmore 1987). Prima facie, it can be suggested that the common attributes of indigenous normative and sanction systems stand in marked contrast to the principles and structures of the Canadian criminal justice system with commensurate potential for conflict (see Finkler 1976, 1983; Dacks 1981; Bayly 1985; Griffiths and Patenuade 1988; Lilles 1989).

Sissons 1968; Tallis 1980, 1985; Griffiths 1985; Jackson 1985; Crawford 1985; Lindsey-Peck 1985; Government of the Northwest Territories 1985a; Price 1986; Griffiths and Patenaude 1988; Jackson 1989).

In contradistinction, the literature on sentencing in the Northwest Territories that maintains some semblance of methodological consistency suffers from restrictive parameters. Thus, while Schuh's (1979) research on the murder trials of northern indigenous offenders between 1899 and 1923 maintains methodological consistency by offence type, it is restricted to the examination of relatively few cases and is historically limited. Finkler's (1976) research on socio-legal controls in Frobisher Bay, inclusive of an examination of the sentencing practices of all three levels of courts in the Northwest Territories in 1972 relative to convictions for 441 federal and territorial offences, is both historically limited and restricted to sentences imposed on Inuit and non-Inuit offenders from Frobisher Bay.

In brief, there is a need to explore the relevance of geographic and demographic circumstances to the criminal sentencing context in the Northwest Territories using research techniques that are methodologically guided and data supported and that do not impose overly restrictive parameters.

Caveats and Limitations

The thesis is limited to an examination of the sentencing process in the Northwest Territories. The level of finding, or the adjudication of guilt or innocence, has been purposefully excluded from the study as there is no apparent

evidentiary basis in the literature to suggest that geographic and demographic dynamics are substantively accommodated by the courts in the Northwest Territories in the criminal law context (Sissons 1968; Morrow 1967, 1971, 1981; Tallis 1980, 1985; Finkler 1976; Schuh 1979; Crawford 1985; Lindsey-Peck 1985; Government of the Northwest Territories 1985; Jackson 1985; Bayly 1985; Griffiths 1985; Griffiths and Patenaude 1988; Jackson 1989). And, although sentencing is unquestionably a process involving a number of significant actors and decision-making stages (see Hogarth 1971; Canadian Sentencing Commission 1987), the thesis is limited to the examination of one actor and one stage of the process in accordance with the "judicial determination of a legal sanction to be imposed on a person found guilty of an offence" (Canadian Sentencing Commission 1987: xxvii). More specifically, although historical and contemporary sentencing practices in the Northwest Territories are reviewed in terms of the existent literature, the study itself is specific to a longitudinal analysis of Territorial and Supreme Court sexual assault sentencing decisions in the Northwest Territories between 1983 and 1986, inclusive. The sentencing practices of Justice of the Peace Courts, which have been dealt with elsewhere (see Finkler 1976; Weafer 1986), were purposefully excluded from the study which is specific to sexual assault sentencing decisions. At least conceptually, Justice of the Peace Courts do not have jurisdiction over this type of sentencing matter (Personal Communication with His Honor, Judge R. Michel Bourassa 1987; Griffiths and Verdun-Jones 1989).

For the purposes of methodological consistency and to ensure a manageable data base, the researcher chose to examine one criminal offence longitudinally, namely the offence of sexual assault. The decision to examine the offence of sexual assault (as per sections 246.1, 246.2 and 246.3 of the Criminal Code) was premised

on the frequency of sexual offences in the Northwest Territories with commensurate implications for the availability of data; the centrality of cultural arguments to offences of a sexual nature as per competing sexual mores between aboriginal and Anglo-Canadian cultures (Finkler 1976; R. v. Curley, Issigaitok and Nagmalik, [1984] N.W.T.R. 263 (N.W.T.Terr.Ct.); R. v. J.S.B., [1984] N.W.T.R. 210 (N.W.T.S.C.); Struzik 1984; Lindsey-Peck 1985; Jackson 1988); the paucity of existing research on the sexual assault provisions given the recency of their enactment at the time (Boyle 1984); and, the current concern for, and interest in issues that directly affect women in the Northwest Territories (Task Force on Spousal Assault 1985; Jackson 1985).

The Organization of the Thesis

The thesis begins with a review of the literature relative to sentencing in the Northwest Territories. Thus, in Chapter II attention is focussed on tracing the "historical antecedents" of, and contemporary criminal sentencing practices in the Northwest Territories. In Chapter III, the methodology that was used for the study is reviewed. The findings of the study are presented in Chapters IV and V; the former chapter specific to the "sexual assault offender" and the "sexual assault offence" and the latter to "sentencing the sexual assault offender". In Chapter VI, the results and implications of the study are discussed.

CHAPTER II

IN DEFERENCE TO EXTRAORDINARY GEOGRAPHIC AND DEMOGRAPHIC REQUIREMENTS: A REVIEW OF THE LITERATURE

Introduction

A review of the existing literature suggests that while there is ample commentary on the sentencing process in the Northwest Territories, from the perspective of both those individuals who have been involved in the evolution of criminal justice as well as those external to this process, there is a paucity of research on the criminal sentencing process in this jurisdiction. Thus, the literature that exists is based more on the experience or perceptions of the observer than on rigorous methodological and data supported analysis (Morrow 1965, 1967, 1971, 1981; Bucknall 1967; Schmeiser 1968; Sissons 1968: Schuh 1979; Tallis 1980, 1985; Crawford 1985; Griffiths 1985; Jackson 1985; Lindsey-Peck 1985; Government of the Northwest Territories 1985a; Price 1986; Griffiths and Patenaude 1988; Jackson 1989).

A review of the existing literature, nevertheless, provides critical insights into how the individuals involved in the administration of justice, in particular the judiciary, have applied the criminal law in a jurisdiction that is geographically and demographically unique. The purpose of this chapter is to identify the historical antecedents of, and contemporary criminal sentencing practices in the Northwest Territories. For simplicity and brevity, the chapter is divided into three administrative phases - 1875 to 1955, 1955 to 1976, and 1976 to 1989.

Historical Antecedents (1875-1955)

Legislative provisions for the "official" application of the laws of the Dominion in the North-West Territories were first enacted in 1875 (Royal Bank of Canada v. Scott and Commissioner of the Northwest Territories [1971] 4 W.W.R. 491 (N.W.T.Terr.Ct.); Crawford 1985). In the absence of legislative provisions for the co-existence of indigenous normative and sanction systems, it can be surmised that the intent of the Dominion Government was for an Anglo-Canadian administration of justice to unilaterally apply the criminal law to the indigenous inhabitants of the North-West Territories. Indeed by virtue of establishing an administration of justice "for" the North-West Territories in 1873 (Royal Bank of Canada v. Scott and Commissioner of the Northwest Territories [1971] 4 W.W.R. 491 (N.W.T.Terr.Ct.)), it can be suggested that any concessions toward legal pluralism arguably were rejected outright by the Dominion Government. As Griffiths and Patenuade (1988:8) state:

> Historically, the position of the federal government in Canada in relation to Native Indian and Inuit legal systems can be characterized as one of total rejection.

Havemann (1983:353) similarly notes:

> The Canadian state has never tolerated autonomy for Indigenous people whether it was in terms of plurality within the legal system, other spheres of social control, or political action.

Based on her analysis of "a series of early murder trials" of northern indigenous accused, Schuh (1979:74) offers a number of interesting observations

about the administration of criminal justice in the Territories between the late 1890s and early 1920s.

As suggested by Schuh (1979), when the "law" first ventured north in the late 1890s and early 1900s, the Royal North-West Mounted Police and a non-resident judiciary were confronted with an indigenous population who had limited experience with, and in some instances no knowledge of, the criminal laws under which they were being prosecuted and sentenced. Indeed, as Schuh (1979:97) points out there were indigenous defendants at this time whose so-called "criminal behavior" may have been quite proper "within [its] own cultural context".

In response to northern indigenous peoples' limited comprehension of the criminal law, Schuh (1979) asserts that the trial process was used as an "educational forum" by a non-resident judiciary. Noting the attendant "ceremony" attached to the early trials of northern indigenous accused, Schuh (1979:83) suggests that when trial proceedings were held in the Territories (as in the case of R. v. LeBeaux who was tried at Fort Providence in 1921, and R. v. Tatamagana and R. v. Alikomiak who were tried at Herschel Island in 1923) the decision to prosecute and sentence in the North was motivated largely by the underlying policy consideration of maximizing "the impact of the trial upon the people". In those instances where indigenous defendants were not tried in the Territories, references to "teaching" the northern indigenous populace the normative standards laid down by the criminal law nonetheless permeated the trial and administrative proceedings (see Schuh 1979 and Moyles 1979).[1]

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[1]Given the sporadic and symbolic nature of the early trials of northern

Based on her "brief survey of murder cases from the frontiers of culture contact" between 1899 and 1923,, Schuh (1979:96) argues that the "special circumstances" of northern indigenous defendants (including "ignorance of the criminal law")[2] had no effect on the judicial determination of guilt or innocence although such "circumstances" were frequently a consideration in sentencing. Suggesting that there was relative constancy in affording "executive clemency in the carrying out of sentence", Schuh (1979:95) observes that when leniency in sentencing was not extended or executive clemency not granted, overriding emphasis was placed on general deterrence largely because of events external to the accused.

In the absence of "clearly articulated" judicial reasons for rejecting a substantively flexible approach to the "special circumstances" of northern indigenous accused between 1899 and 1923, Schuh (1979:98) conjectures there may have been concern that, if an indigenous accused's ignorance of the criminal law was considered as an exculpatory factor in the assessment of criminal liability, the

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indigenous accused between 1899 and 1923, coupled with the linguistic differences between the court and the accused, Finkler (1976), Schuh (1979), and Price (1986), hypothesize that the anticipated "educational benefits" of these trials were minimal. Finkler (1976:19) observes that "[i]nstances of [Inuit] compliance with their traditional normative and reaction system prevailed until the 1960s".

[2]Schuh (1979:102,f.n.91) defines the term "ignorance of the law" to incorporate both the indigenous accused's "total unawareness of the existence of the legal system" and the indigenous accused's adherence to his own lex loci. As Schuh (1979:102, f.n.91) states:

> [The indigenous accused's ignorance of the criminal law] must be clearly distinguished from the more familiar ignorance of the law, which, as the maxim tells us, is no excuse. What is at issue here is not a lack of information about specific legal provisions but total unawareness of the existence of the legal system as such, on the part of the individual who might also be considered to have a lex loci of his own.

same substantive accommodation would have to be extended to other "foreign immigrants" who could similarly claim ignorance of Canadian criminal law. As Schuh (1979:98) states:

> Any exceptions to orthodox reasoning might be difficult to confine to native people . . . whereas discretionary relaxations in arrest and in sentencing proceeded on an ad hoc basis and formed no binding precedents. A breach in the tight structure of Anglo-Canadian concepts of mens rea would have affected the whole criminal law, not just the criminal law as it applied to Indians and Inuit.[3]

With respect to the more basic question of whether the Canadian government even had "jurisdiction" to apply the criminal law to northern indigenous peoples (defined in terms of the "problems of applying the Canadian criminal law to a newly-discovered and relatively untouched native community"), Schuh (1979:99-100) contends that defence counsel "rarely mounted explicit attacks on the court's jurisdiction or on the applicability of 'white' law to the accused" in the interim between the late 1890's and early 1920's.[4] In those instances where either the jurisdictional issue or defences based on custom were raised by defence counsel,

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[3]The trial judge's charge to the jury in the case of Regina v. Sinnisiak (1917) provides some support for Schuh's (1979) "foreign immigrant theory". As stated by Harvey, C.J. (cited in Moyles 1979:55):

> Much has been suggested in the present case about the prisoner's lack of knowledge of our law and our customs ... Of course, that applies to a greater or lesser extent to many of the foreigners who have come into our country; to the Indians, although they have become gradually more and more accustomed to our laws, but that cannot be dealt with by a court such as this in considering liability for the crime. That is a matter to be dealt with in the matter of punishment.

[4]Price (1986) similarly notes the infrequency with which defence counsel raised either the jurisdictional issue or defences based on custom in trials before stipendiary magistrates between 1921 and 1955.

Schuh (1979) asserts that such arguments invariably were rejected by the presiding trial judge. As Schuh (1979:99) remarks, for the courts to have even "entertained" the jurisdictional issue or extend independent legal validity to customary law defences "would have been to open a door very difficult to close again".

An equally plausible explanation for the judicial rejection of substantive flexibility and limited legal acknowledgement of the "special circumstances" of aboriginal accused through discretionary means in matters of sentencing lies in the broader question of why the law came to the Territories. If, as Schuh submits (1979:104), the criminal law was used as an "instrument of policy" to assert sovereignty over northern lands and northern native peoples, a theme that is reiterated by Crawford (1985), the response of the trial courts in the late 1890's and early 1900's was quite consistent with governmental objectives. Indeed, it would have been self-defeating for the trial courts to validate the lex loci of northern aboriginal peoples, or adjust the substantive core of the criminal law in deference to an aboriginal accused's "ignorance of the law" at the level of finding, if the purpose of applying the criminal law was to "civilize" a "primitive" people.[5]

Although the parameters of Schuh's (1979:74) analysis are restricted to "a series of murder trials" (an approximate ten cases, six of which were specific to the Territories) between the late 1890s and early 1920s, both Price (1986) and

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[5]For elaboration of the "civilizing mission" concept, see Berger (1977:85). See also Verdun-Jones and Muirhead (1980); Jefferson (1982); Morse (1983); Havemann (1983); Havemann, Couse, Foster and Matonovich (1983) for discussion of the use of the criminal law as an "instrument of colonization".

Finkler (1975) provide some support for Schuh's (1979) identification of a procedurally as opposed to substantively flexible response to the "special circumstances" of northern indigenous accused.

According to Price (1986), the stipendiary magistrates court established criminal court circuits throughout the Northwest Territories between 1921 and 1955, thus changing the policy (in effect from 1905 to 1921) of removing northern indigenous defendants, witnesses and interpreters from the Northwest Territories to a southern jurisdiction for trial and sentencing.[6] Comparable to Schuh (1979), Price (1986:229-230) suggests that the trials of northern indigenous accused between 1921 and 1955 were attended by a degree of "ceremony", presumably to impress the native peoples in attendance with the "dignity" and "civilized nature" of the proceedings. As well, Price (1986:248) identifies the development of a policy of "loose sentencing guidelines" by the stipendiary magistrates courts for the period 1946 to 1948.

Finkler (1976:19), in his review of the literature, also suggests that the individuals enforcing the laws between the early 1920s and 1955 were in a unique position to "familiarize indigenous people with the Canadian system of law". Commenting on the educational role of the courts at this time, Finkler (1976:19) alludes to the trials of R. v. Tatamagana, R. v. Alikomiak, and three other Inuit

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[6]Although Price (1986) effectively dispels the misconception that all indigenous accused were removed to the south for trial prior to the establishment of the Territorial Court in 1955, he concedes that stipendiary magistrates were not established as resident in the Western Arctic regions of the Northwest Territories until after the late 1930s, with criminal court circuits continuing to be dispensed by non-resident "southern" stipendiary magistrates in the Eastern Arctic until after the establishment of the Territorial Court in 1955.

accused at Herschel Island in 1923, as well as "the first trial of an Inuit, charged with murder at Pond Inlet in the Eastern Arctic in 1923", noting that the presiding magistrate took the time to explain the functions of the various court officials and the purpose of the trials to the indigenous peoples who were assembled as spectators (see also Price 1986). Citing the examples of R. v. Sinnisiak and Uluksak (1917) and the 1949 trial of an Inuk accused, Finkler (1976:20) states that "prior to 1955, there were instances where stipendiaries showed leniency in their sentencing of aboriginal people in recognition of their unfamiliarity with Canadian law" and in recognition of "adherence to Eskimo custom", with the sentence of death commuted in the former case and a "comparatively light" sentence imposed in the latter instance.

The descriptions offered by Schuh (1979), Price (1986) and Finkler (1976) tend to the conclusion that, while the trial courts were unwilling to compromise the substantive core of the criminal law (in terms of either the concept of mens rea or defences based on "custom") between 1899 and 1955, the trial courts were willing to defer to the "special circumstances" of northern aboriginal accused through a procedurally flexible response, particularly in matters of sentencing. Moyles' (1979) narrative of the trials of Sinnisiak and Uluksak (1917) seemingly confirms the judicial rejection of substantive arguments and acceptance of procedural flexibility at the level of sentencing.

Unfortunately, while insightful, the descriptions offered by Schuh (1979), Price (1986), Finkler (1976) and Moyles (1979) cannot be interpreted as conclusive evidence of the manner in which the trial courts applied the criminal law to aboriginal peoples in the Northwest Territories for the time period 1899 to 1955

given the lack of supporting data provided in each analysis and considerable overlap in the cases described. The assertion that the trial courts adopted a procedurally flexible response to the "special circumstances" of northern indigenous accused, rejecting substantive arguments, between 1899 and 1955 generally is based on the cases of R. v. Sabourin (1899), R. v. Sinnisiak and Uluksak (1917), R. v. Le Beaux (1921), R. v. Alikomiak (1923), and R. v. Tatamagana (1923). Indeed, notwithstanding his identification of a policy of "loose sentencing guidelines" between 1946 and 1948, Price (1986:240-241) suggests that there is no "concrete evidence" to support the assertion that stipendiary magistrates resident in the Northwest Territories after the late 1930s necessarily "injected a less harsh, more lenient element into the criminal circuit process".

The Sissons Era (1955-1976)

In 1955, the structure of the administration of justice for the Northwest Territories underwent fundamental change when a re-enactment of the Northwest Territories Act provided for the establishment of a superior court of record for the Northwest Territories, consisting of one judge with the "full civil and criminal jurisdiction of a Superior Court Judge" (Morrow 1981:258; Royal Bank of Canada v. Scott and Commissioner of the Northwest Territories [1971] 4 W.W.R. 491 (N.W.T.Terr. Ct.). Remaining in effect until 1971, the 1955 Act transferred the power and authority of stipendiary magistrates to the newly created "Territorial Court" and introduced a "system of Police Magistrates and Justices of the Peace", thereby displacing the previous system of stipendiary magistrates (Finkler 1976:16; Royal Bank of Canada v. Scott and Commissioner of the Northwest Territories [1971] 4 W.W.R. 491 (N.W.T.Terr.Ct.). Notably, there were no more

concessions toward the recognition of indigenous normative and sanction systems in the Northwest Territories Act of 1955 than in the North-West Territories Act of 1875.[7]

The first judge appointed to the newly created "Territorial Court", Mr. Justice Sissons, and his successor to the bench in 1966, Mr. Justice Morrow, are credited with adopting a "more relativistic", albeit "unorthodox", approach to the uniform application of Canadian laws in the Northwest Territories (Schuh 1979:96, f.n.74). Sissons, for example, is renowned for establishing a system of circuit court justice delivery, encouraging native participation on juries, advocating the inalienable hunting and fishing rights of indigenous peoples, recognizing the validity of customary marriage and adoption, and adapting the rules of procedure and the principles of sentencing to the extraordinary geographic and demographic requirements of the Northwest Territories (Morrow 1965, 1967, 1971, 1981; Bucknall 1967; Sissons 1968; Schmeiser 1968; Finkler 1976; Zlotkin 1983). Morrow

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[7]See, for example, the Carrothers (1966) Commission Report wherein "legal pluralism" for the Northwest Territories was, as Schuh (1979:97) states "decisively rejected". In the words of the Commission (1966:203-204):

> Laws are by nature generalizations. A good law is one which reflects, and is designated to protect, the common interests and values of society. A common legal system presumes a common value system. Before one can recommend responsibly that there be a separate system of criminal law for a group within a larger community such as the Eskimo and Indian, one must be satisfied that the group has a value system or systems that is at odds with the one on which the criminal law is premised, that the value system or systems ought to be preserved, that an appropriate law can be articulated, and that it is both practical and politically acceptable to have a dual system of law. In our judgement, prima facie, two sets of substantive criminal law, one of general application, the other to be applied to a small segment of a small ethnic group, would be quite unworkable; in addition, it could be regarded as a precedent on which other ethnic groups in Canada could seek to establish a claim to special treatment.

is similarly credited with the creative adaptation of Anglo-Canadian law and procedure to suit the "peculiarities of northern life" (Bucknall 1967:159; Schmeiser 1968; Finkler 1976; Morrow 1971, 1981; Zlotkin 1983; Tallis 1980, 1985; Jackson 1989).

The response of Sissons and Morrow to the extraordinary geographic and demographic requirements of the Northwest Territories, including northern indigenous peoples' limited comprehension of the criminal law and continued compliance with traditional normative and sanction systems, was not dissimilar to the approach argued by Schuh (1979), Price (1986), Finkler (1976) and Moyles (1979) for the time period 1899 to 1955. During their respective tenure on the Territorial Court Bench (Sissons from 1955 to 1966 and Morrow from 1966 to 1976), Sissons and Morrow sought to adapt the unilateral application of the criminal law "through a less rigid application of the rules of procedure and principles of sentencing" (Finkler 1976:19).

Although not exclusive to the criminal law context, Sissons (1968:87) adhered to the principle that "the proper place for a trial is the place where the offence was committed" and "that every person accused of a serious offence should be tried by a jury from his own area; and that he should be tried by a jury of his own peers". In this regard, and although not exclusive to the criminal law context, Sissons and Morrow relied extensively on a system of circuit court justice delivery and the jury system (Sissons 1968; Morrow 1981).

In seeking to "take justice to every man's door", Sissons (1968:60) clearly intended that a system of circuit court justice delivery should achieve more than mere geographic accommodation. As Sissons (1968:123) states:

> The territorial court made some discoveries about the principle of bringing justice to every man's door. It is not entirely a matter of geographic accommodation. When you reach the man's door you must conduct the court to encompass his concepts of justice . . . I should like to emphasize the word "encompass". What you take to his door is not downgraded or demeaned. It's enlarged - to accommodate concepts of right and justice developed by another culture. If the other culture lacks some concept allowance must be made for it.

Notwithstanding Sissons apparent willingness to accommodate indigenous concepts of "right and justice", such accommodation must be viewed in terms of the very clear limits imposed by his emphasis on the word "encompass" insofar as Anglo-Canadian concepts of "right and justice" would not be "downgraded or demeaned". In this regard, it is interesting that neither Sissons or Morrow sought to adjust the substantive core of the criminal law in deference to the "special circumstances" of northern indigenous accused during their respective tenure on the Territorial Court Bench. Whereas Sissons and Morrow expressly recognized the validity of native customary marriage and adoption,[8] such recognition was never extended to the criminal law context (Morrow 1967; Bucknall 1967; Sissons 1968; Finkler 1976; Zlotkin 1983). Indeed it can be argued that Sissons' only concession toward the substantive accommodation of the cultural circumstances of northern aboriginal peoples in the criminal law context was his acceptance of

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[8]For a more detailed discussion of Sissons' and Morrow's recognition of customary law in the family law and estate context, see Morrow 1965, 1967, 1971, 1981; Bucknall 1967; Schmeiser 1968; Sissons 1968; Richstone 1983; Zlotkin 1983; and Crawford 1985.

established common law defences, such as provocation and self-defence, in instances where there was congruence between the common law and the cultural circumstance in question (see Sissons 1968; Crawford 1985).

It is also interesting that a "ceremonial" and "educative" function permeated Sissons's courts (clearly evidenced by his practice of planting the Union Jack wherever the territorial court was sitting) suggesting that, at least in the criminal law context, Sissons' system of circuit court justice delivery did little more than guard against the removal of indigenous accused and witnesses from their own physical environment (Sissons 1968). The educational role of Sissons' system of circuit court justice delivery is elucidated by Morrow (1981:265) who states:

> By taking the court to each community, the people are able to see justice being administered. This helps in the educational process, and as well, it should serve to remove some of the mystery associated with trials.

The underlying theme of assimilation resurfaces in Sissons' encouragement of indigenous participation on juries but his tacit acceptance of the trials of indigenous accused by non-native juries despite his overtures to the contrary (Sissons 1968; Finkler 1976; Crawford 1985; Jackson 1985). Notwithstanding Sissons stated objective for encouraging indigenous participation on juries, "to ensure full appreciation of local conditions" (Morrow 1981:263), Finkler (1976:19) observes that Sissons regarded "the participation of Inuit on juries as an opportunity for them to learn about the Canadian legal system" (see also Sissons 1968).

Coincident with their use of the jury as an educative tool, and although not exclusive to the criminal law context, Sissons and Morrow relied extensively on the jury system as one method by which to "soften the blow of the rigid or uniformly applied southern laws to northern conditions" (Morrow 1981:263), intimating that the jury was a particularly effective procedural mechanism by which to diffuse culture conflict. Indeed, in the case of Regina v. Kikkik (1958) Sissons went so far as to instruct the jury to consider the culture and customs of the indigenous accused (Sissons 1968).[9] Reflecting on Sissons instructions to the jury in this case, Bucknall (1967:165) asserts that he "virtually instructed the jury to acquit the accused".[10] And as Morrow (1981:265) remarks in relation to Sissons last trial, R. v Shooyook and Aiyaoot (1966):

> The jury brought in a verdict against Shooyook - manslaughter. The verdict for Ayoot [sic] was "not guilty". It was a great social judgement. A judge would have been required to find a verdict of murder. And so the jury system provided the way out.

In addition to extensive reliance on a system of circuit court justice delivery and the jury system, throughout their combined twenty-one years on the Territorial Court Bench Sissons and Morrow made a number of other adjustments to ensure that northern indigenous accused received a procedurally fair trial (Bucknall 1967; Schmeiser 1968; Sissons 1968; Morrow 1967; Finkler 1976).

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[9]Sissons also encouraged native participation in the judicial proceedings by enlarging "the rules of the territorial court to encompass the Eskimo custom of seeking corroboration from the crowd while giving evidence" (Sissons 1968:125-126).

[10]Sissons instructions to the jury in the first trial of R. v. Kikkik (1958) stand in marked contrast to the stipendiary magistrates criminal court circuits in the Northwest Territories between 1921 and 1955 wherein juries were instructed to base their decision on the strict application of the criminal law (Price 1986).

Sissons, for example, was particularly sensitive to the difficulties of translating culturally specific legal concepts and procedures into indigenous languages and in instances where a legal concept or procedure was beyond the comprehension and experience of an accused, Sissons "relaxed the rules" (Sissons 1968:125). Indeed, Sissons' proclamation that the itinerant court must entail more than mere geographic accommodation stemmed directly from his finding that "Eskimos have no concept of the meaning of being guilty" in their language or culture (Sissons 1968:124). Accordingly, Sissons was extremely reticent in accepting the guilty pleas of Eskimo accused, preferring to proceed to trial to establish guilt or innocence (Morrow 1967).[11]

Morrow, who attributed the frequency of guilty pleas among aboriginal peoples to " . . . their lack of understanding of the proceedings, language difficulties, the desire to please authorities, and to be finished with the proceedings as soon as possible", adopted the same posture as Sissons, refusing to accept the guilty plea of an indigenous accused unless "assured that the accused understood its implication" (Finkler 1976:20; Morrow 1981). However, as Finkler (1976:20) astutely observes, at least one contributing factor to the frequency of guilty pleas in the Northwest Territories:

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[11]A number of the principles established by Sissons and Morrow to ensure the procedurally fair trial of indigenous accused did not emanate from criminal cases, per se, but are equally applicable to the criminal law context. Sissons reticence in accepting guilty pleas from Eskimos, for example, stemmed from R. v. Koonungnak (1963), a hunting rights case in which the accused's admission of having committed the act in question was interpreted by the presiding Justice of the Peace as a plea of guilty (Bucknall 1967).

> . . . has been the neglect by the prosecution to apply the concept of mens rea or to find out whether the accused had any knowledge of the wrongfulness of the alleged act, essential to the determination of guilt.

In addition to the foregoing, Sissons and Morrow made a number of other adjustments to ensure the procedurally fair trial of northern indigenous accused. Sissons, for example, made it a practice to emphasize the crown burden of proof in establishing guilt beyond a reasonable doubt (Morrow 1965, 1967). As well, because of the difficulties in providing the direct and accurate translation of statements made by an accused to the police, Sissons and Morrow were disinclined to allow the introduction of inculpatory statements into evidence in instances where "the court could not confirm that it was exactly what the accused had intended to convey" (Sissons 1968:89-90). As Finkler (1976:20) states, both Sissons and Morrow tended to "exclude confessions and admissions brought forward as evidence by crown, often obtained as a result of the accused's desire to please the police". Further examples of Sissons' and Morrow's "procedurally flexible approach" to the unique geographic and cultural requirements of their jurisdiction were "reflected in a more liberal policy in granting bail . . . [and] less rigid procedures in applications for appeals" (Finkler 1976:20).

It is in the area of sentencing, however, that Sissons and Morrow were perhaps best able to "temper" the uniform and rigid application of the criminal law to accommodate the "special circumstances" of northern native accused (Morrow 1965, 1967, 1971, 1981; Bucknall 1967; Schmeiser 1968; Sissons 1968; Finkler 1976;

Griffiths and Patenaude 1988).[12] As suggested by Finkler (1976:20), in matters of sentencing, Sissons and Morrow "adhered to the belief that some special treatment or adjustment was required if injustice was to be avoided".

Commenting on Sissons approach to sentencing, Griffiths and Patenaude (1988:17) state:

> Illustrative of the approach taken by Mr. Justice Sissons is the case involving the community-sanctioned execution of a mentally disturbed Inuit woman whose behavior posed a serious threat to an Inuit community. In R. v. Shooyook and Aiyaoot [1966] (Unreported) he considered the traditional Inuit social control methods for dealing with an "insane person" when passing sentence. While the jury found Aiyaoot not guilty of murder and Shooyook guilty of the lesser offence of manslaughter, Mr. Justice Sissons imposed a two year suspended sentence on Shooyook.

They further maintain (1988:17-18):

> While a large number of the decisions of Mr. Justice Sissons were appealed and the majority were overturned by the appeal courts, nevertheless his efforts represented a first attempt to reduce the dichotomy between customary law and the Euro-Canadian criminal law by instituting culturally sensitive sentences.

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[12]See also Jackson (1989:260) who states:

> The attempt to accommodate the Canadian criminal justice system to aboriginal communities has a long history in the Northwest Territories. Territorial judges of the stature of Mr. Justice Sissons and Mr. Justice Morrow, in taking justice to the far flung communities of the Northwest Territories on circuits covering many thousands of miles, have in the course of their judgements analyzed certain aspects of the indigenous and customary law of the Inuit and Dene.

In matters of sentencing, it is suggested that Sissons and Morrow were at a distinct advantage over their non-resident predecessors who administered the criminal law between the late 1890s and late 1930s (Morrow 1967, 1971, 1981; Tallis 1980).[13] As full-time resident judges in the Northwest Territories, Sissons and Morrow were able to observe first hand the extraordinary geographic and demographic requirements of their jurisdiction. As Morrow (1967:260) claims in regard to Sissons:

> As the first Judge in the newly constituted Territorial Court Judge Sissons considered that he was master of his own practice. He never hesitated to operate, if necessary, in conflict with recognized legal practice if the local conditions in his large and primitive territory dictated the need for a modified practice and procedure, and if the ultimate ends of justice required it . . . Under the same heading it should be observed that he applied his practical knowledge and experience gained first hand, in the sentencing of accused persons, particularly natives who came before him. Recognizing that Eskimos for example had a shorter life span than whites, and that incarceration in prison away from home might result in the prisoner's ultimate death, he made a firm practice of discounting the length of sentence in proportion to the relative life-span of the person concerned.

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[13]According to Price (1986) stipendiary magistrates were not resident in the Northwest Territories until the late 1930s. Interestingly, Price (1986) asserts that it is questionable whether the stipendiaries who became resident in the Northwest Territories in the late 1930s injected a more lenient element into the criminal circuit process. Price (1986:240-241) states:

> Whether these resident Judges injected a less harsh, more lenient element into the criminal circuit process is debateable. Certainly through personal experience, they could identify more readily with the harsh realities of northern living - the isolation, the lengthy winters, the transportation and communication difficulties. This in turn may have made them more tolerant and understanding of misconduct when it occurred, though no concrete evidence of this has emerged.

Elaborating on the "destructive effects of incarceration" and the "shorter life span" factors, Morrow (1981:267) asserts:

> It is perhaps in the realm of sentencing where the northern court has been better able to bend the law, to soften its impact where appropriate. Many a case where guilt is firmly established would result in a real injustice if what might be called - for want of a better term - a traditional sentence were to be imposed. To take a relatively unsophisticated native - perhaps even a primitve one - and impose the term of imprisonment normally expected in the South would often prove to be disastrous. Then too, close confinement in a southern penal institution for a native hunter used to the nomadic way of life, could turn out to be not punitive, but destructive. Incarcerated in a prison like Prince Albert, unable to speak English, with no opportunity to taste his native food and no visitors of his own kind, promises a punishment far in excess of what can be considered as fair and reasonable. As well, I think the shorter life span of the northern native has to be allowed for. If five years would be appropriate for a white man in the southern society, it seems to me that something closer to half would only be fair for an Eskimo if allowance is to be made for the above facts. It is not a case of a "softer" sentence really, but rather a case of evening things up.

Morrow, who similarly considered the destructive effects of incarceration in a southern penitentiary and the shorter life span of Eskimos in imposing "non-institutional sentences and shorter prison sentences" (Finkler 1976:20), notes that Sissons' familiarity with local conditions in the Northwest Territories as applied to matters of sentencing in criminal cases was given the "seal of approval" by the Northwest Territories Court of Appeal (1967:260). In rendering judgement for the Court of Appeal in R. v. Ayalik (1960), MacDonald J.A. expounds:

> . . . it should be noted that in the present case the learned trial judge had a distinct advantage over the members of the court for with his wide experience in the far-flung areas of the extensive jurisdiction of the trial division of this court he has knowledge of local conditions, ways of life, habits, customs and characteristics of the race of people of which the accused is a member (as cited in Morrow 1967:260).[14]

Notwithstanding the restriction of Finkler's (1976) study to Inuit and non-Inuit offenders from Frobisher Bay sentenced by Justice of the Peace, Magistrates and Superior Courts during the year of 1972, Finkler's (1976) examination of socio-legal controls in Frobisher Bay (one of the few methodologically guided and data based analyses of sentencing in the Northwest Territories) provides some support for the contention that the Sissons and Morrow courts made adjustments in the type and length of sentence imposed in deference to the extraordinary geographic and demographic requirements of this jurisdiction.

Based on his finding that the courts in the Northwest Territories (Justice of the Peace, Magistrates, and Supreme) imposed non-institutional sentences with much greater frequency than institutional sentences, Finkler (1976:110) concludes that there is evidence for the assertion that the Northwest Territories courts attempt to "bridge the gap between traditional and modern law ways through a less

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[14]The appellate court judgement in R. v. Ayalik (1960), 3 W.W.R. 377 (N.W.T.C.A.) is especially significant because this decision has been "consistently followed" by subsequent courts in the Northwest Territories (Morrow 1967:260). Indeed, the relevance of Ayalik (1960) transcends the contemporary context as recognized in the 1984 Territorial Court decision Regina v. Ittigaitok, [1984] N.W.T.R. 21, wherein it was stated:

> It is an accepted principle of sentencing that local conditions may be taken into account, and this is done by all levels of courts here in the Northwest Territories. In many . . . cases it is not unusual to see sentences which . . . reflect, inter alia, the perception of the crime by the Northwest Territories public (as cited in Crawford 1985:8).

rigid approach to the rules of procedures and sentencing". Finkler (1976:110) states that:

> Accordingly, sentencing of Inuit reflected several modifications, such as extensive use of non-institutional sentences based on the knowledge that Inuit, in particular, do not readily adapt to confinement, and shorter institutional sentences for Inuit to take into account their shorter life span.

Finkler (1976:110-111) further provides:

> . . . while the transition of Inuit to our legal norms and formalized means of social control will soon reach the point where it will no longer constitute grounds for any adjustments in sentencing Inuit or indigenous people, the fact remains that at present, the majority of those coming to the attention of the administration of justice in the Northwest Territories, generally handicapped in educational or occupational skills as well as relegated to a lower socio-economic strata, are aboriginal people . . . We believe that the current decisions of the courts show an increasing emphasis on the criminogenic role of the socio-economic consequences of Inuit adjustment to Euro-Canadian society and town life, with less attention being given to their shorter life span, ability to adapt to confinement, and other sentencing or procedural adjustments, particularly important during their initial contact with our Canadian laws . . . .

With the exception of Finkler's (1976) research on sentencing practices in the Northwest Territories for the year of 1972, there are a number of attendant problems associated with the literature relative to the application of the criminal law during the "Sissons Era".

Much of the literature establishing procedural, as opposed to substantive, accommodation of the geographic and demographic realities of the Northwest Territories between 1955 and 1976 is based on anecdote as opposed to methodologically guided and data supported research (Morrow 1965, 1967, 1970,

1971, 1981; Bucknall 1967; Schmeiser 1968; Sissons 1968; Finkler 1976; Tallis 1980, 1985; Griffiths and Patenaude 1988). With particular reference to the criminal sentencing context, relatively few case examples are cited in the literature to support the proposition that Sissons and Morrow were necessarily "lenient" in deference to the "special circumstances" of northern indigenous accused. Reliance on the cases of R. v Shooyook and Aiyaoot (1966) and R. v. Ayalik (1960), as well as the writings of Sissons and Morrow, does not provide conclusive evidence that the criminal law was adapted to the "special circumstances" of northern indigenous accused in matters of sentencing (Bucknall 1967; Morrow 1967, 1971, 1981; Schmeiser 1968; Sissons 1968; Tallis 1980, 1985: Griffiths and Patenaude 1988). As Bucknall (1967:164) asserts in relation to his analysis of Sissons' application of the criminal law to northern indigenous peoples, "[f]ew cases have been reported, although two murder trials involving Eskimos have received publicity".

The use of anecdote and relatively few supporting case examples similarly permeates the literature on contemporary criminal sentencing practices in the Northwest Territories.

The Contemporary Context (1976-1989)

The existing literature on contemporary criminal sentencing practices in the Northwest Territories suggests that the courts in this jurisdiction accommodate the unique geographic and demographic requirements of this jurisdiction in matters of sentencing (Tallis 1980, 1985; Griffiths 1985; Crawford 1985; Jackson 1985; Lindsey-Peck 1985; Government of the Northwest Territories 1985a; Griffiths and Patenaude 1988; Jackson 1989).

In deference to the cultural diversity of the Northwest Territories as well as the varying "levels of acculturation" in this jurisdiction, Tallis (1980, 1985:1-5) suggests that the "cultural background of the offender" (inclusive of the "shock of acculturation" and the "differential impact of incarceration upon aboriginal peoples from remote areas") is a factor that may be considered by the Northwest Territories courts in mitigation of sentence. According to Tallis (1985:3), the "shock of acculturation" as a mitigating factor refers to the incomplete assimilation of northern aboriginal peoples into the dominant "southern" culture insofar as the transition from "primitive" to "sophisticated" has not been completely effected. As cited in Tallis (1985:3-4), the "shock of acculturation" is conceptualized as follows:

> Reference has already been made to the ever increasing intrusion of the "so-called" white man's culture from the south. The rapidity with which this transformation . . . is taking place, promises to completely overwhelm Canada's original inhabitants of the north. . . In an effort to alleviate this situation and to help in preparing these people for the oncoming changes, the authorities have in recent years carried out what might be called a concerted crash programme to prepare these fine people for the new way of life. This "civilizing" process has not always brought about the hoped-for result . . . While the younger generation of Eskimos and Indians are becoming quite sophisticated and are showing tremendous strides forward in assuming control of their destiny in the north, for many of the people, their thin veneer of civilization, i.e. the degree to which they have made the transition into the southern way of life, is still quite thin and incomplete.

In support of his contention of the relevancy of cultural background to the sentencing process in the Northwest Territories, with particular reference to "offenders who are in the process of bridging the gap between two distinct and different cultures", Tallis (1980:306) points to the case of R. v. Naukatsik (1977), 20 C.L.Q. 290 (N.W.T.S.C.), wherein he imposed a sentence of one year

imprisonment and one year probation on a "youthful" offender convicted of rape (see also R. v. Ikalowjuak (1980), 27 A.R. 492 (N.W.T.S.C.); Jackson 1985).

From an examination of reported and unreported Canadian sentencing decisions, including sentencing decisions from the Northwest Territories prior to December 1982, Chartrand (cited in Griffiths 1985) suggests the judicial consideration of circumstances relating to both the offence and the offender includes the "cultural background of the offender" as recognized by the Ontario Court of Appeal in the case of R. v. Fireman (1971), 4 C.C.C. (2d) 82 (Ont.C.A.). Based on his review of seven cases (including R. v. Ayalik (1960) (N.W.T.C.A.), R. v. Fireman (1971) (Ont.C.A.); R. v. Beatty (1982) (Sask.C.A.) R. v. Capot Blanc (1973) (B.C.C.A); R. v. Timothy (1969) (N.W.T.S.C.)), Chartrand (cited in Griffiths 1985) contends that the sentencing courts consider the "cultural background factor" as a factor that is personal to the accused rather than the accused's race. According to Chartrand (cited in Griffiths 1985:4.9), the "cultural background of the offender" is inclusive of the "accused's historical living environment, his community, and the characteristics of his community". Chartrand (as cited in Griffiths 1985:4.9) further suggests that the judicial consideration of the accused's cultural background in sentencing encompasses the "shock of acculturation" and the "differential impact of incarceration upon aboriginal people from remote areas" as well as the "mortality rates of Inuit accused" as recognized by Morrow, J., in R. v. Timothy (1969).

Based on her personal experience as a barrister and solicitor in the Northwest Territories and an examination of the relevant legislation and reported and unreported case law in the Northwest Territories, Crawford (1985:8) states:

> As a matter of experience, there are very few ways that the differing culture and attitudes of native defendants have been used as complete defences. Elements of existing recognized defences can be found in many cultural factors, but for the most part a different belief or understanding of the world will not constitute, in itself, a criminal defence. A lack of knowledge that an act is punishable at law is not a defence; a belief that a culpable act is normal and acceptable behavior is not a defence. It appears to be always necessary that somehow the defence should fit into one of the existing categories . . . In as much as cultural factors rarely make a difference in a determination of guilt or innocence, they are always relevant and always appear welcome in speaking to an appropriate sentence. In most instances the cultural factor will be a mitigating one . . . .

In her review of the reported and unreported case law, Crawford (1985:8-9) notes that it is an accepted principle of the courts in the Northwest Territories to consider local conditions in matters of sentencing (as per R. v. Ittigaitok [1984] N.W.T.R. 21 (N.W.T.Terr.Ct.); that the courts may incorporate native tradition in the sentence imposed (as per the imposition of a banishment order in the case of Saila v. R. [1984] N.W.T.R. 176 (N.W.T.S.C.); that the courts may involve the "assistance of the community" in the execution of sentence (as per R. v. Innuksuk, (N.W.T.Terr.Ct.), Slaven, C.J.T.C., August 4, 1978, unreported and R. v. Akilak [1983] N.W.T.R. 210 (N.W.T.Terr.Ct.); and that the courts may "attune" the sentence to the capabilities of offender as in the case of ability to pay a fine. Crawford (1985:9) concludes:

> In all these ways, the criminal law in the North has been prepared to adapt to the ways of the people who come before it.

Lindsey-Peck's (1985) cross-comparative analysis of sexual assault sentencing trends in the Northwest Territories suggests that, in addition to the many factors that are generally considered by a judge in sentencing an offender, there are a number of factors specific to the Northwest Territories that may affect

the type and length of sentencing disposition imposed by the court. The three "Northern" factors isolated by Lindsey-Peck (1985:52) are:

> (1) the effect of the sanction on the community (and the role of the community in sentencing);
> (2) community isolation factor (determining cultural transitional state);
> (3) the effect of the sanction on the livelihood of the offender.[15]

Based on the cases of R. v. J.S.B., [1984] N.W.T.R. 210 (N.W.T.S.C.); R. v. Simons, N.W.T.S.C., Marshall, J., February 1, 1985, unreported; and R. v. Rabesca, N.W.T.Terr.Ct., Bourassa, J., January 27, 1983, unreported, Lindsey-Peck (1985:53) contends that, with respect to the "effect of the sanction on the community", the courts in the Northwest Territories may consider "the role

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[15]The three "northern factors" identified by Lindsey-Peck (1985) are elucidated in the Government of the Northwest Territories (1985a:1-10) submission to the Canadian Sentencing Commission as inclusive of the following four factors:

> (1) the offender's awareness of the laws of Canadian society and any conflict that may exist between these laws and native customs;
> (2) the size and isolation of the offender's community;
> (3) the effect a sanction may have on the livelihood of an offender;
> (4) the effect a sanction may have on an offender's community and an offender's family.

The first factor, the offender's awareness of Canadian laws and culture conflict, is conceptualized as the offender's understanding of the criminal law, including ignorance of the criminal law and conflict between the criminal law and the cultural norms of the offender. The second factor, community size and isolation, is conceptualized in terms of the public censure of an offender in small, remote and isolated communities as well as the effect of removing an offender from his/her community for the purpose of imprisonment as in the case of R. v. Fireman (1971), 4 C.C.C. (2d) 82 (Ont.C.A.) where such factors were taken in mitigation of the penalty imposed. The third factor, effect of sanction on an accused, is conceptualized in terms of the negative effects that culturally specific sanctions may have when imposed on indigenous offenders as in the case of R. v. Weyallon, [1983] N.W.T.R. 394 (N.W.T.S.C.)]. The fourth factor, effect of sanction on family and community, is conceptualized in terms of the social utility of the offender in the community as in the case of R. v. J.S.B. [1984] N.W.T.R. 210 (N.W.T.S.C.).

of the offender in the community" in selecting a specific sanction because of the social and economic dependence within small and isolated rural communities. She further suggests, although rarely stated in reasons for sentence, the judicial consideration of this factor may influence both the type and severity of the sanction imposed. According to Lindsey-Peck (1985), the judicial consideration of the "effect of the sanction on the community" encompasses both those offenders who are of social utility to the community as well as those offenders who are disruptive to the community. She also contends that "the effect of the sanction on the community" may include the role of the community in the sentencing process in terms of either community participation at the sentencing hearing or assistance in the rehabilitation of the offender (Lindsey-Peck 1985).

Premised on the varying "levels of acculturation" of northern indigenous offenders, Lindsey-Peck (1985:56) asserts that the "community isolation factor" pertains to the judicial assessment of an individual offender's degree of assimilation into "southern" society. The purpose of such an assessment, Lindsey-Peck (1985:56) suggests, is to determine the "individual's awareness of Canada's laws" and adherence to traditional values. In assessing the "community isolation factor", the courts may consider the location and relative isolation of the offender's community, the economic base of the community relative to wage employment in the community and hence exposure of the offender to "southern values", the linguistic traditions of the offender, and other "general factors relating to the offender" (Lindsey-Peck 1985:56-57). Lindsey-Peck's (1985:56-57) identification of the "community isolation factor" is based on the cases of R. v. Nasoguluak (N.W.T.S.C., Marshall J., December 5, 1984, unreported) and R. v. Curley, Issigaitok and Nagmalik [1984] N.W.T.R. 262 (N.W.T.Terr.Ct.). In the former

case, arguments by counsel for the accused that the offender was "unsophisticated" in Canadian law were rejected by the trial judge because of the offender's exposure to southern society. In the latter case, the offender's lack of "sophistication" in Canadian law was recognized by the trial judge because of the offender's adherence to a traditional lifestyle and the relative isolation of the offender's community.

With respect to the "effect of the sanction on the livelihood of the offender", Lindsey-Peck (1985) points to the cases of R. v. Weyallon, [1983] N.W.T.R. 394 (N.W.T.S.C.) and R. v. Tobac, N.W.T.S.C., de Weerdt, J., October 29, 1982, unreported, to suggest that the courts in the Northwest Territories may consider the adverse effects of a specific sanction on an offender when imposing sentence. In each of these two respective cases, the court considered the adverse effects of imposing a firearms prohibition, as per section 98. (1) of the Criminal Code, (since revised) on an aboriginal offender who adhered to a traditional lifestyle.

Notwithstanding the significance of her identification of "Northwest Territories factors", it is interesting that Lindsey-Peck's (1985) isolation of these factors is, to a significant degree, premised on cases external to those used in her cross-comparative analysis of sexual assault sentencing trends in the Northwest Territories.

With regard to sexual assult sentencing trends in the Northwest Territories, Lindsey-Peck's (1985) findings are based on the descriptive case analysis of an approximate twenty-three Northwest Territories cases of rape and sexual assault for which sentences were rendered by the Territorial and Supreme Courts between

1977 and 1985 as compared to an approximate 30 cases from "southern" jurisdictions. In her cross-comparative analysis of sentencing practices in the Northwest Territories relative to four "types" of sexual assault offences ("Exceptional Aggravating or Mitigating Factors", "Stark Terror Sexual Assault", "Minimal Sexual Assault", and "Acquaintance Sexual Assault"), Lindsey-Peck (1985:49) alleges that there is "remarkable consistency in sentences given by the courts throughout Canada"; that any publicly perceived differences between the sentencing practices of the Northwest Territories courts and the sentencing courts in other Canadian jurisdictions may be at least partially explained by the absence or predominance of certain types of sexual assault offences in the Northwest Territories as well as by "other" factors specific to the Northwest Territories such as the offender's "ignorance of the law" or relative isolation of the offender's community.

Based on their review of the trial and appellate sentencing decisions in the cases of R. v. Curley, Issigaitok and Nagmalik (1984), Saila v. the Queen (1984), R. v Akilak (1983), R. v. J.S.B., R. v. Baillargeon (1986), R. v. Naqitarvik (1986), Griffiths and Patenaude (1988:29) submit that while, generally the courts in the Northwest Territories appear to be aware of "the need to be sensitive not only to the cultural context of the Native Indians and Inuit in the NWT, but also to the community context in which sentencing takes place", there are clearly prescribed limits to the judicial accommodation of cultural and communal factors in the sentencing context. As expressed by Griffiths and Patenaude (1988:29):

> . . . the principle established by Chief Justice Harvey in 1917 - "the laws are the same for all" - continues to guide the decisions of the Territorial and Supreme Courts in the NWT as well as the Courts of Appeal sitting outside the NWT.[16]

Conclusion

If one is to accept the review of the literature at face value, it could be surmised that there is long standing historical precedent in the Northwest Territories for the judicial accommodation of extraordinary geographic and demographic requirements in matters of sentencing, with a gradual transition from the necessity of accommodating an indigenous accused's complete unawareness of the criminal law and attendant culture conflict associated with applying the criminal law to a "newly discovered people" to judicial sensitivity to the cultural and communal context of sentencing in the Northwest Territories (Schuh 1979; Griffiths and Patenuade 1988). Of significance, the anticipated assimilation of northern aboriginal peoples into the dominant society has not been effected as evidenced by the continuing adaptation of the criminal law to an offender's relative "lack of sophistication" in Canadian law ways and adherence to indigenous normative and sanction systems throughout the three administrative phases under review (Finkler 1976; Berger 1977; Tallis 1980; Lindsey-Peck 1985; Bayly 1985; Jackson 1985; Griffiths and Patenuade 1988).

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[16]See also Jackson (1989) who discusses the implications of the R. v. J.N., [1986] N.W.T.R. 128 (N.W.T.C.A.) decision in terms of the limits imposed on future judicial accommodation of the "Canadian criminal justice system to aboriginal communities" in matters of sentencing; See also Jackson (1985) who discusses the potential effects of the Charter in imposing limits on the judicial recognition of "custom" in matters of sentencing in the Northwest Territories as well as the possible necessity for imposing limits in deference to protection of the rights of women and children.

As a presumed "temporary measure" (see Finkler 1976; Tallis 1980), judicial accommodation of the "special circumstances" of Northern aboriginal accused in matters of sentencing is clearly based on ethnocentric assumptions. This underlying ethnocentrism resurfaces in the emphasis placed by the Northwest Territories courts on the trial and sentencing process as an "educational forum" between 1875 and 1976. Remarkably, the use of the sentencing process in the Northwest Territories as an "educational forum" is not restricted in its historical relevance. Relative to the contemporary context, Lindsey-Peck (1985:9) suggests that the sentencing process "embodies a need to educate", achieved in part through the continued practice of circuit court justice delivery.

Additional ethnocentric (or systemic) bias emerges in the limits imposed on judicial accommodation of "cultural factors" in sentencing insofar as such accommodation must be achieved within the confines of a judicial posture that continues to assert "the laws are the same for all" (Harvey, C.J., cited in Griffiths and Patenaude 1988:29). Substantive legal pluralism, either within or outside existent criminal justice structures, has not been effected in the Northwest Territories to date (see Jackson 1989). In this regard, while the adaptation of the criminal law to the "special circumstances" of northern indigenous accused (inclusive of "lack of sophistication in" or "ignorance of" Canadian law ways, and conflict between aboriginal and Canadian normative and sanction systems) in matters of sentencing arguably can effect "procedural" fairness, such "fairness" should not be mistaken for fairness or justice in the substantive sense (Finkler 1976).

As well, in seeking to accommodate "indigenous cultural values" within dominant criminal justice structures both historically and contemporarily, there is no apparent judicial distinction between the multiplicity of aboriginal cultures in the Northwest Territories (see NWT Data Book 1986). Thus, "cultural diversity" and the need for sensitivity to such diversity is recognized only at its most superficial level as illustrated by Mr. Justice Tallis' (1980:305-306) distinction between the three cultures - Indian, Inuit and Non-Native - of the North as well as his reference to "two distinct and different cultures" (implying a native, non-native dichotomy) in the Northwest Territories. The extent to which there is judicial differentiation between the cultural and linguistic diversity of northern aboriginal peoples in the literature reviewed is obscured by the more general terminology used by the courts - Inuit, Indian, and White (see also Sissons 1968; Morrow 1981).

Regardless of these criticisms, there are a number of difficulties in accepting the review of the literature at face value because the literature that is profferred is not necessarily exhaustive and because there are numerous limitations associated with each of the commentaries discussed. Schuh's (1979) analysis, while illustrative of the period 1899 to 1923, is restricted to the review of an approximate ten cases of which only six are specific to the Territories. Although the case studies are supplemented with materials from the Indian and Northern Affairs public archives as well as RNWMP annual reports, it is not clear whether Schuh (1979) provides a partial or exhaustive sampling of all offences of murder during the time period of her analysis. Although Finkler (1976), Price (1986), and Moyles (1979) provide some support for Schuh's (1979) conclusions,

there is, as suggested, considerable overlap in the cases described as well as reliance on the description of a select few cases.

The assertion that there was adjustment of the criminal law in matters of sentencing to accommodate the special circumstances of northern indigenous accused during the Sissons Era (1955 to 1976) is premised largely on statements to that effect by Sissons and Morrow; there is a marked paucity of supporting case law in the literature to reinforce this contention (Morrow 1965, 1967, 1970, 1971, 1981; Bucknall 1967; Schmeiser 1968; Sissons 1968; Finkler 1976; Griffiths and Patenaude 1988; Jackson 1989). While Finkler's (1976) findings provide some support for the contention that the courts in the Northwest Territories sentenced more leniently in deference to the "differential effects of incarceration" and "shorter life span" factors, in the absence of more detailed analysis of the effect of "offence type" on the use of non-carceral sanctions by the courts in the Northwest Territories at the time, this connection is tenuous. Furthermore, Finkler's (1976) findings are limited to a specific time (1972), place (Frobisher Bay) and ethnic sample (Inuit and non-Inuit) and to this extent cannot be generalized to the Northwest Territories as a whole.

With the exception of Lindsey-Peck's (1985) cross-comparative analysis of sexual assault sentencing trends (as per her examination of an approximate twenty-three Northwest Territories sentencing decisions relative to the offences of rape and sexual assault), the literature for the contemporary period (1976 to 1986) is based predominantly on the examination of select few unreported and reported Northwest Territories sentencing decisions combined in some instances with the personal experience of the commentator. Thus, Tallis' (1980, 1985)

observations are based on his experience as a superior court justice in the Northwest Territories as well as one supporting sentencing decision; Chartrand's (as cited in Griffiths 1985) observations specific to the Northwest Territories context are based on the examination of an approximate three pre-1982 Northwest Territories Supreme and Appellate court sentencing decisions; Crawford's (1985) observations are based on her personal experience as a practising lawyer in the Territories and an approximate four supporting Territorial and Supreme Court sentencing decisions; and, Griffiths and Patenaude's (1988) observations are based on the examination of an approximate six Territorial, Supreme and Appellate Court sentencing decisions.

As well, there is generally considerable overlap in the cases described: R. v. Fireman (1971), 4 C.C.C. (2d) 82 (Ont.C.A.); R. v. Ittigaitok, [1984] N.W.T.R. 21 (N.W.T.Terr.Ct.); Saila v. R., [1984] N.W.T.R. 176 (N.W.T.S.C.); R. v. Innuksuk, N.W.T.Terr.Ct., Slaven, C.T.C.J., August 4, 1978, unreported; R. v. Akilak, [1983] N.W.T.R. 210 (N.W.T.Terr.Ct.); R. v. J.S.B., [1984] N.W.T.R. 210 (N.W.T.S.C.); R. v. Curley, Issigaitok and Nagmalik, [1984] N.W.T.R. 262 (N.W.T.Terr.Ct.); R. v. Weyallon, [1983] N.W.T.R. 394 (N.W.T.S.C.); R. v. J.N., [1986] N.W.T.R. 128 (N.W.T.C.A.) (Griffiths 1985; Crawford 1985; Lindsey-Peck 1985; Government of the Northwest Territories 1985a; Griffiths and Patenaude 1988; Jackson 1985; Jackson 1989).

In essence, there are a number of limitations - methodological, substantive and temporal - to the "research" that has been undertaken to date on sentencing in the Northwest Territories. While Lindsey-Peck (1985) is able to isolate factors specific to the Northwest Territories that may impact on the judicial determination

of an appropriate sentencing disposition for an indigenous accused, her analysis is methodologically inconsistent and limited. Lindsey-Peck's (1985) analysis is based on the examination of sexual offences in the Northwest Territories, yet her findings relative to "Northwest Territories factors" have little to do with the cases described in that context. Further, her analysis is restricted to the examination of relatively few cases (twenty-three) for which sampling techniques are not specified and her "sample", if one can refer to it as such, is disproportionately weighted in favour of Supreme, as opposed to Territorial, Court sentencing decisions (twenty Supreme, as opposed to three Territorial, Court, decisions are reviewed). As well, it is difficult to ascertain how Lindsey-Peck's (1985) inference between "Northwest Territories factors" and "type and length" of disposition imposed can be made in the absence of supporting inferential statistics.

Given the limitations of the analyses described above, it is suggested that there is need for methodologically guided and data supported research on the sentencing process in the Northwest Territories that seeks to answer the following questions:

1. Does the sentencing court, as intimated by Lindsey-Peck (1985), seek to "typify" or distinguish the northern sexual assault offence and the northern sexual assault offender?

2. Are there factors, or a complexity of factors, specific to the Northwest Territories that affect the judicial reasoning process in matters of sentencing?

3. If there are "Northwest Territories factors" that potentially influence the judicial reasoning process in matters of sentencing, what are these factors? When are these factors judicially considered? And, how do these factors potentially influence the judicial reasoning process in matters of sentencing?

CHAPTER III

METHODOLOGY

Introduction

The parameters of the present study are restricted to adult male offenders who were convicted and sentenced by the Territorial or Supreme Court of the Northwest Territories for the commission of at least one offence contrary to the sexual assault provisions of the Criminal Code (as they then were) - sections 246.1 (sexual assault simpliciter), 246.2 (sexual assault with a weapon/threats to a third party/causing bodily harm), or 246.3 (aggravated sexual assault).[1] The time frame for the study canvasses January 4, 1983 when the then "new" sexual assault provisions of the Code were proclaimed (Ellis 1984) to December 31, 1986, inclusive.

Data for the study were gathered during a three month period of field research (September to December 1986) in Yellowknife, Northwest Territories. Because of the inherent problems associated with the conduct of research in the North,[2] the researcher collected data using unobtrusive measures. Two sources

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[1]The sexual assault provisions of the Canadian Criminal Code were revised in 1989. Comparable provisions to sections 246.1, 246.2 and 246.3 are now found under sections 271, 272 and 273 of the Code.

[2]For elaboration of some of the ethical considerations associated with the conduct of research in the North see Savoie (1983); see also Finkler (1976) for discussion of a number of the practical difficulties associated with the conduct of "socio-legal" research in the Northwest Territories.

of archival data were collected, namely corrections data and sentencing transcripts.

For the purposes of analysis, corrections data and transcribed sentencing decisions were collapsed into one data source effectively eliminating those offenders from the sample for whom corrections and court data were available but inconsistent or incomplete. From an initial sample of 149 offenders, the final sample was comprised of 57 offenders, 32 of whom were sentenced by the Supreme Court and 25 of whom were sentenced by the Territorial Court.

Research Purpose

The central purpose of the research was to explore the judicial reasoning process in the Northwest Territories, with particular reference to the judicial accommodation of the extraordinary geographic and demographic requirements of this jurisdiction in the context of sentencing an offender convicted of a criminal offence. Accordingly, the following research objectives were enumerated:

(1) To examine what geographic and demographic circumstances are considered by the Northwest Territories courts in the process of sentencing a criminal offender;

(2) To examine how the judicial consideration of geographic and demographic circumstances affects the judicial reasoning process relative to the sentencing of a criminal offender;

(3) To examine when the courts are willing to consider geographic and demographic circumstances in the process of sentencing a criminal offender.

Subsidiary objectives included eliciting information on the "northern" criminal offender and the "northern" criminal offence.

Research Parameters

The parameters of the study were limited to the examination of Territorial and Supreme Court sentencing decisions from January 4, 1983 until December 31, 1986 relative to adult male offenders who committed at least one sexual assault offence in the Northwest Territories contrary to Section 246.1, Section 246.2, or Section 246.3 of the Canadian Criminal Code. The parameters of the study were further restricted to those sexual assault offences which were proceeded by indictment as opposed to summarily (as per the hybrid section 246.1 provisions of the Code).

These parameters were advantageous for several reasons. In contrast to other studies wherein distinctions between the various sexual offence provisions of the Code have not been made (see Lindsey-Peck 1985), limiting the scope of the study to a longitudinal examination of sentencing decisions specific to the sexual assault provisions of the Criminal Code allowed for methodological consistency in sampling and analysis, and an adequate but manageable sample size. As well, given the recency of enactment of the sexual assault provisions of the Criminal Code and the paucity of research focussing exclusively on these provisions at the time (see Boyle 1984), an examination of the "new" sexual assault provisions was viewed by the researcher as a positive contribution to the existing sexual assault literature.

Unfortunately, the parameters chosen for the study also impose a number of limitations on the generalizeability of the findings.

By limiting the study to an examination of the sentencing process, the researcher was proscribed from exploring whether the judicial consideration of geographic and demographic circumstances extends to the adjudication of guilt or innocence. However, on the basis of her experience as a practising lawyer in the Northwest Territories, Crawford (1985) has suggested that "cultural factors", at least, are not relevant to the adjudication of guilt or innocence.

Further, by limiting the study to an examination of the sexual assault provisions of the Code, namely sections 246.1, 246.2 and 246.3, as they then were, the researcher was proscribed from determining whether the judicial consideration of geographic and demographic circumstances in the sentencing process is or is not "offence specific". Sentencing decisions pertaining to the "new" sexual assault provisions of the Criminal Code are not necessarily representative of "other" sexual or criminal offences. Thus, while sections 246.1, 246.2, and 246.3 of the Criminal Code encompass a wide variety of illicit sexual behaviors (R. v. Sandercock (1985), 40 Alta. L.R. (2d) 265 (Alta.C.A.); Lindsey-Peck 1985), it does not necessarily follow that the findings of the study can be extended across all offences of a sexual nature given the more narrowly defined behaviors canvassed under the "other" sexual offence provisions of the Code (Lindsey-Peck 1985). In particular, the generalizeability of findings on length of disposition relative to section 246.1 offences are compromised by the introduction of a three year starting point approach to sentences for this type of offence in the Northwest

Territories in 1986 (R. v. Sandercock (1985), 40 Alta. L.R. (2d) 265 (Alta.C.A.); R. v. J.N., [1986] N.W.T.R. 128 (N.W.T.C.A.).

As well, the findings of the study may not be generalizeable to "other" criminal offences given the suggestion that sexual offences present the most difficult sentencing decision to a judge (see Hogarth 1971; Gigeroff 1982). The centrality of cultural arguments to offences of a sexual nature in the Northwest Territories (see R. v. Curley, Issigaitok and Nagmalik, [1984] N.W.T.R. 263 (N.W.T.Terr.Ct.); Finkler 1976; Struzik 1984; Lindsey-Peck 1985; Jackson 1988) also may restrict the generalizeability of findings to other criminal offence types. Although cultural arguments have been raised in the Northwest Territories in relation to other types of offences, such as the offence of break and enter (see R. v. Ittigaitok, [1984] N.W.T.R. 21 (N.W.T.Terr.Ct.), spousal assault (see R.v. J.S.B., [1984] N.W.T.R. 210 (N.W.T.S.C.); R. v. Baillargeon, [1986] N.W.T.R. 121 (N.W.T.S.C.), and manslaughter (see R. v. Ettagiak, [1986] N.W.T.R. 203 (N.W.T.S.C.), such arguments may not be relevant to all criminal offence types.

The offence of sexual assault relative to the time frame chosen for the study (1983-1986) also is problematic given the recency with which the sexual assault provisions had been enacted. In 1983 offenders in the Northwest Territories were still being sentenced under the old provisions of the Code (rape, attempted rape and indecent assault) suggesting that findings for the year of 1983 may not be comprehensive (see R. v. Illingayuk, N.W.T.S.C., Rothman, S.C.J., May 11, 1983, unreported; R. v. Ootoova, N.W.T.S.C., de Weerdt, S.C.J., May 11, 1983, unreported).

Research Design

The study is an exploratory examination of the judicial reasoning process in the Northwest Territories, with particular reference to the judicial consideration of geographic and demographic circumstances in the criminal sentencing context. The design for the study was based on the longitudinal analysis of archival data. Unobtrusive measures, the secondary analysis of corrections data and sentencing transcripts, were selected as the data gathering technique to accommodate the limited resources (temporal and financial) of the researcher while simultaneously facilitating some of the practical and ethical considerations associated with the conduct of research in the North. Practical limitations to the conduct of research in a northern jurisdiction, such as the Northwest Territories, can range from ethnic and linguistic barriers between the researcher and research subjects to the exhorbitant costs associated with transportation to, and accommodation in remote and isolated northern communities. Ethical constraints can range from the difficulty in maintaining the anonymity of research subjects in small and remote northern communities to obtaining the informed consent of individual communities prior to conducting research (see Finkler 1976; Savoie 1983; Griffiths 1985).

Research Procedure

The planning and development of a research design began with the initial decision that an exploratory study of the sentencing process in the Northwest Territories necessitated fieldwork in this jurisdiction. The available case law in Vancouver was restricted to reported sentencing decisions. An examination of reported sentencing decisions in Vancouver likely would not have distinguished

the findings of the study from those reported elsewhere (see Lindsey-Peck 1985; Crawford 1985; Jackson 1985; Griffiths 1985; Griffiths and Patenaude 1988). Nor would an examination of reported sentencing decisions in Vancouver have allowed for a representative or adequate sample size.

The second decision was "where" in the Northwest Territories the research should be conducted. The location of Yellowknife was ultimately selected as the appropriate fieldwork location. As both the governmental and judicial centre of the Northwest Territories (Finkler 1976; Delisle 1983), it was anticipated that the researcher would be provided with the greatest access to information and field contacts in Yellowknife. The researcher also was aware that at least one source of archival data, namely reported and unreported transcribed trial and sentencing decisions, were available at the Court House in Yellowknife. And, prior to going to the fieldwork location, a tentative request had been made on the researcher's behalf to accompany the Territorial Court on circuit thus facilitating access to information at the local (or community) level.

In deference to the fieldwork decision, the researcher applied to the Northern Scientific Training Grant Program (NSTGP) for funding in the Fall of 1985. Funding support to conduct a three month period of field research in the Northwest Territories was granted to the researcher by this program.[3] The time

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[3]Northern Scientific Training Grant funding was initially applied for and granted to the researcher to examine the effectiveness of Native Courtworker Programs in the Northwest Territories as a mechanism for increasing communication between native peoples living in rural and isolated northern communities and the dominant criminal justice system. In completing graduate coursework, however, the researcher determined that both the subject matter and proposed research design would be problematic in a northern research setting given that the evaluation of any criminal justice program in the North may unintentionally jeopardize the funding of,

frame that was selected for the field research was September 1986 to December 1986.

Data Sources

Data on the judicial reasoning process relative to sentencing in the Northwest Territories were gathered using unobtrusive measures, inclusive of the secondary analysis of corrections data and transcribed sentencing decisions, and the observation of circuit court proceedings.

Corrections Data

During the researcher's visit to the fieldwork location, Yellowknife, Northwest Territories, from September 1986 to December 1986, the researcher requested and was granted access to the Government of the Northwest Territories, Corrections Information System (see Appendix A: Letters Regarding Access to the GNWT Corrections Data Base). Data (in the form of personal background data

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and community control over the program (Griffiths 1985). In addition, the proposed data gathering methods, including interviews and the administration of questionnaires both to recipients and administrators of criminal justice services may have placed the researcher in a dual role (see Finkler 1976:32).

Fortuitously, in the context of graduate coursework, the researcher became interested in sentencing in the Northwest Territories. The subject matter of sentencing was more conducive to the conduct of research in the North since it did not jeopardize funding or community control of a program. Additionally, the selection and conceptualization of the research problem fit within the parameters of the fieldwork location and the time frame for which funding had been granted. The identification of the practical and ethical constraints to the conduct of research in the North prior to entering the fieldwork location enabled the reseacher to tailor the research design to accommodate some of the practical and ethical considerations associated with the conduct of research in the North.

reports, incarceration data reports, and probation data reports) were generated for 149 adult male offenders who had been convicted for the commission of at least one sexual assault offence contrary to section 246.1, section 246.2 or section 246.3 of the Criminal Code and whose sentence was recorded in the Corrections Information System prior to November 12, 1986. Following the researcher's return to Vancouver from Yellowknife, permission to incorporate the corrections data as a direct data source in the researcher's thesis was requested and granted under the proviso that offender names, or identifying information, not be incorporated or published in the thesis. Further, the Department of Corrections requested that a copy of the thesis be made available for comment prior to its publication (see Appendix B: Letters Regarding Permission to Use Corrections Data as a Direct Data Source).

The corrections data were used by the researcher to provide a general demographic overview of the sexual assault offender sample. The types of information included in the personal background data reports, the corrections data reports and the probation data reports are summarized as follows:

A. **Personal Background Data Reports**

1. Name of the Offender;
2. Health Care Plan Number;
3. Usual Address (community);
4. Birth Date (year, month, day);
5. Marital Status (single, married, divorced, widowed, separated);
6 Number of Dependents (number);
7. Occupation (general labour, hunter/trapper/fisherman, service, trades/technical, clerical/professional, handicrafts, other);
8. Living Arrangements (with parents/friends/relatives, with spouse and/or children, alone in fixed abode, other);
9. Ethnicity (Inuit, Indian, Metis, Other);
10. Sex (male, female);

11. Training (none, adult education, vocational, apprenticeship);
12. Education (grade level);
13. Previous Incarcerations (number).

B. Incarceration Data Reports

1. Name of the Offender;
2. Health Care Plan Number;
3. Age (chronological age at the time of corrections intake);
4. Employment Status (full time, part time, periodically, not at all);
5. Aggregate Sentence Length (days);
6. Intermittent Sentence (yes/no/not specified);
7. Warrant Type (sentence/remand/parole);
8. Fine Default (amount);
9. Court Type (JP/Territorial/Supreme/Appellate/Other);
10. Court Location (community);
11. Warrant Execution Date (year/month/day);
12. Offence/Intake Related Problems (alcohol/violence/drugs/other);
13. Offence Type (statute, section);
14. Number of Charges (number);
15. Additional Offences (statute, section);
16. Number of Additional Charges (number).

C. Probation Data Reports

1. Offender Name;
2. Health Care Plan Number;
3. Age (chronological age at the time of corrections intake);
4. Offence/Alcohol Related (yes, no, not specified);
5. Employment Status (full time, part time, periodically, not at all);
6. Pre-Sentence Report (yes, no, not specified);
7. Disposition/Accordance with P.S.R. (yes, no, not specified);
8. Discharging Institution (name of institution);
9. Court Type (JP/Territorial/Supreme/Appellate/Other);
10. Court Location (community);
11. Offence Location (community);
12. Fine/Restitution/Community Service Order (amount/length);
13. Disposition Date (year/month/day);
14. Disposition (length/supervised/unsupervised);
15. Incarceration (length/days);
16. Offence Type (statute, section);
17. Number of Charges (number).

The use of corrections data as a direct data source is subject to a number of limitations. At the time corrections data were collected, offenders receiving dispositions other than incarceration or probation were not recorded in the GNWT Corrections Information System. Thus corrections data are restricted to offenders receiving dispositions exclusive to, or including incarceration and/or probation. The use of these data, then, biases the findings of any study on which they are based toward sentences involving incarceration or probation. As well, the corrections data give no indication of whether section 246.1 offences were proceeded summarily or by indictment. Of most significance, the corrections data do not provide any in-depth information on the offender, the sexual assault offence, the sentence imposed, or the judicial reasoning process. Thus, the utility of the corrections data relative to the present study was restricted to the superficial description of the offender sample.

Transcribed Sentencing Decisions

During the researcher's visit to the fieldwork location the researcher was given access to reported and unreported Territorial and Supreme Court transcribed sentencing decisions. The majority of these transcripts were easily accessed in the Court House Library. The remaining transcripts were retrieved from archives with the assistance of the Territorial and Supreme Courts. In total, the researcher was able to obtain transcribed sentencing decisions for 71 adult male offenders sentenced by the Territorial and Supreme Courts between 1983 and 1986, inclusive, for the commission of at least one indictable sexual assault offence contrary to section 246.1, 246.2 or 246.3 of the Code. Following the researcher's return to Vancouver from Yellowknife, the researcher apprised both the

Territorial and Supreme Courts of the manner in which this data would be used. The researcher was informed that permission to use the reported and unreported transcribed sentencing decisions as a direct data source was not required as these transcripts are considered to be matters of public record (see Appendix C: Correspondence With The Territorial and Supreme Courts). Nevertheless, the Territorial and Supreme Court were advised of the researcher's intention to use this information as a direct data source and copies of the researcher's chapter outline and content analysis format were made available to both levels of court for review.

The transcribed sentencing decisions provide an in-depth description of factors relating to the offence and the offender, the sentence imposed, and the reasons for sentence. Although variant in the type and amount of information contained within, the transcripts generally contained data on the personal background and history of the offender (age, family, employment, education, community record, criminal record, psychiatric/psychological profile, social services profile), the dynamics of the offence (type of sexual contact, duration of the assault, aggravating factors such as the use of weapons, violence and causation of injury, personal circumstances of the victim), and the judicial reasoning process relative to the sentence imposed (principles of sentencing, aggravating and mitigating factors, jurisprudence, reasons for sentence, and the type, length and conditions of sentence). The information in the transcribed sentencing decisions can be briefly summarized as follows:

A. General Information

1. Sentencing Hearing Proceedings
2. Judicial Proceedings to Date
3. Type and Length of Disposition

B. Offender Information

1. Demographic Information
2. Personal Background Information
3. Criminal History

C. Offence Information

1. Factors Relating to the Commission of the Offence
2. Factors Relating to the Victim

D. Sentencing Information

1. Documented Reports
2. Arguments Made by Counsel
3. Cases Judicially Considered
4. Legal Principles
5. Aggravating/Mitigating Factors
6. Reasons for Sentence

The use of transcribed sentencing decisions as a direct data source is subject to a number of limitations. Prima facie, the information contained within the transcripts is restricted to the stated reasons for sentence. As Lindsey-Peck (1985:60) aptly points out there may be "numerous subtle factors" which affect the sentence imposed but do not form part of the stated reasons for sentence. Lindsey-Peck (1985:60) states:

> Numerous subtle factors affect the sentence imposed by the court. Many of these factors may not be articulated in the reasons for sentencing. The character and even the role of the community, the cultural background and transitional state of the offender and the

> anticipated effect of the sanction on the offender are usually impossible to assess except on a somewhat superficial level. Due to the special nature of the sentencing hearing in the 'North', often with a high degree of community involvement, assessing the factors relating to an offender would be much more readily understood if one could actually witness the process.[4]

A further difficulty associated with the use of this data source is that there is no set formula for the type and amount of information that must be contained within a transcribed sentencing decision. Thus, there is wide variation in both the type and amount of information contained in each of the transcripts used for the present study, with some decisions as lengthy as twenty pages and others as brief as two pages. In addition, it is worthy of note that there is an imbalance in the number of transcribed sentencing decisions available for each of the two levels of courts as well as each of the eleven different judges who rendered decisions (see Appendix D: Sentencing Judge Relative to Offender Sample). This imbalance may well circumscribe the generalizeability of findings.

Circuit Court Observation

During the period of field research, the researcher accompanied the Territorial Court on a one-day circuit to Baker Lake and the Supreme Court on a one-day circuit to Cambridge Bay, Northwest Territories. Given that it would be fallacious to make generalizations about circuit court proceedings based on these two brief circuits, the observation of circuit court proceedings was not used as a direct data source for the study.

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[4]See also Hogarth (1971) for elaboration of the problems associated with using official statistics in the study of sentencing.

Operational Definitions

All variables are individually operationalized in the context of findings in Chapters IV and V.

Sampling

Corrections data and sentencing transcripts were sampled on the basis that the offender had committed at least one sexual assault offence, proceeded by indictment, contrary to section 246.1, 246.2, or 246.3 of the Criminal Code. The additional requirement, that the offender must have been convicted and sentenced by either the Territorial or Supreme Court between January 1983 and December 1986, inclusive, was selected to correspond with the date on which the sexual assault provisions of the Code were enacted (Ellis 1984) and the termination of field research in the Northwest Territories.

The relatively restrictive sampling criteria for the study were selected to facilitate the reliability of, and consistency between and within each of the two data sources. For the reasons that follow, sampling on the basis of post-1983 sentencing decisions, coinciding with the enactment of the sexual assault provisions of the Criminal Code, afforded the greatest degree of reliability and consistency. Although the researcher was able to gather corrections data and transcribed sentencing decisions for all types of sexual offences, the researcher was informed that corrections data were most reliable after 1978 and a cursory examination of Territorial and Supreme Court sentencing transcripts indicated that transcribed Territorial Court decisions were consistently available only after 1982. In

contrast, transcribed Supreme Court decisions were consistently available from 1965 onward. Because the reliability of pre-1983 data was questionable, the researcher determined that it would not be feasible to sample all offences of a sexual nature. As well, although the researcher was able to access corrections data and sentencing transcripts for a variety of "other" types of Criminal Code offences, such as assault and break and enter, sampling was restricted to the sexual assault sections of the Code to ensure that the amount of data was manageable.

Data Analysis

For the purposes of data analysis, corrections data and transcribed court data were collapsed into one data source effectively eliminating those offenders from the sample for whom corrections data or court data were available but inconsistent or incomplete. Thus 92 offenders from the corrections data base and 14 transcribed sentencing decisions were eliminated from the final sample of 57 offenders. Through the amalgamation of both sources of data, the researcher was able to construct a "sentencing profile" consisting of information relative to the offender, the offence and the sentence imposed for each of the remaining 57 offenders in the sample.

Data analysis techniques included the collation and statistical description of corrections data; and, the content analysis, collation, and qualitative case description of information contained within the sentencing transcripts (see Appendix E: Content Analysis Format). Corrections data were used to provide a description of the offender sample (age, ethnicity, usual living address, marital

status and number of dependents, living arrangements, employment and occupational status, level of training and education, criminal history). Transcribed sentencing decisions, at times augmented by the corrections data, were used to provide a description of the sexual assault offences committed by the offender sample (geographic and physical location of the assault, type of sexual contact, duration of the assault, the relationship of weapons, violence, injury, alcohol, and planning and premeditation to the assault, and victim data) and the sentencing process (the trial process, the sentence imposed, and the legal and extra-legal factors considered in imposing sentence).

Data analysis was restricted to the use of descriptive statistics and qualitative case description because the small sample of offenders was not conducive to the use of inferential statistics.

Ethical Considerations

Although a number of practical limitations and ethical issues may arise in the conduct of research in the North (Finkler 1976; Savoie 1983; Griffiths 1985), the researcher was primarily concerned with two ethical considerations, namely the identification of individual sexual assault offenders and communities in the Northwest Territories.

With respect to the former concern, permission granted by the Corrections Division, Government of the Northwest Territories, to the researcher to use Corrections Information System data as a direct data source for the researcher's thesis expressly prohibited the identification of individual offenders by name.

And, although considered "matters of public record", the identification of individual sexual assault offenders as per the transcribed sentencing decisions is problematic in those cases where there has been a ban on publication to protect the identity of the victim. Accordingly, all offenders in the sample are identified by number only.

The identification of communities in the North also can be problematic. In addition to the reasons forwarded by Savoie (1983) for the protection of community identity, the researcher was aware that the identification of individual communities may have had unintended consequences. Indeed, in one case relative to the offender sample, the request by crown counsel for judicial notice of the frequency of sexual assault offences in a particular community was rejected in the absence of supporting statistics. Given that the findings of the study are now somewhat dated and that the community in which an offence has occurred can have direct bearing on the criminal sentencing process (see R. v. J.N., [1986] N.W.T.R. 128 (N.W.T.C.A.); Lindsey-Peck 1985; Griffiths and Patenaude 1988; Jackson 1989), communities were identified in relation to the usual living address of the offender sample, the location of the sexual assault offences, and the location of the sentencing hearings as well as within the context of case excerpts. As suggested by Lindsey-Peck (1985:44):

> In the Northwest Territories, knowledge of the particular community in which an offence was committed is essential to understanding the degree of "cultural transition" accomplished by or affecting the accused and hence also the views of the community towards the offence . . . Regional differences are very important to the court.

Limitations of the Study

The scope of the study is worthy of comment. As stated above, the study is exploratory.

The researcher does not presume to correlate any of the factors that are discussed in Chapters IV and V with the type and length of sentence that is ultimately imposed by the sentencing court. Indeed, such inference would be difficult based on the use of descriptive statistics and case study descriptive techniques.

The study is limited to an examination of the judicial reasoning process in the Northwest Territories. In contrast to Lindsey-Peck's (1985) analysis of sexual assault sentencing trends in the Northwest Territories, the study is not a cross-comparative analysis of inter or intra regional sentencing disparity. Nor is the study a cross-comparative analysis of the rural/urban sentencing dichotomy (see Hogarth 1971; Hagan 1977; Verdun-Jones and Muirhead 1980). The study also is limited to what Hogarth (1971:15) refers to as the "formal justification of sentencing" or the stated reasons for sentence thereby excluding the "numerous subtle factors" alluded to by Lindsey-Peck (1985:60) that may affect the sentencing process. As noted in Chapter I, the study is limited to the "judicial determination of a legal sanction to be imposed on a person found guilty of an offence" (Canadian Sentencing Commission 1987:xxvii), excluding a consideration of the significance of other actors and other stages of the criminal sentencing process.

The judicial reasoning process foci of the study may limit the generalizeability of the findings on which it is based. Unquestionably, sentencing is a "process" involving a series of decision-making stages (Hogarth 1971; Canadian Sentencing Commission 1987; Griffiths and Verdun-Jones 1989; Lilles 1989). In this regard, the study does not control for the funneling of offenders from the criminal justice system at each stage of the process, the charging practices of the police at the local level, the high clearance rate of offences in the Northwest Territories, "plea negotiation", or the submissions made by counsel in the sentencing hearing (unless judicially considered) (Delisle 1983; Griffiths 1985; Griffiths and Verdun-Jones 1989).

CHAPTER IV

SEXUAL ASSAULT IN THE NORTHWEST TERRITORIES

Introduction

The discussion in this chapter provides a descriptive review of the sociodemographic attributes of the offender sample and the dynamics of the sexual assault offences which they committed. In Chapter V, drawing on the information relative to both the offender and the offence, the sentencing process itself is examined.

The Sexual Assault Offender

Because "all of the circumstances relating to the offence and the offender" are relevant to the judicial assessment of sentence (Offender 20), the following is intended to provide the reader with a brief description of the sample of sexual assault offenders.

Personal background data reports generated from the Corrections Information System were used to provide a sociodemographic description of the offender sample. These reports consist of data on the offender's ethnicity, age, usual address, marital status, number of dependents, living arrangements, employment and occupational status, and level of training and education. The transcribed sentencing decisions (more variable in terms of the amount and type of information contained within) were used to cross-check and elucidate

information relative to the personal background and history of the offenders that was not contained in the personal background data reports. In essence, the two data sources complemented one another, the former providing a superficial overview of the offender sample and the latter providing a more in-depth description of the offender sample.

Age, marital status and number of dependents, employment and occupational status, and level of training and education are all significant variables insofar as they may serve to aggravate or mitigate against the sentence imposed (Ruby 1976; Nadin-Davis 1982; Lindsey-Peck 1985). As discussed in Chapter V, these variables also are relevant to the "judicial assessment" of the offender for the purposes of determining whether a "rehabilitative" as opposed to "incapacitative" sentence is appropriate (see Nadin-Davis 1982; Lindsey-Peck 1985).

Ethnicity

For the purposes of the present study, ethnicity was divided into four categories: Inuit, Indian, Metis and Other.[1] Of the 57 male adult offenders in the sample, 39 (68.4 %) were classified as "Inuk"; eight (14.0%) were classified as "Indian"; six (10.5%) were classified as "Metis"; and four (7.0%) were classified as "Other".

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[1]The term "ethnicity", used in the corrections data base to denote the four racial groupings as referred to, obscures the multiplicity of aboriginal and non-aboriginal cultural and linguistic groupings in the Northwest Territories which are subsumed under "Indian", "Inuit", "Metis", and "Other". See, for example, f.n. 2, p.3 of the current text for acknowledgement of the diversity of aboriginal cultural and linguistic groupings in the Northwest Territories.

Because of the small sample size (less than 100 offenders) and the difficulty of cross-checking the reliability of "ethnic origin" against the transcribed sentencing decisions (which generally do not specify the ethnic origin of the offender), ethnicity was re-calculated for the initial sample of 149 adult male sexual assault offenders for whom personal background data reports were generated. A recalculation of ethnic origin indicates that the ethnic distribution for the offender sample of 57 may be distorted, with an overrepresentation of Inuit offenders and an underrepresentation of the three remaining categories. For the initial sample of 149, ethnic origin was distributed as follows: 60.4% "Inuit", 18.1% "Indian", 11.4% "Metis", and 10.1% "Other".[2]

Age

Operationalized as the "chronological age of the offender at the time of corrections intake/disposition date", the offender sample ranged from 18 to 56 years in age with virtually three-quarters (73.67%) aged 32 years or less at the time of corrections intake. The modal age for the offender sample was 29 years and 31 years, respectively, with a median age of 29 years. The mean average age of the offender sample at the time of corrections intake was 29.40 years.

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[2]Although restricted to "admissions to Northwest Territories institutions" and hence sentences of less than two years, see also Finkler (1982a, 1982c) who examines the ethnic distribution of offenders in the Northwest Territories between 1968 and 1980. In contrast to the present study, Finkler's (1982a, 1982c) findings suggest a higher proportion of offenders who are Indian and a lower proportion of offenders who are Inuk: 39.8% Indian; 21.6% Inuit; 23.4% Metis; 14.8% Other; .4% Unknown.

Usual Living Address

The offender's "usual living address" was operationalized as the "community of residence identified at the time of corrections intake/disposition date". It was found that the sexual assault offenders in the sample represent 25 of the 63 communities in the Northwest Territories with the largest percentage of offenders identifying their "usual community of residence" as Frobisher Bay (15.78%) and Cape Dorset (10.52%), respectively. The communities of Inuvik, Rae and Fort Smith also were identified with relative frequency, with 21.03% of the sample dispersed equally between each of these three communities.

Table I
Offender Sample Usual Living Address

Community	Frequency Offenders	Percent	Community	Frequency Offenders	Percent
Aklavik	1	1.75	Frobisher Bay	9	15.78
Arctic Bay	2	3.50	Hall Beach	1	1.75
Baker Lake	2	3.50	Hay River	1	1.75
Cambridge Bay	1	1.75	Inuvik	4	7.01
Cape Dorset	6	10.52	Norman Wells	1	1.75
Chesterfield	1	1.75	Pangnirtung	1	1.75
Clyde River	1	1.75	Rae	4	7.01
Coppermine	2	3.50	Rankin Inlet	3	5.26
Coral Harbour	2	3.50	Resolute	1	1.75
Eskimo Point	1	1.75	Snowdrift	1	1.75
Fort Resolution	1	1.75	Tuktoyaktuk	3	5.26
Fort Simpson	1	1.75	Yellowknife	3	5.26
Fort Smith	4	7.01			
Total				57	99.86

Marital Status and Number of Dependents

Operationalized as "single", "married", "separated", "widowed" or "divorced" at the time of corrections intake/disposition date, "marital status" was specified for all of the offenders in the sample. Thirty-two (56.14%) of the offenders were classified as "single" and 22 (38.59%) as "married" at the time of corrections intake.[3] The three remaining offenders were classified, respectively, as "separated", "divorced", or "widowed". Thus, of the 57 offenders in the sample, the majority (56.14%) were single at the time of corrections intake/ disposition date, although a significant proportion (38.59%) were classified as married.

With respect to "the number of dependents each offender is identified as having at the time of corrections intake/disposition date", 29 (50.87%) of the offenders in the sample were classified as having no dependents and 28 (49.12%) as having one or more dependents: 17 (60.71%) of the 28 having between one and two dependents; four (14.28%) of the 28 offenders having between three and four dependents; six (21.42%) of the 28 having between five and six dependents; and, one (3.57%) of the 28 offenders having seven or more dependents. The number of dependents per offender ranged from one to seven with a mode of one dependent and a median of two dependents. The mean average number of dependents for the 28 offenders was 3.2.

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[3]The corrections personal background data reports do not provide a "common law" classification. Thus, it was not possible to elicit how many, if any, of the offenders were living common-law at the time of disposition.

Living Arrangements

Operationalized as living "with parents/friends/relatives", "with spouse and/or children", "alone in fixed abode", or "other" at the time of corrections intake/disposition date, 28 (49.12%) of the 57 offenders in the sample were classified as living "with parents/friends/relatives". Of the remaining 29 offenders in the sample, 21 (36.84%) were classified as living "with spouse and/or children"; four were classified as living "alone in fixed abode"; and, four were classified as having "other" living arrangements.

Employment and Occupation Status

Operationalized as "full time", "part time", "periodically", and "not at all", this variable was used to measure whether the offender was employed at the time of corrections intake/disposition date.[4] Thirty-two, or 56.14%, of the offenders in the sample were classified as "not being employed at all" at the time of corrections intake. Paradoxically, the second most significant category was the "employed full-time" category with 17 (29.82%) of the 57 offenders falling within this classification. The remaining eight offenders were classified either as

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[4]With particular reference to an employed/unemployed dichotomy, the assessment of "employment status" at the time of corrections intake/disposition date is problematic because it obscures the number of offenders in the sample who may have been employed prior to the discovery/prosecution/conviction and/or sentencing of the sexual assault offence. Indeed, the more detailed information on record of employment provided in the sentencing transcripts indicates that there are offenders in the sample whose employment was terminated as a result of the discovery of the sexual assault offence. As stated by the Territorial Court in relation to Offender 7, at p.4: "As a result of the offences before the Court today, he has lost his job and seems to have suffered in other ways, as well".

this classification. The remaining eight offenders were classified either as employed "part-time" (8.77%) or "periodically" (3.22%).

Occupational status was categorized as "service", "general labour", "trades/technical", "clerical/professional", "hunter/trapper/fisherman", "handicrafts", and "other" and operationalized as the type of occupation the offender held at the time of corrections intake/disposition date. The majority of offenders in the sample (49.12%) were classified as "general labourers", while 14.03% were classified as "hunter/trapper/fisherman" and 12.28% as "trades/technical". The remainder were distributed among service (8.77%), clerical/professional (5.26%), handicrafts (3.50%), and other (7.01%).[5]

Level of Training and Education

Specified for all of the 57 offenders in the sample, "training" was operationalized as the "type" of training ("none", "adult education", "vocational",

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[5]The variables of "employment and occupational status" are problematic when applied to a culturally diverse population such as that found in the Northwest Territories. In the absence of "traditional" and "mixed economy" classifications, the assessment of employment status assumes employment in the wage economy. Thus, the employment status of "not at all" may indicate the number of offenders who are not employed in the wage economy but fails to indicate the number of offenders who continue to pursue a purely traditional lifestyle based on the land. Similarly, the "periodically employed" status may indicate the number of offenders who are occasionally employed in the wage economy but fails to indicate the number of offenders who may combine wage employment with traditional pursuits such as hunting, fishing and trapping. Although the inclusion of a "hunting/trapping/fishing" category allows for the classification of those offenders who continue to pursue a traditional lifestyle, the absence of a "mixed economy" occupational status forces classification into either the traditional or wage economy. As a consequence, the above findings on employment and occupational status may not adequately reflect the number of offenders in the sample who fit within a purely land based or mixed economy classification (see Berger 1977).

and "apprenticeship") the offender had at the time of corrections intake/ disposition date. The majority of offenders in the sample, or 45 (78.94%) of the 57 offenders, were classified as being without training of any kind; seven (12.28%) of the offenders were classified as having adult education training; four (7.01%) of the offenders were classified as having vocational training; and, one (1.75%) of the offenders was classified as having apprenticeship training.

Level of education was not specified for seven (12.28%) of the 57 offenders in the sample. Of the 50 (87.71%) offenders for whom an educational level was provided, the level of education ranged from grades one to 15, with a modal level of education of grade 8; a median level of education of grade 8; and, a mean level of education of grade 8.56. Notably, one-half (50.00%) of the offenders for whom an educational level was provided had a level of education of grade 8 or less, with almost three-quarters (72.00%) of the sample for whom an education level was specified having a level of education of grade 9 or less. Only one offender in the sample was classified as having an education level beyond that of grade 12.[6]

Criminal Offence Patterns

The criminal behavior patterns of the offender sample are of particular

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[6]Comparable to "employment" and "occupation", the variables "training" and "education" are culturally biased. As operationalized in the corrections data base, neither of these variables account for "training" or "education" in accordance with the cultures and traditions of indigenous peoples. The type of training that is specified (adult education, vocational, and apprenticeship) and the level of educational achievement (grades one through 12) are based on participation in the dominant society. The "training" classification, for example, does not anticipate training on the land. And, educational achievement assumes participation in the formal educational system.

relevance to the present analysis insofar as prior, contemporaneous, and posterior records of criminal conduct are variables that potentially influence the judicial assessment of a "fit and proper sentence" in all of the circumstances. Thus, while a prior record of criminal conduct may be discounted at the time of sentence in instances where the prior record is not extensive, unrelated to the immediate offence, or a lengthy period of time has elapsed between the commission of prior offences and the instant offence, the existence of an extensive criminal record, in particular one that includes prior offences similar to that of the current offence (in this instance offences of violence and sex offences), in addition to the type and length of previous dispositions rendered often will be taken into consideration by the sentencing judge in his/her determination of an appropriate sentencing disposition (Hogarth 1971; Ruby 1976; Nadin-Davis 1982). Equally significant, the absence of a prior criminal record usually will entitle the offender to treatment as a first offender by the court, with greater emphasis placed on a rehabilitative, non-carceral sentence (R. v. Sandercock (1985), 40 Alta. L.R. (2d) 265 (Alta.C.A.); Ruby 1976; Tallis 1980; Nadin-Davis 1982; Lindsey-Peck 1985).[7]

Additional charges/offences to the current offence at the time of sentence may also influence the judicial assessment of an appropriate sentence as the court, in determining whether to impose consecutive or concurrent sentences, usually will consider the principle of "totality" or the "global sentence" (R. v. Sandercock (1985), 40 Alta. L.R. (2d) 265 (Alta.C.A.); Ruby 1976; Nadin-Davis 1982). As

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[7]It should be noted that the present study does not control for "sentence bargaining" insofar as the criminal record of the accused, or parts thereof, may be suppressed by crown counsel as part of the plea negotiation process (See Griffiths and Verdun-Jones 1989). Thus, the offence information which is discussed in relation to the offender sample may not be truly reflective of actual criminal history.

well, although conceptually distinct, the existence of a posterior criminal charge/offence may have an indirect bearing on sentence if interpreted by the court as indicative of the offender's "inability to control himself" (see R v. Oquataq, N.W.T.S.C., unreported, January 23, 1985; R. v. Reddick (1976), 17 N.S.R. (2d) 369. N.S.C.A.; Nadin-Davis 1982). Conversely, in instances where there has been a significant passage of time between offence commission and conviction and sentence for the offence and the offender has managed to "stay out of trouble", the absence of posterior criminal behavior may be advanced as a reason for imposing a rehabilitative as opposed to incapacitative sentence.[8]

Prior Criminal Record

Operationalizing "prior criminal record" as "yes" or "no" at the time of sentencing (disposition date), it was found that although a significant proportion (63.15%) of the sample of 57 offenders had prior criminal records, 21 (36.84%) of the 57 offenders did not have prior criminal records. For those 36 offenders with prior criminal records, the number of prior offences per offender ranged from one to 39 offences, with almost one-half (47.22%) of these offenders having records of five or less prior criminal offences.[9]

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[8]As Rothman, S.C.J., remarks in relation to Offender 25, at p.5:

> But given his absence of any criminal record prior to this, given the fact that he has not committed any offences or had any problem with the law in the community since the offence, which is now three years ago, I am hopeful that rehabilitation is a very real probability in his case, and I would want my sentence to reflect that.

[9]The assessment of prior criminal record is based on information contained within the incarceration and probation data reports generated from the corrections data base because complete data for the offender sample were available. The

Prior Offences of Violence

Of the 36 offenders in the sample with prior criminal records, 24 (66.66%) had records for offences of violence (including sexual offences) with the number of prior violent offences per offender ranging from one to eight offences. Narrowing the scope of prior violent offences to sexual offences only, it was found that 17 (47.22%) of the 36 offenders had been sentenced (probation and/or incarceration) for at least one sexual offence prior to the commission of the current sexual assault. The number of prior sexual offences per offender ranged from one to three offences (15 of the 17 offenders identified as having a record of one prior sexual offence; one of the 17 as having a record of two prior sexual offences; and, one of the 17 as having a record of three prior sex offences).[10] The types of prior sexual offences committed by the 17 offenders varied from indecent assault and

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sentencing transcripts rarely provided comprehensive data on the offender's criminal history and were inconsistent in the specifics that were provided on criminal history, in many instances failing to specify the number and type of prior criminal offences. Accordingly, the analysis of prior criminal offences could not be cross-checked with the transcripts for accuracy and should be interpreted as a "rough estimate" only.

[10]There was inconsistency between the two data sources with respect to both the number of offenders in the sample who allegedly committed prior sexual offences and in the number of prior sexual offences attributed to individual offenders. Whereas the corrections data indicated that 17 (29.82%) of the offender sample had been convicted for the commission of one or more prior sexual offences, the transcriptual data indicated that only 13 (22.80%) of the offender sample had such convictions. In this instance, the researcher chose the more liberal estimate of 17 offenders provided by the corrections data because more precise information on the number and type of prior sexual offences was specified. With respect to the inconsistency in number and type of prior sexual offences attributed to individual offenders, the sentencing transcripts indicated as many as five prior offences of "violence against women" and the corrections data indicated a maximum of three such offences. Because the term "violence against women" was not defined within the context of the transcript, the researcher chose the more conservative estimate of three prior sexual offences provided by the corrections data.

rape under the old provisions of the Criminal Code to sexual assault simpliciter under the 1983 provisions of the Code (since revised).

Examining the incidence of incarceration among the 36 offenders with prior criminal records, the number of times with which offenders had been previously incarcerated ranged from 0 to 12. Only two (5.55%) of the 36 offenders with prior criminal records had not been previously incarcerated. The overwhelming majority of the 36 offenders, namely 34 (94.44%) of the 36, had been incarcerated on at least one occasion or more, although almost two-thirds of these offenders had been incarcerated three times or less: (nine or 25.0% of the 36 offenders had one prior incarceration; six or 16.66% of the 36 had two prior incarcerations; and five or 13.88% of the 36 had three prior incarcerations).

Table II
Frequency of Incarceration for Offenders with Prior Criinal Records

Number of Prior Incarcerations	Frequency		Cumulative	
	N	%	N	%
0	2	5.55	2	5.55
1	9	25.00	11	30.55
2	6	16.66	17	47.21
3	5	13.88	22	61.09
4	0	0.00	22	61.09
5	3	8.33	25	69.42
6	3	8.33	28	77.75
7	1	2.77	29	80.52
8	2	5.55	31	86.07
9	1	2.77	32	88.84
10	2	5.55	34	94.39
11	1	2.77	35	97.16
12	1	2.77	36	99.93
Total	36	99.93		

Offences Additional to the Sexual Assault

According to information contained within the sentencing transcripts, 16 (28.07%) of the 57 offenders in the sample were sentenced for at least one offence additional to the sexual assault offence, with substantial variation in the number and type of additional offences attributed to each of these offenders and in the interrelationship and temporal proximity of the additional offence(s) to the sexual assault.[11] At least eight of these 16 offenders were sentenced, inter alia, for breaching a court order (undertaking or probation).[12]

Other "additional offences" committed by the offender sample included break and enter, escape from lawful custody, assault causing bodily harm, impaired driving, abduction, rape, careless use of a firearm, unlawful confinement and attempted murder (see Appendix F: Sentence for Additional Offences).

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[11]Again there is inconsistency between the two data sources, the corrections data suggesting a much higher frequency of "additional" offences than the sentencing transcripts. Because it was not possible to determine whether the "additional" offences enumerated in the corrections data were part of one or several sentences, the researcher relied on the more conservative estimate of "additional" offences provided by the transcribed sentencing decisions.

[12]An additional three offenders also appear to have committed breaches (undertaking or parole) at the time of the sexual assault offence but apparently were not sentenced for this additional offence as the breach is not discussed in relation to sentence. In total, then, five offenders breached probation at the time of the sexual assault; five offenders breached an undertaking at the time of the sexual assault; and one offender violated mandatory supervision at the time of the sexual assault.

Posterior Criminal Offences

In relation to posterior criminal offences, only three (5.26%) of the 57 offenders in the sample were identified as having committed an offence subsequent to the sexual assault.[13] The relative absence, or infrequency, of posterior criminal behavior may be at least partially attributable to the relatively brief time frame chosen for analysis (a four year period from 1983 to 1986 inclusive), with particular reference to those offenders sentenced to lengthy periods of incarceration and those offenders sentenced in 1985 or 1986.

In sum, the majority of offenders in the sample were Inuit, single, equally as likely to have dependents as to not have dependents, living with parents/ friends/relatives, general labourers, without training of any kind, and unemployed at the time of disposition. The average offender age at the time of sentencing was 29 years and the average level of educational achievement for the offender sample was grade eight.

The majority (63.15%) of offenders in the sample were identified as having prior criminal records, with two-thirds (66.66%) of these offenders having prior records for offences of violence (including sexual offences). Almost one-half (47.22%) of the offenders with prior criminal records had been convicted for a prior sexual offence. For those offenders with prior criminal records, the overwhelming majority (94.44%) had been incarcerated on one or more occasions although the

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[13]The quantification of posterior criminal offences necessarily excludes one offender in the sample who was waiting sentence for a prior sexual offence.

frequency of incarceration generally was three times or less. Less than one-third of the offender sample were sentenced for offences additional to the sexual assault and only a minority (5.26%) of offenders were identified as having committed an offence posterior to the sexual assault.

As will be exemplified in Chapter V, the personal circumstances and history of the offender sample (inclusive of age, educational achievement, employment history, family and community record, psychological/psychiatric profile, criminal history) are placed on a continuum by the sentencing court. At one end of the continuum are those offenders in the sample who are described as having an "excellent community record" in terms of their relative educational achievement, exemplary family, work and community records and who were "acting out of character" in relation to the sexual assault offence. At the other end of the continuum are those offenders who are described as "having had a very sad or difficult life" in terms of their relative exposure to alcohol abuse and family violence and whose personal, psychological and alcohol problems combined with an extensive criminal history are suggestive of a "continuing course of antisocial conduct" in relation to the commission of the sexual assault offence.

The Sexual Assault Offence

The sexual assault provisions of the Criminal Code classify sexual assault under three broad provisions which in turn reflect gradations of seriousness and maximum punishment - sexual assault simpliciter (246.1) which, if proceeded by indictment, is punishable by a maximum of ten years imprisonment, sexual assault with a weapon/causing bodily harm/threats to a third party (246.2) which is

punishable by a maximum of 14 years imprisonment, and aggravated sexual assault (246.3) which is punishable by a maximum term of life imprisonment. Because there is no explicit definition of what sexual assault is, the types of behavior that might be classified as a sexual assault (in contrast to the more narrowly defined illicit types of sexual behavior found under other provisions of the Code) are many and varied (R. v. Sandercock (1985), 40 Alta. L.R. (2d) 265 (Alta.C.A.); R. v. Ramos, [1985] N.W.T.R. 68 (N.W.T.Terr.Ct.); Chase v. R. (1987), 59 C.R. (3d) 193 (S.C.C.); Parker 1983; Ellis 1984; Usprich 1987a). For this reason, and because factors relating to the offence are equally as relevant to the judicial determination of an appropriate sentencing disposition as are factors relating to the offender,[13] it is useful to provide an overview of the dynamics of the sexual assault offences that were committed by the 57 offenders in the sample.

An examination of the sexual assault offences committed by the offender sample is of particular significance because, as will be discussed in Chapter V,

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[13]As stated by de Weerdt, S.C.J., in relation to Offender 15 at pp. 1-2:

> Sexual assault is a new offence under our Criminal Code. It can include any kind of assault of a sexual character. What was rape under the old law is sexual assault today, but sexual assault is not confined to assault amounting to rape. It can include a mere touching, an unwanted touching of a sexual nature falling short of rape itself . . . Assault is the application of force by one person to another without the consent of the other. Indeed, the mere threat of the use of force may, in certain circumstances, amount to an assault. As I've said, a sexual assault is assault of a sexual nature . . . Given the wide range of behavior that may constitute a sexual assault, it is very important that courts which are called upon to sentence offenders for such crimes should do so with a very clear understanding of the facts of the particular offence in question before them. A punishment for one type of sexual assault may be altogether inappropriate for another type of sexual assault. The punishment, if one is to be imposed at all, must fit the crime. The disposition of the court must not only be such as to fit the offence, it must also, as far as the law allows, fit the offender.

factors relating to the offence may be taken in aggravation or mitigation of sentence depending on their presence or absence (R. v. Sandercock (1985), 40 Alta. L.R. (2d) 265 (Alta.C.A.); Ruby 1976; Nadin-Davis 1982; Boyle 1984). As also will be discussed in Chapter V, the dynamics of the sexual assault are used by the sentencing courts in the Northwest Territories to place the offence on a continuum of seriousness.

Number and Type of Sexual Assault Charges/Offences

The offenders in the sample represent a total of 62 sexual assault charges for which convictions and sentences were rendered by the Territorial and Supreme Courts of the Northwest Territories between 1983 and 1986, inclusive. The majority of offenders in the sample (92.98%) were convicted and sentenced for the commission of one charge of sexual assault. Three offenders in the sample (5.26%), however, were convicted and sentenced for the commission of two charges of sexual assault and one offender in the sample (1.75%) was convicted and sentenced for the commission of three charges of sexual assault.[14]

Examining more closely the four offenders convicted and sentenced for multiple charges of sexual assault, one offender was convicted of two charges of sexual assault involving the same victim and a second offender was convicted of three charges of sexual assault involving the same victim. The third offender was

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[14]With the exception of one (1.61%) of the 62 offences committed by the offender sample, all of the sexual assault offences involved a lone offender. For the purposes of the present study which is restricted to adult male offenders, the offence involving two co-accused was treated as though committed by a lone offender because the co-accused was female.

convicted of two charges of sexual assault simpliciter involving two victims, each of whom were assaulted together on two separate occasions. The fourth offender was convicted and sentenced for two different types of sexual assault offence (section 246.1 and section 246.2), each incident occurring at a different time and involving a different victim.

With respect to the specific provisions of the Criminal Code that were violated by the offender sample, the majority of offences (54 or 87.09%) for which convictions and sentences were rendered fell within the sexual assault simpliciter provisions of the Code - Section 246.1. In contrast, only 9.67% (or six) of the offences fell within the sexual assault with a weapon/causing bodily harm/threats to a third party provisions of the Code (four sexual assault with a weapon offences and two sexual assault causing bodily harm offences) and even fewer offences (two or 3.22%) were classified as aggravated sexual assault.

Table III
Frequency of Offence Type Relative to the Offender Sample

Offence Type	Frequency Offender N	%	Frequency Offence N	%
246.1 (sexual assault simpliciter)	49	(85.96)	54	(87.09)
246.2 (sexual assault with a weapon, causing bodily harm, threats to a third party)	6	(10.52)	6	(9.67)
246.3 (aggravated sexual assault)	2	(3.50)	2	(3.22)
Total	57	(99.98)	62	(99.98)

Note: The one offender who was convicted and sentenced for the commission of both a section 246.1 and section 246.2 offence was classified as a Section 246.2 offender/offence.

The Geographic Location of the Sexual Assault Offences

The community in which an offence is committed in the Northwest Territories is significant insofar as it may be a factor that is relevant to the sentencing process. As suggested by Lindsey-Peck (1985:44):

> In the Northwest Territories, knowledge of the particular community in which an offence was committed is essential to understanding the degree of "cultural transition" accomplished by or affecting the accused and hence also the views of the community towards the offence . . . Regional differences are very important to the court.[15]

Using both data sources it was possible to determine the geographic location of the sexual assault offences committed by the offender sample and the extent to which there was congruence between the location of the offence and the offender's "usual living address".

The offender sample committed their offences in 25 of the approximate 63 communities in the Northwest Territories (Griffiths and Patenaude 1988) suggesting an average of 2.28 offenders committing 2.48 offences per community. The highest concentration of offences was found in the communities of Frobisher Bay (22.58%) and Yellowknife (9.67%). The majority of offenders in the sample, 45 (78.94%) of 57 offenders representing 49 (79.03%) of 62 sexual assault offences, committed their offence in the same community identified as their "usual living address". Twelve (21.05%) of the offenders in the sample (representing 13 or

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[15]See R. v. J.N., [1986] N.W.T.R. 128 (N.W.T.C.A.), for example, in which the relative isolation and crime free nature of the commmunity were considered by the court in passing sentence.

Variation in the offence patterns of the offender sample extended to 11 of 25 communities. In five communities (Aklavik, Detah, Frobisher Bay, Hall Beach, Yellowknife) there was an increase in the number of offenders committing their offence, as compared to the the number of offenders "usually living", in the community. The most dramatic increase in the number of offences committed per community was reflected in Frobisher Bay, with an increase from 15.78% of the offender sample "usually living", as compared to 22.80% of the offender sample committing their offence, in this community. On the other hand, in six communities (Cape Dorset, Fort Smith, Inuvik, Rae, Rankin Inlet, and Snowdrift) there was a decrease in the number of offenders committing their offence, as compared to the number of offenders "usually living", in the community. The most dramatic decrease was reflected in Cape Dorset with 10.52% of the offender sample identifying this community as their "usual living address" but only 3.50% of the offenders committing their offence(s) in this community (see Appendix G: Community Variation in Offence Patterns).

The Physical Location of the Sexual Assault Offence

The physical location of the sexual assault offence is significant insofar as the "invasion of the sanctity of a home" may be taken in aggravation by the sentencing court (R. v. Sandercock (1985), 40 Alta. L.R. (2d) 265 (Alta.C.A.) at 273). Distinguishing between those offences committed indoors and those committed outdoors, the majority of sexual assault offences committed by the offender sample occurred "indoors", with only a select few offences occurring partially or totally outdoors. Of the 62 offences of sexual assault committed by the 57 offenders in the sample, 53 (85.48%) occurred totally indoors within the

offender sample occurred "indoors", with only a select few offences occurring partially or totally outdoors. Of the 62 offences of sexual assault committed by the 57 offenders in the sample, 53 (85.48%) occurred totally indoors within the seclusion of a room in a private residence, dwelling house, apartment, hotel, or dormitory or the interior of a motor vehicle. Two (3.22%) of the offences occurred partially indoors and partially outdoors (trailer/bushes, company bunkhouse/ bushes). One (1.61%) of the offences occurred totally outdoors in an empty lot. The exact physical location of the sexual assault offence was not specified for six (9.67%) of the offences committed by the sample.

For those 53 offences occurring totally "indoors" it was possible to isolate "whose" dwelling/vehicle the offence occurred in. Nineteen (30.64%) of the total number of offences committed by the offender sample were committed in the dwelling of the complainant; 17 (27.41%) of the 62 offences were committed in the dwelling of both the complainant and the offender; 10 (16.12%) of the 62 offences were committed in the dwelling/vehicle of the offender; seven (11.29%) of the 62 offences were committed in a dwelling for which possession or ownership was not specified; and three (4.83%) of the 62 offences, as already established, were committed at least partially in a location that was out-of-doors.

It is interesting to note that 12 of the 17 offences committed in the dwelling of the complainant involved the surreptitious, clandestine, illicit or uninvited entry of the accused into the complainant's home, with only three of the 17 offences involving an accused who was an invited guest into the complainant's home. The question of whether the offender was or was not invited into the complainant's home was not specified for two of the 17 offences.

The Nature of the Sexual Assault

The specific dynamics of the 62 sexual assault offences are widely divergent. The nature of the "sexual" contact perpetrated by the offender sample varied from a single instance of "touching" to multiple acts of forced vaginal intercourse combined with "other degrading acts". The use of weapons and violence in the course of the assault, the degree of injury sustained by the complainant, the role of intoxicants in the offence, the amount of premeditation attributed to the accused, and the reason for termination of the sexual assault varied significantly from one offence to the next. Similarly, the age of the complainant at the time of the offence, the age differential between the offender and the complainant, the relationship of the accused to the complainant, the physical and emotional vulnerability of the complainant to the offender, as well as offence reporting dynamics are all factors that varied.

Accordingly, the quantification of the "nature of the sexual assault" must be interpreted with caution as "no two offences" committed by the offender sample were identical. As well, it is difficult to quantify certain aspects of the sexual assault offence. For example, the quantification of "type" of sexual contact may be misleading given that a number of the offences involved more than one type of sexual activity. For this reason, the "nature" of the sexual assault was quantified on the basis of the "most serious type of physical invasion" (in other words, if an assault involved both forcible intercourse and attempted intercourse it was classified as the former) which is in itself an arbitrary distinction given that all sexual assaults, by definition, are serious physical violations of the person.

The type of sexual contact involved in the offence of sexual assault is significant insofar as the presence or absence of specific types of sexual acts may be taken in aggravation or mitigation. Thus, the sentencing courts have tended to distinguish between offences in which there is no penetration and offences in which there is penetration, the latter generally regarded as more serious than the former (Boyle 1984). As well, "repeated acts or other acts of degradation" (R. v. Sandercock (1985), 40 Alta. L.R. (2d) 265 (Alta. C.A.) at 272) and "accompanying or indecent acts" (Boyle 1984:175) are factors that may be taken in aggravation. As will be discussed in Chapter V, the type of sexual contact also is one of the variables that is used by the sentencing courts in the Northwest Territories to place the sexual assault offence on a continuum of seriousness.

Distinguishing between forcible sexual intercourse (rape under the old provisions of the Code), attempted sexual intercourse (attempted rape under the old provisions of the Code), fondling or touching (indecent assault under the old provisions of the Code), "other" types of sexual invasion, and sexual invasions that were not specified in the context of the sentencing transcript, the most frequent "type" of sexual assault committed by the offender sample was "forcible intercourse" (23 or 37.09% of 62 offences),[16] followed by "fondling or touching" (17 or 27.41% of 62 offences), "attempted intercourse" (seven or 11.29% of 62 offences) and "other types of sexual invasion" (five or 8.06% of 62 offences). The

[16]The "forcible sexual intercourse" classification subsumes the acts of fellatio and sodomy. Thus, the assessment of 23 (37.09%) offences involving "forcible sexual intercourse" includes two assaults wherein fellatio or sodomy was combined with the forcible sexual intercourse.

"nature" of the sexual assault was not specified for 10 (16.12%) of the 62 offences committed by the offender sample.

The five offences involving "other" types of sexual invasion included three offences wherein the offender "lay on top of the victim" and simulated sexual intercourse or fondled the accused. Although two of these offences involved ejaculation, the offences were not classified as attempted sexual intercourse because there was no penetration or attempt at penetration (Offenders 35 and 36). One of the "other" instances involved the insertion of the accused's finger into the complainant's anus. And the last offence, for which intercourse could not be proved, involved kissing.

The offences committed by the offender sample can be further distinguished in terms of whether the assault was an isolated incident or part of an "ongoing pattern of behavior", the latter generally recognized by the courts as more serious than an isolated incident.[17] The offences also varied in the number of sexual acts or assaults committed against the complainant during the course of the offence. While a majority of the sexual assault offences (34 of 62 offences or 54.83%) committed by the sample of offenders were classified as "isolated incidents involving a singular sexual act", a significant proportion of the offences committed by the offender sample (13 of 62 offences or 20.96%) were "part of an ongoing pattern of behavior involving more than one sexual act or assault" against the

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[17]Commenting on the difference between an isolated sexual assault and one which is ongoing in the case of Offender 49, Davis, J. states at p.3:

> The courts also recognize that if the offence or the assaults continue over a period of time it is more serious than just an isolated occasion.

complainant. Seven (11.29%) of the 62 offences were "isolated incidents involving multiple sexual acts or assaults" against the complainant. The duration of the assault and number of sexual acts or assaults were not specified for eight (12.90%) of the 62 offences (see Appendix H: Type of Sexual Contact).

The "isolated incident, singular sexual act" assault is illustrated in the following passage:

> The accused and his victim were at school together. He had gone to visit her on the evening in question. She was drinking in the company of another man when he arrived. The other man then left. The victim asked the accused to stay . . . The accused agreed to stay. The victim then went to her room. Shortly afterwards, the accused followed her into her room, where he removed her pants and underpants in spite of her attempts to stop him. He then removed his own pants and achieved sexual intercourse with her notwithstanding her attempts to stop him. The act of intercourse was of short duration and no apparent physical harm has resulted to the victim (Offender 26, p. 2).

The "ongoing sexual assault" is illustrated in the following excerpt:

> The accused admits that sometime in December, again in January and again in February of 1985 . . . he had been drinking and was alone with his fifteen year old step-daughter when he asked her if she would participate in sexual activities with him, at all times in his residence. The first time she took off her panties. There was no force used, and the accused did not believe he used any threats. The second time he pulled off her pants, and she did resist and push him away. And the third time she again resisted by trying to push him away after he had relations (Offender 2, p. 2).

The "isolated incident, multiple sexual act" sexual assault is illustrated in the case of Offender 19:

> He kept the 15 year old girl in the room while he required his wife to bring coffee to him and to light cigarettes on a number of occasions . . . The sister-in-law had indicated that she only wished to leave the premises but she was retained for some number of hours and on three further occasions the accused forced himself upon her and had intercourse three more times (pp. 6-7).

The Role of Weapons, Violence and Injury in the Offence

The relationship of weapons, violence and injury to the commission of the sexual assault offence is significant in that the presence or absence of these factors may be taken in aggravation or mitigation (R. v. Sandercock (1985), 40 Alta. L.R. (2d) 265 (Alta.C.A.); Ruby 1976; Nadin-Davis 1982; Lindsey-Peck 1985). As will be discussed in Chapter V, these factors also are used by the sentencing courts in the Northwest Territories to place the sexual assault offence on a continuum of seriousness.

Although the sexual assault provisions of the Canadian Criminal Code allow for the differential classification of sexual assault offences as "sexual assault simpliciter", "sexual assault with a weapon/causing bodily harm/threats to a third party" and "aggravated sexual assault", the offence with which an accused is charged or convicted is not necessarily indicative of the offence that occurred (see Griffiths and Verdun-Jones 1989). Given that some offenders in the sample may have been charged with, or been found guilty of the lesser included offence of sexual assault simpliciter and that the Code provisions give no indication of the "type" of weapon used or the "type and extent" of violence or injury in the offence, an examination of the role of weapons, violence and injury provides a more in-depth understanding of the dynamics of the offences committed by the offender sample.

The "display or use of a weapon" (R. v. Sandercock (1985), 40 Alta. L.R. (2d) 265 (Alta.C.A.) at 273) is a factor that may be taken in aggravation by the sentencing court. As previously suggested, six (9.67%) of the offenders in the sample were sentenced for offences contrary to the Section 246.2 provisions of the Criminal Code, two of whom were sentenced for the offence of sexual assault causing bodily harm and four of whom were sentenced for the offence of sexual assault with a weapon. In total, however, five (8.77%) of the offender sample, representing five (8.06%) of 62 offences, used a weapon in the commission of the offence. The additional offender, notwithstanding the use of a weapon and injury to the complainant, was found guilty of the "lesser included offence of sexual assault simpliciter".

The type of weapon and nature of its use was specified for only four of the five offenders and can be briefly summarized as follows: (1) the accused threatened the complainant during the course of the assault with a large kitchen knife; (2) the accused threatened the life of the complainant with a rifle; (3) the accused had two rifles with him which he threatened to use while he forced the complainant to have sex with him while her husband was in another room; (4) using a knife, the accused slashed his wifes' throat and wrists after forcing her to have sex with him. In contrast to the use of weapons in five (8.06%) offences, the majority of offences committed by the offender sample, 46 (74.19%) of the 62 offences, did not involve the use of weapons. The use of weapons was not specified for 11 (17.74%) of the 62 offences committed by the sample.

With respect to the "new" sexual assault provisions of the Criminal Code (as they then were), Boyle (1984:177) suggests that the main aggravating factor

should be the "degree of violence used" rather than the nature of the sexual activity (as per the indecent assault, attempted rape and rape provisions of the Code). Including, but not restricted to, those offences involving the use of a weapon, the degree and type of violence used by the offender sample varied substantially from one offence to the next. In some instances, the victim was forcibly confined by the accused during the course of the assault and that was the extent of the violence and in other instances the amount of force used by the offender was such as to cause substantial physical injury to the victim. In total, 33 (53.22%) of the 62 offences committed by the offender sample involved some type of violence ranging from threats to the victim to the use of physical force to subjugate the victim. In contrast, 14 (22.58%) of the 62 offences committed by the offender sample did not involve the overt use of violence (although at least one of these offences involved the use of "persuasion"). The use of violence was not specified for 15 (24.19%) of the offences committed by the sample of offenders.

Distinguishing between the type and degree of violence used during the commission of the offence, 12 (19.35%) of the 33 offences involved "physical force/violence"; eight (12.90%) of the 33 offences involved "threats", either verbal or with a weapon; five (8.06%) of the 33 offences involved threats and physical force; four (6.45%) of the 33 offences involved "forcible confinement and threats"; two (3.22%) of the 33 offences involved "forcible confinement and physical force/violence"; one (1.61%) of the 33 offences involved "inducement and physical force"; and one (1.61%) of the 33 offences involved "forcible confinement" alone. More simply stated, at least 20 (32.25%) of the 33 offences included the use of physical violence or force of some kind; at least 17 (27.41%) of the 33 offences included the use of threats with or without a weapon; and, at least seven (11.29%)

of the 33 offences included the use of forcible confinement (see Appendix I: The Role of Violence in the Offence).

As suggested by Lindsey-Peck (1985:29, f.n.61), the "amount of harm done to a victim is a controversial factor" in matters of sentencing in that the foundation of the criminal law is the assessment of culpability based on the the state of mind of the accused rather than the actual or anticipated harm incurred as a result of the offence. As Lindsey-Peck (1985:49-50) states:

> Culpability is a key factor in determining the fitness and fairness of a sentence. When there is ignorance of the law or a spontaneous assault, the offence must be regarded as less culpable than a premeditated attack. Using culpability to determine a fit penalty is in keeping with the theroretical basis of the criminal law . . . Sentencing is the one viable area where the degree of harm intended is the primary consideration. The actual harm done may, however, in some cases also be a factor in sentencing. But rarely will it outweigh the blameworthy state of mind of the particular offender.

Both the actual or anticipated injury to a victim of sexual assault, however, may be relevant to the judicial assessment of sentence, as either an aggravating or mitigating factor, and in the judicial characterization of the offence (see R. v. Sandercock (1985), 40 Alta. L.R. (2d) 265 (Alta.C.A.). With respect to the causation of harm or injury to the complainant during the course of, or as a result of the commission of the sexual assault offence, only two offenders (representing two or 3.22% of the 62 offences) were convicted under the Section 246.2(c) provisions of the Code - sexual assault causing bodily harm - with an additional two offenders (representing an additional two (3.22%) offences) convicted under the Section 246.3 provisions of the Code - aggravated sexual assault. Thus, only four (7.01%) of the offenders, representing five (6.45%) of the total number of offences,

were convicted for an offence of having caused bodily harm or injury to the complainant.

In actuality, almost one-half of the 62 offences (48.38%) committed by the offender sample involved injury of some kind to the victim of the assault, although in at least five instances psychological harm to the complainant was inferred on the basis of Regina v. Sandercock (1985), 40 Alta. L.R. (2d) 265 (Alta.C.A.).[18] In total, 30 (48.38%) of the offences committed by the offender sample involved some type of injury to the complainant.

Distinguishing between the "type" of injury suffered by the complainant on the basis of whether the injury inflicted by the offender was purely physical, purely psychological, or a combination of physical and emotional, 14 (22.58%) of the 62 offences involved psychological injury to the complainant (including the inference of such injury); 11 (17.74%) of the offences involved physical injury to the complainant, and five (8.06%) of the offences involved a combination of physical

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[18]The case of Regina v. Sandercock (1985), 40 Alta. L.R. (2d) 265 (Alta.C.A.), binding in the Northwest Territories since 1986 (see R. v. J.N., [1986] N.W.T.R. 128 (N.W.T.C.A.) allows for the judicial inference of psychological harm to the victim of a sexual assault offence in cases where the sexual assault warrants definition as a "major" sexual assault. Referring to the inference of psychological harm on the basis of Sandercock, in the case of Offender 48 at pp. 2-3, Davis, J., states:

> The Court [of Appeal] also indicates that a trial judge can assume that some psychological and emotional harm will result, because assaults destroy the personal security that society tries to enforce; and its only therefore on noteable psychological or emotional harm that the Crown must give additional evidence if it wishes the Court to take that into account.

and emotional injury to the complainant (see Appendix J: The Role of Injury in the Offence).

The role of weapons, violence and injury in the sexual assault offences committed by the sample of offenders can be summarized as follows:

Table IV
The Role of Weapons, Violence and Injury in the Sexual Assault Offences

Role in Offence	Weapons N	Weapons %	Violence N	Violence %	Injury N	Injury %
Yes	5	(8.06)	33	(53.22)	30	(48.38)
No	46	(74.19)	14	(22.58)	15	(24.19)
Not Specified	11	(17.74)	15	(24.19)	17	(27.41)
Total/Offences	62	(99.99)	62	(99.99)	62	(99.98)

The Role of Alcohol in the Offence

In examining the "nature" of the sexual assault offences committed by the offender sample, the role of alcohol relative to the commission of the offence is an important factor to explore. Intoxication, whether by alcohol or other drugs, is a factor that may be taken in aggravation or mitigation (Ruby 1976; Nadin-Davis 1982). As a factor related to the offender's mental state at the time of the offence (particularly as such mental state may indicate a lack of premeditation or spontaneity on the offender's behalf), the court may take the offender's consumption of alcohol into account. As stated by Marshall, S.C.J., in the case of Offender 1 at p.4:

> What circumstances must be considered so that the penalty is fitting? Punishment or penalty should, in logic, only be meted out for culpability or blameworthiness. What are the circumstances that would affect blameworthiness? First, there is what you might call a cultural milieu often so different here. A person in a culture, for example where drunkeness is a norm, will not be, it seems to me, as culpable as one that is raised with an awareness of its social price.

Mitigation may also be extended if the victim of the assault was intoxicated (Lindsey-Peck 1985).

It is equally possible, however, that the court will be take a harsh view toward the offender's consumption of alcohol (Ruby 1976). Indeed as stated by Paul, S.C.J., in the case of Offender 47, at p. 3, the offender's voluntary consumption of alcohol cannot be construed as an excuse for his behavior:

> Once again, here we can see that alcohol was the "causa causans" of that serious crime. It is absolutely not an excuse and the courts have to be severe with those who wilfully get intoxicated to a point where they commit violent crimes of this nature.

And as stated by de Weerdt, S.C.J., in relation to Offender 14, at p.7:

> The fact that he would appear to have been intoxicated during these offences does not do more than perhaps explain why he could behave so foolishly and cruelly as he did. It simply does not excuse the act although it may help to explain it.

Examining the role of alcohol relative to the commission of offences by the offender sample also is important because the crime rate, with particular reference to the violent crime rate, in the Northwest Territories frequently is associated with the consumption of alcohol in this jurisdiction (see Finkler 1976, 1982b; Hobart

1978; Tallis 1980; Morrow 1981; Havemann, Couse, Foster and Matonovich 1983; Lindsey-Peck 1985; Griffiths and Patenaude 1988). Speaking to the frequency with which the ingestion of alcohol is associated with crimes of violence, de Weerdt, S.C.J., states:

> As so frequently occurs in cases coming before the Court involving firearms and assault, this is a case in which the conduct of the accused appears to have been strongly influenced by his ingestion of too much alcohol for his ability to cope with it (Offender 34, p.3).

And with respect to the offence of sexual assault, de Weerdt, S.C.J., comments:

> It is sad to say that sexual assaults upon women in the North are only too frequent, and have been regrettably frequent in the past, not only at Rae-Edzo but elsewhere, and this is generally associated with over-indulgence in alcohol (Offender 29, pp.3-4).

Alcohol, and to a lesser extent other intoxicants, were a factor in a number of the sexual assault offences committed by the offender sample. Generally, the consumption of alcohol and/or intoxicants was specified as a factor in 40 (64.51%) of the 62 offences as contrasted to six (9.67%) of the 62 offences in which alcohol and intoxicants were specified as <u>not</u> being a factor. The role of alcohol/intoxicants was not specified for 16 (25.80%) of the 62 offences.

Notwithstanding the consumption of alcohol in almost two-thirds of the sexual assault offences, the role of alcohol varied substantially between offences both in relation to "who" consumed alcohol and the "amount" of alcohol consumed. Thus, while in some instances the consumption of alcohol extended to both the offender and the victim, in other instances the consumption of alcohol and

intoxicants was restricted to the offender and in rare instances the complainant. Interestingly, there were no offenders in the sample who were under the influence of drugs alone, other than alcohol, although at least two offenders in the sample mixed alcohol with the prescriptive drugs they were taking for a psychiatric/ psychological disorder. As suggested, the amount of alcohol consumed was widely divergent. Some of the offenders were so intoxicated as to be unaware of having committed the offence; some of the complainants were so intoxicated as to be unaware of having been assaulted; other offenders (and complainants) had consumed alcohol but were not intoxicated at the time of the offence (Offenders 4, 12, 14, 19, 23, 26, 31, 34, 39, 40).

The following excerpts are illustrative of the varied role of alcohol and other intoxicants in the offences committed by the offender sample:

> On the other side of the coin as aggravating factor is the fact that he is 32 years of age and the victim is ten years of age. He, over her original protests, got her to drink liquor before he had his way with her. He is the uncle of the young girl. There was intercourse; there was penetration (Offender 4, p. 2);

> However, [the accused] apparently was, at the time, intoxicated, and as his lawyer points out, he mixed drugs, Cogentin and Lycaine, with alcohol. And, of course, that is, itself, in my view, a serious intoxicant, and one that will, in fact, disinhibit or make it more likely that you will get into trouble (Offender 12, p.4);

> . . . he states the accused's memory of the offence as being initially none, due to the amount of alcohol he had consumed. According to the doctor, the accused had described consuming 40 ounces of whiskey and vodka, having his last drink about 9.00 o'clock on the morning of the events here in question (Offender 14, p.4);

> The accused and his victim were both intoxicated at the time and there does not appear to have been any premeditation on the part of the accused (Offender 26, p.2);

> As to the circumstances of the offender, it is none too clear, but I accept that he was to some extent under the influence of liquor at the time (Offender 31, p. 4);

> [The accused] claims that he was drinking that night, blacked out, and does not remember anything (Offender 39, p.2).

In brief, for the 40 offences in which alcohol/intoxicants played a role, consumption was limited to the offender in 27 (43.64%)[19] of the 62 offences and to the complainant in one (1.61%) of the 62 offences, with both the offender and the complainant consuming alcohol in 12 (19.35%)[20] of the 62 offences committed by the offender sample.

Planning and Premeditation

Again as a factor taken in aggravation or mitigation, the extent of "planning and premeditation" may be considered by the sentencing court (Nadin-Davis 1982; Lindsey-Peck 1985). The extent of planning and premeditation involved in the offence was directly addressed by the court in relation to only 15 (26.31%) of the offenders in the sample. Six (10.52%) of the 57 offenders (representing six or

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[19]Includes two offenders, responsible for three offences, who were under the influence of both alcohol and drugs at the time of the offence.

[20]Includes three complainants who did not consume alcohol of their own volition but who were "encouraged" or "forced" to drink alcohol by the offender.

9.67% of the offences) were considered to have had a pre-existing intention to commit the offence. Nine (15.78%) of the 57 offenders (representing 10 or 16.12% of the offences) were considered to have had "reduced intent" at the time of the offence. Planning and premeditation was not specified for 42 (73.68%) of the offenders in the sample (representing 46 or 74.19% of the 62 offences).

The following excerpts are illustrative of the judicial assessment that the offence was planned and premeditated, or that the offender had a pre-existing intention to commit the offence:

> I will deal now with the accused himself. First off, counsel says that he had been drinking but, indeed, the evidence was that he had with stealth and precision carried out the actions outlined in this case, so I have come to the conclusion that he knew quite well what he was doing (Offender 11, p.3);

> There was premeditation here. Obviously, [the accused] knew that she was asleep in the bedroom. Obviously, he formed the intent of committing sexual assault, which is evidenced by barricading the door (Offender 24, p.6).

Conversely, the following excerpts illustrate the judicial assessment that the offence was not planned and premeditated, or that the offender did not have a pre-existing intention to commit the offence:

> What circumstances must be considered so that the penalty is fitting? Punishment or penalty should, in logic, only be meted out for culpability or blameworthiness. What are the circumstances that affect blameworthiness? First, there is what you might call a cultural milieu, often so different here. A person in a culture, for example where drunkeness is a norm, will not be, it seems to me as culpable as one that is raised with an awareness of its social price . . . Social milieu clearly is another consideration. The circumstances of the accused, the opportunities or the lack thereof, the depravation of his

> youth, should be taken into account, his family background, his possibilities, his training, his plans, his hopes, his attitudes . . . How blameworthy was [the accused]? . . . Clearly when considering all these various things, disparity in sentencing will occur over the cases. Cultural rubric or fabric in the North . . . will set this situation apart from others . . . [The accused] is not all bad. He has had a bad time . . . . (Offender 1, pp.4-5);

> Also, it was indicated by the elders and others that the question of the sexual abuse of children was not a problem that the native people are familiar with in Snare Lake. For these reasons, it was argued that blamewothiness or blame should be reduced, and because of this the penalty should be less (Offender 13, p. 2);

> I am satisfied on the facts that I heard during the trial that there was no premeditation, or virtually no premeditation by the accused in the commission of the offence, and that it was an act that occurred pretty much on the spur of the moment. There certainly is no planning in evidence (Offender 25, p.4);

> The accused and his victim were both intoxicated at the time and there does not appear to have been any premeditation on the part of the accused (Offender 26, p. 2).

Reason for Termination of the Assault

The reason for termination of a sexual assault offence is significant in that the "voluntary discontinuation" of an assault by an offender may be a factor that is taken in mitigation by the sentencing court (R. v. Sandercock (1985), 40 Alta. L.R. (2d) 265 (Alta.C.A.).

The sexual assault offences committed by the offender sample were terminated for a variety of reasons. Whereas the majority of offences, 35 (56.45%) of the 62, were terminated because the assault was in effect "complete" and the

offender either released the complainant or removed himself from the place where the offence occurred, at least 20 (32.25%) of the 62 offences were discontinued during the course of the assault.[21]

The reasons for the discontinuation of the assault varied as exemplified by the following excerpts. In brief, in at least two instances the complainant managed to escape during the course of the assault; in at least one instance the complainant became so hysterical during the course of the assault that the offender discontinued the assault of his own volition; in several instances the complainant, who was asleep, awoke during the course of the assault and the assault was discontinued; and, in several other instances there was "third party intervention" which led to the discontinuation of the assault.[22]

> The victim had fallen asleep on her bed, next to her husband, who was very drunk, in her bedroom. The accused, who was a visitor in their home, later entered the marital bedroom, removed some of the wife's clothing and proceeded to get on top of her. At about this point, the wife awakened, finding that it was not her husband. She told the accused to leave and he did (Offender 3, p.2);

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[21]The distinction between the "completion" of an assault and the "discontinuation" of an assault is to some extent fallacious in that a number of offences committed by the offender sample were "ongoing". For the purposes of the present analysis, ongoing sexual assault offences wherein there was sexual intercourse were categorized as "complete". Conversely, ongoing sexual assault offences wherein sexual intercourse had not been effected were categorized as "discontinued".

[22]The term "third party intervention" is used to canvass those instances where during the course of the assault the offence was discovered by a witness. The assault was subsequently discontinued either because of the presence of the witness or because the witness alerted the authorities to the offence.

> The young woman continued her resistance as far as she was able to do so, crying out when she could, and eventually escaped to room number 47, where she found her friends. The commotion caused by her struggles had been heard by several witnesses in the meantime. The police were called (Offender 20, p.4);

> She also yelled at the accused, telling him to stop. At this point, someone else from the house ran to the RCMP detachment to report the assault, and the police responded immediately and entered the house (Offender 24, p.1);

> The girl told the offender that she had to be home, and eventually he released her without making any other attempt to interfere with her sexually (Offender 31, p.3);

> What is even more aggravating is the age and circumstances of this victim and the threats and the use of a weapon. In fact, the only way it ended was when the victim completely became hysterical [sic] after almost three-quarters of an hour (Offender 37, p.4).

The reason for termination of the sexual assault was not specified for seven (11.29%) of the 62 offences.

The Victims of the Sexual Assault Offences

It is trite to say that the "victim" of the sexual assault is an important variable to be considered in relation to the dynamics of the sexual assault offence. In addition to injury to the victim, a number of factors pertaining to the victim of the sexual assault offence, including the number of victims, the age of the victim at the time of the offence with particular reference to victims who are children, the difference in age between the victim and the offender, the relationship between the victim and the offender, and the "vulnerability" of the victim may be taken in

aggravation or mitigation, thus influencing the judicial assesment of a "fit and proper" sentence in all of the circumstances (R. v. Sandercock (1985), 40 Alta. L.R. (2d) 265 (Alta.C.A.); Ruby 1976; Nadin-Davis 1982; Boyle 1984).

The Age of the Victim at the Time of the Offence

The 62 offences/charges of sexual assault for which the sample of 57 offenders were convicted and sentenced involved a total of 59 complainants. Only two (3.50%) of the offenders in the sample committed sexual assaults against more than one victim. And, with the exception of one complainant who was male, all of the victims of the sexual assault offences were female.[23] The victims of the sexual

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[23]In the one case (Offender 16) involving a male complainant the nature of the sexual assault was ongoing over a six year period. As the father of the adopted victim, the offender was in a position of "loco parentis" to the complainant. Of significance, there is an apparent distinction by the sentencing court in this case between heterosexual and homosexual sexual assault with considerable emphasis placed on the "rehabilitation" and "treatment" of the homosexual offender. As stated by the Territorial court in the case of Offender 16 at pp.6-8:

> Most of the reported cases on sexual assaults refer to heterosexual contact . . . Most of the cases where jail was considered appropriate to satisfy the needs of society, the assaults were by men on females . . . Many Courts have also expressed the theory that treatment and cure gives the better or best protection to the community, rather than a penalty involving incarceration . . . I am taking the general approach that punishment is not a deterrent to sexual abuse of children. I have considered a denunciatory sentence, as an expression of the disapproval of society to the actions of the accused, but I do not believe there would be any benefit either to society or to the accused . . . I am of the opinion that the special circumstances of the accused should override the need for a jail term . . . Therefore, I am going to suspend the sentence and place the accused on probation . . . .

Notably, this decision was varied on appeal and a sentence of 60 days imprisonment was substituted for the suspended sentence with the probation order to remain. In its reasons for judgement, the Northwest Territories Court of Appeal emphasized the failure of the trial judge to place sufficient emphasis on the principle of denunciation as well as the "serious psychological damage incurred by the victim" (N.W.T.C.A., Memorandum of Judgement, p.1).

assault offences ranged from three years of age at the time of the offence to one complainant who was described by the court as a "very, very elderly lady, semi-paralyzed, and in her own words, 'half dead'" (Offender 1, p.2).

Notwithstanding the questionable assumptions on which it is based, the age of the complainant at the time of the sexual assault offence, with particular reference to differentiation between child and adult victims, may be a factor that is considered by the court in passing sentence (Boyle 1984). Although the age of the sexual assault complainant may be relevant to the judicial assessment of sentence, particularly as such age relates to the "vulnerability" of the victim as in the case of a child or elderly victim (Lindsey-Peck 1985), the age of the complainant at the time of the sexual assault offence was not specified for 21 (35.59%) of the 59 victims of the offender sample (with the court sometimes inferring the age of the complainant by terms such as "young lady", "girl", or "woman"). For the remaining 38 (64.40%) complainants for whom age at the time of the offence was specified, there was a 56 year range in age (3-59), with almost one-half (47.44%) of the complainants aged 18 years or less at the time of the offence. The relatively young age of the victims of the offender sample is even more pronounced when isolated to the 38 complainants for whom age was specified, with 28 (73.68%) of the 38 victims aged 18 years or less at the time of the offence.

The age of the offender and victim at the time of the offence also may serve to aggravate the "seriousness of the offence" in circumstances where there is a substantial difference in age between offender and victim (Offenders 4 and 8). It was possible to establish an age differential between victim and offender for the 38

(64.40%) complainants for whom age was specified. It was not possible to establish the difference in age for 21 (35.59%) of the sexual assault complainants because data for either the victim or the offender were incomplete or missing.

The complainants were both younger and older than the offenders in the sample, although the majority of complainants (or 34 or 57.62% of the 59 complainants) were younger than their assailants. Only four (6.77%) of the 59 complainants were older than their assailants. The largest age difference between a victim and an offender was 33 years, the complainant aged 15 and the offender aged 48 at the time of the offence. Collapsing age difference into five year intervals (1-5, 6-10, 11-15 and so on), the most frequent age difference between victim and offender (18.64% of the victims) was 11-15 years followed by 21-25 years (16.94% of the victims).

The Relationship Between the Complainant and Offender

The nature of the relationship between the complainant and offender may serve to aggravate the seriousness of the offence particularly in instances where the offender was in a position of trust, or in "loco parentis" to the victim (Ruby 1976; Nadin-Davis 1982; Boyle 1984; Lindsey-Peck 1985). The distinction between an offender who is a stranger to the victim as opposed to an offender who is known to the victim may also serve to aggravate or mitigate notwithstanding the fallacious reasoning on which such a distinction is based (Boyle 1984). Although the exact nature of the relationship between victim and offender could not be analyzed for 21 (35.59%) of the 59 complainants because of missing, vague or incomplete data,

there were some interesting patterns in the nature of the relationship between victim and offender for the remaining 38 (64.40%) victims of the offender sample.

Examining all of the relationships between offender and victim relative to the offender sample, it was found that 12 of the victims were the friend of, or acquainted with the offender; nine of the victims were the daughter or stepdaughter of the offender; five of the victims were a complete stranger to the offender; three of the victims were the sister (including sister-in-law) of the offender; two of the victims were the niece of the offender; two of the victims were in a fiduciary relationship to the offender; one of the victims was the adopted son of the offender; one of the victims was the stepmother of the offender; one of the victims was the wife of the offender; one of the victims was the cousin of the offender; and, one of the victims was a distant relation of the offender. The precise nature of the relationship between victim and offender was not specified for 21 of the complainants (see Appendix K: Relationship Between Complainant and Offender).

Although at first glance, the most frequent relationship between complainant and offender appeared to be that of "friend/acquaintance", with 12 (20.33%) of the complainants falling within this classification, by collapsing all categories wherein the complainant and accused were related by blood or marriage (son, daughter, sister, neice, stepmother, wife, cousin, distant relation) the most frequent relationship between the victims and the offender sample is relationship by blood or marriage. Nineteen (32.20%) of the 59 victims were related to their offender by blood or marriage. Similarly, by adding the categories son, daughter and niece to the "fiduciary relationship and loco parentis" category, the assaults

of at least 15 (24.52%) complainants involved a breach of trust. Interestingly, only five (8.47%) of the 59 victims were complete strangers to their assaulters with at least 33 (55.93%) of the complainant's having had some form of contact with the offender prior to the assault. Prior contact between a sexual assault offender and victim, particularly prior contact that is of a consensual sexual nature, may be a significant factor in sentencing as discussed in relation to Offender 42, at p.2:

> I therefore have entered a conviction under section 246.1 of the Code, but classify this particular act of the accused as a less serious matter than I might otherwise consider such an assault, because the accused had had previous contact with the victim . . . .

The "Vulnerability" of the Victim

One of the more striking elements that applied to most, if not all, of the sexual assault offences committed by the offender sample was the "vulnerability" of the complainants who were assaulted. In almost all instances, whether because of age, physical size, physical availability to the accused (as in the case of incest), physical disability or infirmity, state of unconsciousness (as in the case of both the sleeping and intoxicated complainant) or as a function of the individual circumstances of the complainant (such as living alone), the complainant was either physically or emotionally vulnerable to the offender (Offenders 1, 4, 6, 8, 10, 11, 12, 25, 34, 40, 44, 51, 57). Indeed, as discussed below, one of the more frequent circumstances, occurring in at least nine (14.51%) of the 62 offences, involved complainants who were assaulted by the accused when they were asleep whether alone, beside their spouse or with others present in the dwelling.

The "vulnerability of the victim" dynamic is illustrated in the following excerpts:

> The facts of the case were somewhat bizarre in that the victim was a very, very elderly lady, semi-paralyzed, and in her own words, "half dead". She came to Court by ambulance . . . Such an elderly and infirmed lady is clearly entitled to the law's protection (Offender 1, p. 2);

> The accused entered clandestinely into the young lady's home where she lived alone . . . She is a young lady whom he did not know and had not met. He then brutally and with considerable force subdued her and strangled her to the point of seriously abraising and injuring her neck (Offender 11, p.3);

> The Crown points out that the victim was a helpless victim, in that she was just nine-years-old; and I concur (Offender 12, p.4);

> The accused . . . while intoxicated, had intercourse with the woman in question who was herself intoxicated and unaware of what was happening . . . (Offender 34, p.2);

> There was no substantial violence used, but the accused did struggle with the victim sufficiently to ensure that she, as a crippled girl who requires crutches, was not able to get away from him during this ordeal (Offender 44, p.2);

> In this instance, of course, there is that additional problem where the 15 year old victim was afraid of the accused and was available to him because of the special circumstances in which he found himself relating to his stepdaughter (Offender 51, p. 7).

Reporting the Sexual Assault

For the majority (64.52%) of the sexual assault offences committed by the offender sample, or 40 of the 62 offences, how the offence came to the attention of the police was not specified within the context of the sentencing transcript. For the remaining 22 offences, 11.29% of the offences were reported to the police directly by the complainant; 6.45% of the offences were reported to the police by a friend or relative of the complainant; and, 17.74% of the offences were reported to the police by a third party.[24]

Toward A Profile of Sexual Assault Offences in the Northwest Territories

It is extraordinarily difficult to "type" any of the sexual assault offences committed by the offender sample into discrete or mutually exclusive categories for at least two reasons. First, the researcher accepts that the offences committed by the offender sample differ substantively from one offence to the next and to this extent defy quantification into "neat" categories. Indeed, the construction of a typology may obscure more than it reveals about the offences committed by the offender sample. Second, the specific dynamics of each offence may qualify it for

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[24]The term "third party" is used to designate the intervention of a social service agency (social worker, probation officer, or nurse) who reported the offence to the police. Third party intervention includes, however, those instances where the offence came to the attention of other individuals during the course of the offence who in turn notified the police. There were a number of instances, for example, where individuals other than the victim and offender became aware of the offence either by "walking in" on the assault, or by "over-hearing" the assault while it was in progress. The "relative/friend" designation canvasses those instances where either a parent or other family member notified the police on behalf of the complainant who, in many instances, was too young to contact the police on their own behalf.

classification in more than one category. The offence committed by Offender 22, for example, may be classified as both a "sleeping complainant sexual assault" and as "incest" given that the complainant was both asleep at the time of the sexual assault and the niece of the accused. Accordingly, the following profile of some of the outstanding commonalities between some of the sexual assault offences committed by the offender sample should not be interpreted as a "fixed", "discrete", or "mutually exclusive" classification scheme. Nor should the profile be considered as "exhaustive" as there are at least six of the 62 offences which could not be classified within the profile provided below (Offenders 10, 12, 37, 41, 46 and 52).[25]

"The Incestuous Sexual Assault"

As supported by the findings on the relationship between the complainant and offender, the most frequent "type" of sexual assault offence committed by the offender sample was that involving an assault by an offender who was either related in some way to the victim or in a position of trust or loco parentis to the victim. At least twenty-three (37.09%) of the 62 offences committed by the offender sample can be described as "the incestuous sexual assault offence" (Offenders 2, 4, 5, 7, 13, 15, 16, 30, 35, 36, 39, 44, 45, 49, 51, 53, 54, 55, 56).[26]

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[25]See also Lindsey-Peck (1985:21-50) who delineates four "types" or classifications of sexual assault behavior that can be applied to the Northwest Territories context, inclusive of the "Exceptional Aggravating or Mitigating Factor Sexual Assault"; the "Stark Terror Sexual Assault"; the "Minimal Sexual Assault"; and, the "Acquaintance Sexual Assault".

[26]The "incestuous sexual assault offence" reflects three offenders in the sample who committed multiple charges/offences of sexual assault. Offender 7 was sentenced for two charges of sexual assault involving the same victim; Offender 45 was

The "incestuous" sexual assault offence, used to denote incest/loco parentis/breach of trust, varies widely on a number of dimensions including the nature of the specific relationship between offender and victim which ranged from father-daughter incest to breach of trust by a trusted family friend. There is no apparent consistency in the type of sexual contact involved in the "incestuous" sexual assault offence, the assaults ranging from one act of touching to multiple acts of sexual intercourse. And, there is no apparent consistency in the length of time subsumed by the "incestuous" sexual assault offence, some offences a one-time incident and others ongoing for a period of months or years. Perhaps the one generality that can be said of this offence profile is that the victims of the offence tend to be both younger children and adolescents. Thus, the adult/child dichotomy is the more frequent age differential between offender and complainant for the "incestuous" sexual assault.

The following excerpts exemplify some of the dynamics associated with the "incestuous sexual assault" offences committed by the offender sample:

> [The accused] appears before the Court admitting to two sexual assaults occurring on the 18th of February and the 21st of February, where on both occasions he was in an intoxicated state and used force to be involved with sexual activities with his sister, who was a 20 year old person living with him in the same apartment . . . (Offender 7, p.2);

> . . . the father of the adopted victim, now a twelve year old boy, began having minor sexual contact with his adopted son when he was about six years of age. For a number of years sexual interest and

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sentenced for three charges of sexual assault involving the same victim; and, Offender 56 was sentenced for two charges of sexual assault involving two victims who were sexually assaulted together on two separate occasions.

minor harassment occurred with no overt acts, until 1984 when in the month of July the accused sexually fondled the boy, using persuasion but no force. The relationship ended when the boy reported the activity to the police (Offender 16, p.1);

Briefly, the facts involve [the accused] attempting sexual intercourse on a child, a four-year old child . . . This little girl looked up and found the accused virtually climbing onto her for sexual gratification. It is obvious from the facts . . . that there was some penetration . . . I am prepared to find that the young girl contracted gonorrhoea from the accused . . . the aggravating factors in this case are that, firstly, [the accused] was in Loco Parentis with the child . . . (Offender 30, pp. 2-3,4);

The facts as accepted indicate that while at the accused's residence a seven year old young lady of the same surname entered his bedroom, and he then took off her pants and panties and his own pants and laid on top of her, to the extent that he was pretending to have sex, and finally ejaculated on this young girl. There was no penetration and no efforts at penetration . . . . (Offender 35, p.2);

There has been a breach of trust, a sexual assault, the girl was only 7 years old, and there was some sort of physical tear, which was bodily harm in some form (Offender 39, p.2);

[The accused] appears before the Court admitting that . . . he observed a seventeen year old cousin who was going to her home early in the morning and invited her to visit him, but when she refused she went to her house . . . She heard somebody then come in the other door . . . the accused approached her and for a couple of hours assaulted her to the extent that he warned her not to make any noise and he attempted to touch her and remove her panties (Offender 44, p.2);

Over a period of a couple of months . . . the accused went into the room of his [ninteen year old] daughter and closed the door and fondled her breasts and attempted to touch her private parts . . . The accused . . . had been convicted two years ago of a similar offence and was required to serve six months in jail (Offender 55, p.2).

"The Social Situation Acquaintance Sexual Assault"

Encompassing situations wherein the complainant and accused were "acquainted" or "knew each other" prior to the sexual assault offence, with at least two of the offenders (Offenders 38 and 42) in the sample having had prior consensual sexual relations with their victims, at least nine (14.51%) of the 62 offences committed by the offender sample can be described as "acquaintance rape" (Offenders 1, 26, 29, 33, 38, 40, 42, 48, 57). The dynamics of the "acquaintance rape" sexual assault offence include instances both where the offender was an invited guest into the complainant's home with forcible sexual intercourse subsequently taking place, and instances where the offender and complainant were at some form of social gathering or event (house party/dance) immediately preceding the attempted or completed forcible sexual intercourse. The victims of this offence tend to be young adult women and adolescents and it is not unusual for alcohol to have been consumed by both offender and victim.[27]

The following excerpts exemplify some of the dynamics associated with the "social situation acquaintance sexual assault" offences committed by the offender sample:

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[27]See also Lindsey-Peck (1985:41-47) who similarly identifies the "Acquaintance Sexual Assault". The three outstanding dynamics of this "type" of sexual assault, according to Lindsey-Peck (1985:41) are minimal violence, joint intoxication of offender and complainant, and prior acquaintance between offender and complainant. In contrast to the findings of the present study, however, Lindsey-Peck (1985) asserts that the acquaintance sexual assault is the most frequent "type" of sexual assault in the Northwest Territories.

Reviewing the circumstances of the offence, it is to be noted that there was alcohol involved although the degree of intoxication is not clear, and also that the accused had picked up [the complainant] and other girls in his truck at some time between 5.00 and 7.00 a.m. . . . While it is not clear exactly what occurred during the time they were together, it appears that the accused and [the complainant] ended up in the truck, and that he then attempted to have . . . sexual intercourse with her without her consent . . . He struck several blows to the victim who suffered a broken nose and certain cuts . . . (Offender 29, p.2);

The facts of the incident . . . were that the accused and his friends . . . just returned from a period of hunting and trapping in the bush, back to town with his friends and with a group of young girls in his community . . . Some exchange of cigarettes, the girls were invited into the home of the young men. The young men provided the young girls with alcohol, they all drank alcohol . . . During the course of the party . . . some of the young ladies were sexually assaulted by the accused, specifically the complainant in the case (Offender 33, p.2);

There was a disagreement as to exactly what happened . . . I am satisfied from what has been admitted by [the accused], and as well as what was proven that he went into this young girl's room. He tied her wrists, pulled her pants down, and commenced to have sexual intercourse with her. She shouted out and her actions were incompatible with any conclusion other than that she didn't want to do this . . . Now, the presentence report goes on to say that [the accused and complainant] had had sexual relations in the past, and that up to the 20th of July she had been a willing participant (Offender 38, pp.6-7);

There was a Christmas party. The evidence is clear that there was a great deal of drinking. It was a boisterous party . . . [The accused] beckoned her to dance. She agreed to dance with him; but that ended her willingness to participate . . . The difficulty began when he persisted in pursuing his own desires despite her protests . . . . (Offender 40, pp.4-5);

. . . the accused invited a fifteen-year-old girl to his house where there were others to listen to some music. She went to a bedroom and was listening to recorded music when approached by another person whom she had discouraged from advances. Later, the accused then attended at the same room and with force, and with some degree of

> struggling, after locking the door had commenced to have intercourse with the victim, at which time she was crying but was not observed by others in the house or those who had left the premises. The accused for a very short period of time had continued to have intercourse with her, but after observing that she was crying discontinued his acts at the time, left her, and she dressed and left the residence (Offender 48, p.4).[29]

"The Sleeping Complainant Sexual Assault"

One of the more common features associated with the sexual assault offences committed by the offender sample pertains to the state of the complainant at the time of the offence insofar as the complainant was asleep, intoxicated and has "passed out" at the time of the assault and generally (or at least initially) unaware of what was happening. The "sleeping complainant" sexual assault offence was one of the more frequent types of sexual assault offence committed by the offender sample with at least nine (14.51%) of the 62 offences involving a sleeping complainant (Offenders 3, 6, 17, 18, 21, 22, 24, 27, 32) and an additional two (3.22%) of the 62 offences involving an intoxicated complainant (Offenders 34 and 43).

Generally speaking, this "type" of assault involves an accused who "comes across" (either as an invited or uninvited guest to a private residence or dwelling house) a "sleeping", "intoxicated" or "passed out" complainant and spontaneously commences to sexually assault the complainant whether by touching, fondling,

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[29]Offender 48 was sentenced for the commission of two distinct sexual assault offences, namely a section 246.1 offence and a section 246.2 offence. Because each of these two offences involved distinct victims and divergent dynamics, each offence was treated separately for the purpose of the "offence profile".

attempted or forcible sexual intercourse. Interestingly, the "sleeping complainant" is not always alone, other individuals being present in the room or dwelling at the time of the assault. The victims of this "type" of offence tend to be adult women or older adolescents and this type of offence may involve, but is not exclusive to, the complainant who is intoxicated and/or has "passed out" as a result of consuming alcohol. This "type" of offence includes instances where the complainant is an invited guest into the accused's home and where the accused is an invited guest into the complainant's home, although more frequently this "type" of offence involves the offender surreptitiously entering the complainant's home while she is asleep.

The following excerpts exemplify some of the dynamics associated with the "sleeping complainant sexual assault" offences committed by the offender sample:

> It's not as though the circumstances of this case are totally novel, this court has run into them in the past on a few occasions . . . He went to this woman's house, believing that her husband was out on the land, went into her bedroom, fondled her breasts, at which point she woke up, and the assault was discontinued (Offender 6, p.2);

> It is enough, I think, to notice that in each case, a woman had fallen asleep in the house of the accused person, that he had been drinking and the victim had been drinking, and that the woman in each case was sexually assaulted by the accused when she was to all intents and purposes, alone (Offender 17, p.2);[29]

[29]Offender 17 was sentenced for the commission of two sexual offences, rape and sexual assault. For the purposes of the present analysis, which is restricted to the sexual assault provisions of the Criminal Code, the rape offence was discounted.

> The victim of the assault . . . had gone to a house to visit a girlfriend. When she found her friend was not at home . . . she went to the friend's bedroom and laid down on the bed, fully clothed, wearing jeans, and went to sleep. About two hours later, the accused arrived at the house, drunk. He entered the bedroom and barricaded the door with a bureau. He then lay on top of [the complainant], and began . . . undoing her pants. She woke up and resisted him . . . She continued to resist violently and yelled for help . . . At this point, someone else from the house ran to the RCMP detachment to report the assault, and the police responded immediately . . . . (Offender 24, p.1);

> [The accused] appears before the Court admitting that when he had been drinking . . . he went to the residence of [the complainant] and put his hand and finger between her legs while she was in bed, and by doing so awakened her when he was sexually assaulting her in that way. Immediately upon being told to leave the bedroom he did so without saying a word . . . (Offender 32, p.2);

> The accused . . . while intoxicated, had intercourse with the woman in question, who was herself intoxicated and unaware of what was happening, the accused undressing her sufficiently for his purpose but not using any weapon or causing any physical injury to her or indeed . . . disturbing her composure at the time. However, what he did evidently disturbed the other occupants of the house, who reported it to the police . . . (Offender 34, p.2).

"The Exceptional Violence Sexual Assault"

Some of the offences committed by the sample are perhaps best classified as the "exceptionally violent sexual assault" or, as referred to by Lindsey-Peck (1985:22), the "Stark Terror Sexual Assault",[30] involving either the

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[30]Lindsey-Peck (1985:29) defines the "Stark Terror Sexual Assault" as inclusive of that "form of behavior which may also be classified as aggravated sexual assault". She further suggests that this "type" of sexual assault offence may involve the use of weapons, forcible confinment or abduction, and break and enter. As Lindsey-Peck (1985:29) states:

> When picturing a 'rape', the common image is a young woman being

surreptitious entry of an adult female complainant's home and subsequent "brutal" rape of the victim or the child victim who is, in essence, "grabbed off the street" and forced into the offender's home or into the bushes and subsequently sexually assaulted. Frequently, these types of sexual assault involve multiple sexual acts as well as the confinement of the complainant for a period of hours. Each of these types of sexual assault also tend to involve an offender who is a stranger to the victim. As suggested by its nominal classification, this type of offence involves considerable physical force, either by way of threats or the physical subjugation of the victim, and may involve an offender who attempts to disguise himself in some manner. The offender, in this type of offence, tends to be severely intoxicated at the time of the offence. With regard to the offences committed by the sample of offenders, at least nine (14.51%) of the offences can be described as the "exceptionally violent sexual assault" (Offenders 9, 11, 14, 20, 25, 31, 47, 48, 50).

The following excerpts exemplify some of the dynamics associated with the "exceptional violence sexual assault" offences committed by the offender sample:

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assaulted as she walks down a lonely and deserted street, or being accosted in her bedroom late at night. There is the assumption that such a scenario is the most harmful or traumatizing to the victim, which may or may not be a factor to be considered when sentencing the offender.

According to Lindsey-Peck (1985), the "Stark Terror Sexual Assault" is extremely rare in the Northwest Territories and that those offences in the Northwest Territories that might be classified as this "type" of sexual assault are generally less violent than their "southern" counterpart. The dynamics of this type of offence identified by Lindsey-Peck (1985) include extreme intoxication on the part of the offender, a lack of premeditation, and minimal violence because of the docility or compliance of the victim.

On the 25th of August, 1985, in Cape Dorset . . . the accused returned to his residence after a night of drinking. He changed his clothing, putting on a winter jacket, with a hood covering his face, and took a large kitchen knife. A short time later, the accused went to the residence of the victim . . . She was alone . . . The victim had left the hall light on in the house. She noticed that the hall light went out, and she heard a noise. She got up immediately and looked out of her bedroom door. The accused was standing at the doorway, with a knife in his right hand. The accused had a hood pulled around his face, and the victim could see only his eyes . . . The accused entered the bedroom, grabbed the victim and a struggle ensued . . . The accused laid on the victim, his pants undone to just below his knees. The act of sexual intercourse took place . . . Sexual intercourse took place again . . . The accused then asked the victim to perform an act of fellatio, to which she refused. He then pulled her hair, grabbed onto the knife, and told her to perform . . . an act of fellatio took place, followed by an act of sexual intercourse (Offender 9, pp.2-4);

On June 3rd, of this year, at about 8:15 in the morning, the victim . . . a young girl age 9 at that time, was on her way to school in Hay River, with her six-year-old brother, when she was approached by the accused, a man of twenty-four years who appears to be physically well set up, but was described . . . as being someone in the lower range of normal intelligence. The accused ordered the young boy to go on to school, and stayed with the girl who was carrying her lunch kit. This the accused threw into the bushes making her cry. He then went into the bushes and retrieved the lunch kit for her, following which he forcibly took her into the bushes and forcibly had sexual intercourse with her. . . They then went together to another place in the vicinity of the fish plant, where he once again had sexual intercourse with the child . . . and then took her to a trailer . . . a short distance away, and that he there on a third occasion had sexual intercourse with her. I understand she screamed on this and the previous occasions; that he told her to be quiet; that he at this point let her go . . . (Offender 14, pp.2-3);

We are concerned here with a sexual assault of a 13 year old child who had no way of resisting your advances and the force that you brought to bear on her . . . The complainant . . . was seized physically, the door was locked by you and she was carried bodily into the bedroom. Her clothing was removed. She was held by the neck. She was threatened that she would be killed if she cried out . . . and there is evidence as well that she was assaulted in some way at least in the region of the vagina (Offender 25, pp.2-3);

> The offence took place at about 7:30 p.m., or after dark, on Novermber 5th . . . The girl was walking home alone . . . when she met the offender on the road. Attempting to pass by him she found herself seized by the offender, who placed his gloved hand over her mouth, nose and eyes. Her screams . . . apparently went unheard. He dragged her from the road . . . to an empty lot. At some point she either fell or was pushed to the ground, where the offender held her as he unzipped her parka and ski pants. Reaching inside her pants and underpants, the offender inserted a finger into her anus. According to the girl, he kept it there for about half a minute, then telling her: "If I was an animal, I would have done it to you" (Offender 31, pp. 2-3);

> On October 30th, 1985, while the accused was on an undertaking from the first offence, had entered a residence in the early morning at approximately 5:00 a.m. while the husband and the victim and a child were asleep, to be observed at the foot of the bed by the victim . . . Upon arousing her husband, the husband inquired from the accused what he wanted, since the accused had in his possession two rifles, and with threats and demands the accused had the wife come out to the other room where he by using -- or having available -- one of the rifles and continuing to have it available and pointing it at times had forced her to have sex on the floor before he told her that he intended to use the rifles to kill himself, at which time he left the premises (Offender 48, p.4).

"Sexual Assault in the Presence of a Third Party"

One of the more "bizarre" types of sexual assault offence committed by the offender sample are offences in which there was a "third party" present during the assault, with particular reference to the presence of the offender's wife during the course of the assault. At least four (6.45%) of the offences committed by the offender sample were committed in the "presence of a third party" (Offenders 8, 19, 23, and 28). Three of these offences were committed with either the knowledge, presence or assistance of the wife of the offender, with one of the "wives" convicted with her husband for her role in the sexual assault of her daughter

(Offender 23). An additional offence was committed in the presence of an eleven-year-old girl (Offender 6).

The following excerpts exemplify some of the dynamics associated with the "sexual assault in the presence of a third party" offences committed by the offender sample:

> . . . the facts of the offence, which reveal that the accused, aged twenty-four, forced a girl of fourteen to have sexual intercourse in the presence of another (eleven year old) girl, after attacking his victim with physical violence when she refused to submit willingly. This occured at three o'clock in the early morning, the accused having wakened the girls from their sleep (Offender 8, p.3);

> [The complainant] is a 15-year-old sister-in-law of the accused who was around the residence of the accused on various occasions as babysitter and visitor and on the date in question the accused was drinking and forced [the complainant] to go to the bedroom while his wife was present, at which time he forced [the complainant] to take some drinks of alcohol, indicating that if she did not obey he would get mad . . . As time went on he became more angry at both the victim and his wife, who was present. He swung his fist at his wife and began feeling the legs and private parts of the 15-year-old sister-in-law whose pants and panties he had removed before placing his fingers in her vagina and touching her breasts, and then having intercourse with her in the presence of his wife. He kept the 15-year-old in the room while he required his wife to bring coffee to him and to light cigarettes . . . The sister-in-law had indicated that she only wished to leave the premises but she was retained for some number of hours and on three further occasions the accused forced himself upon her and had intercourse three more times (Offender 19, pp.6-7);

> On January second, this year, [the accused and accused's wife] received a liquor order, in the usual way . . . It contained twenty-six ounces of Southern Comfort . . . forty ounces of gin, and twenty-six ounces of wine. They drank this, sharing it with friends. They became intoxicated. When [the complainant] came home at midnight, she had a small child with her, which she settled to sleep . . . At three in the morning, [the accused's wife] came out of the bedroom . . . and told [the complainant] to go into the bedroom . . . [The accused] then made sexual advances at [the complainant], being

> encouraged to do this by [the accused's wife]. [The accused's wife] told [the complainant] to stay in the bedroom and have an affair with [the accused]. Up to that point, no physical force was used, but it is clear that [the complainant] had done nothing to encourage [the accused] or [the accused's wife] or to make them think that [the complainant] wanted or would be willing to have sexual intercourse with [the accused] . . . He began to take her clothes off while she tried to stop him. At this point, [the accused] used force, helped by [his wife]. He removed [the complainant's] clothes, in spite of her resistance . . . [The accused] then, helped by [his wife], forced [the complainant] to have sexual intercourse with him (Offender 23, pp. 3-4);

> The facts . . . are simple enough. The sexual assault on [the complainant] was done by main force when she was seized and pulled into [the accused's] house where the wife was present. [The accused] sent her away and pulled [the complainant] into the bedroom in spite of her struggles and forced himself on her. He then threatened her so that she wouldn't tell on him. This was a despicable and cowardly use of force against a weaker person, who was helpless against him (Offender 28, p. 6).

Conclusion

In brief, the findings on the sexual assault offences committed by the offender sample can be summarized as follows. With few exceptions, the offender sample were convicted and sentenced for the commission of one sexual assault simpliciter offence. And, with the exception of one offence, all offences were committed by an offender who was acting alone. There was some fluctuation in the consistency with which the offender sample committed their offence(s) in the same community identified as their "usual living address", with at least 12 (21.05%) offenders committing the sexual assault offence(s) in a community other than that identified as their "usual living address". The greatest fluctuation between "offence location" and "usual living address" was reflected in the communities of Frobisher Bay and Cape Dorset, the former showing an increase, and the latter a

decrease in the number of offences committed by the offender sample relative to their usual living address.

Regarding the specific dynamics of the sexual assault offences committed by the offender sample, the vast majority of offences (85.48%) were committed in the seclusion of a private residence or dwelling (and in one instance a vehicle) with very few offences committed out-of-doors. The largest percentage (37.09%) of the offences involved forcible sexual intercourse, although a significant proportion of the offences (27.41%) were restricted to fondling or touching. The majority of offences (54.83%) committed by the offender sample consisted of an isolated incident and singular sexual act. Although weapons were used infrequently during the commission of the offences, with only 5 (8.06%) of 62 offences involving the threat or use of a weapon, violence and injury were involved in an approximate one-half of the offences. Some degree of violence was specified in 53.22% of the offences and some degree of injury to the complainant for 48.38% of the offences. Similarly, alcohol and/or intoxicants played a role in the majority of offences with 64.51% of all offences involving the consumption of alcohol/intoxicants by the offender and/or victim. While a majority of the offences (56.45%) were terminated because they were, in effect, complete, a significant proportion of the offences (32.25%) were discontinued either voluntarily by the offender or because of some form of intervention during the course of the assault.

All of the victims of the sexual assault offences committed by the offender sample, with the exception of one, were female and almost one-half of the victims (47.44%) were aged 18 years or less at the time of the assault. A significant proportion of the victims (44.06%) were related to their offender by blood or

marriage. A common element between most, if not all, of the victims of the sexual assault offences was their vulnerability, either physical or emotional, to the assault.

Profiling some of the commonalities between the offences committed by the offender sample, it was found that the "incestuous sexual assault" was the most frequent "type" of offence committed by the offender sample with at least 23 (37.09%) of 62 offences falling within this classification. The "social situation acquaintance sexual assault", the "sleeping complainant sexual assault", and the "violent stranger sexual assault" were equally distributed, each reflecting nine (14.51%) of 62 offences. The more unusual "sexual assault in the presence of a third party" was relatively infrequent occurring in only four (6.45%) of 62 offences. As the "types" of offences forwarded were not meant to be discrete, mutually exclusive or exhaustive, at least six (9.67%) of the 62 offences did not fit any of the profferred classifications.

As suggested at the outset of this chapter, "all of the circumstances relating to the offence and to the offender" are relevant to the judicial assessment of a "fit and proper" sentence. As stated by Marshall, S.C.J., in relation to Offender 1, at pp.3-4:

> It seems in consideration that the sentence in any case must, above all, fit the circumstances, all the circumstances of the particular situation before the Court. It is only by careful consideration of all the circumstances that the application of a fit and fair sentence can be given, and that is the Court's function.

The manner in which "all of the circumstances relating to the offender and the offence" are weighed in the judicial assessment of a fit and proper sentence for the offender sample is the subject matter of Chapter V - Sentencing the Sexual Assault Offender.

CHAPTER V

SENTENCING THE SEXUAL ASSAULT OFFENDER

Introduction

In this chapter, information on the offender and the offence is drawn together within the legal framework for sentencing in Canada (as defined by the relevant provisions of the Canadian Criminal Code, appellate court direction, and the established principles of sentencing) to assess the question - what effect do the extraordinary geographic and demographic requirements of the Northwest Territories have on the criminal sentencing process. As stated by de Weerdt, S.C.J., in referring to the sentencing options available to the court for section 246.1 offences:

> In order to determine a proper and fitting sentence, the Court must consider these various options in the light of all the circumstances of the offence and also the circumstances of the offender. A great many different kinds of behavior resulting in greater or lesser degrees of harm to society and to the victim or victims, may constitute a sexual assault. It is therefore important to identify the kind of sexual assault in question, and to bear in mind its actual or potential consequences for society and the victim or victims of the offence. It is also important to consider the characteristics of the offender, for human beings can and do vary greatly from one individual to the next in many respects, as we know all too well, in such a culturally diverse and dynamic part of Canada as the Northwest Territories. The offender, like the victim, and the offence itself, cannot be viewed in isolation. These matters must all be considered in their legal, social, cultural and historical context (Offender 20, pp.2-3).

As noted in the preceding chapter, all of the offenders in the sample were both convicted and sentenced for the commission of at least one sexual assault

offence contrary to section 246.1, 246.2, or 246.3 of the Canadian Criminal Code (since revised). The 57 offenders in the sample represent 57 individual sentencing decisions of the Territorial and Supreme Courts of the Northwest Territories, 32 of the offenders sentenced by the Supreme Court and 25 of the offenders sentenced by the Territorial Court.[1] The 57 offenders were sentenced by 11 resident and deputy judges, 51 (89.47%) offenders sentenced by resident judges in the Northwest Territories and six (10.52%) of the offenders in the sample sentenced by deputy judges. The number of offenders sentenced per judge varied from one to 14 (see Appendix D: Sentencing Judge Relative to Offender Sample).

To the extent that a greater proportion of the offenders in the sample were sentenced by the Supreme Court rather than the Territorial Court and that the number of sentencing decisions rendered per judge are not equally weighted, the generalizeability of findings may be circumscribed.

The Trial Process

The location of the sentencing hearing is significant because the Territorial, and to a lesser degree the Supreme, courts in the Northwest Territories continue

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[1]The discrepancy between the number of Supreme and Territorial Court sentencing decisions may be due, in part, to the differing transcription practices of each level of court. With more time at its disposal, it is the practice of the Supreme Court to transcribe all sentencing decisions involving a period of incarceration. In contrast, the Territorial Court, with less time at its disposal, transcribes only those decisions from which an appeal is anticipated (Personal Communication with Mr. Justice de Weerdt and His Honor, Judge R. Michel Bourassa 1986). The discrepancy in numbers, however, may also be due to the differing jurisdiction of each level of court, the Supreme Court generally having broader jurisdiction with respect to the adjudication (and hence sentencing) of indictable sexual assault offences.

to operate on the basis of a circuit court system of justice delivery (Delisle 1983; Lindsey-Peck 1985; Griffiths 1985; Griffiths and Patenaude 1988).[2]

The 57 offenders in the sample were sentenced in 21 of the approximate 63 communities in the Northwest Territories (Griffiths and Patenaude 1988). Examining the consistency with which the offender sample were sentenced in the same community in which they committed their offence(s), Yellowknife reflected the most substantial (and only) increase in the number of offenders sentenced, as compared to the number of offenders committing their offence(s), in this community. Whereas five (8.77%) offenders committed their offence in Yellowknife, 18 (31.57%) offenders were sentenced in this community. A decrease in the number of offenders sentenced in the community, as compared to their offence location, was reflected in an additional 13 communities (see Appendix L: A Comparison of Offence and Sentencing Location).

The fluctuation in offence and sentencing location is restricted to 14 (24.56%) offenders. A significant proportion of the offender sample, 43 (75.43%) of 57 offenders, were sentenced in the same community as that in which they committed their offence(s). The Territorial Court sentenced 22 (88.00%) of 25 offenders in the same community in which the offence was committed, with three (12.00%) of 25 offenders sentenced in a community other than that in which the offence was committed. The Supreme Court, on the other hand, sentenced 21 (65.62%) of 32 offenders in the same community in which the offence was committed,

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[2]As suggested in Griffiths (1985:1.5), "40-50 communities are serviced by both territorial and Supreme Court judges travelling on six circuits".

with 11 (34.37%) of 32 offenders sentenced in a community other than that in which the offence was committed.

In part as a function of the system of circuit court justice delivery, the courts in the Northwest Territories have been criticized for case delay, or the time lapse in bringing an offender to trial (Griffiths and Patenaude 1988). Examining the amount of time elapsing between the commission of the sexual assault offence(s) (controlled for most recent charge/offence if more than one charge/offence of sexual assault was committed or if the sexual assault was part of "an ongiong pattern of behavior"), a rough estimate of the number of months elapsing between offence commission and disposition date was established for 38 (66.66%) of 57 offenders in the sample. The assessment of time lapse between offence commission and sentencing was proscribed for the remaining 19 (33.33%) offenders because of missing or incomplete data. The number of months elapsing between the commission of the offence and the date on which disposition was rendered ranged from one to 16 months for the offender sample, with a mean average of 6.84 months, a mode of four months, and median of six months elapsing between offence commission and sentence.[3] The majority of offenders for whom "sentencing delay" was calculable, 25 (65.78%) of 38 offenders, were sentenced within eight months or less from the date on which the offence(s) was committed (see Appendix M: Time Lapse Between Offence Commission and Sentence).

[3]Although there is one offender in the sample who committed the offence some three years previous to the date on which sentence was rendered, the time lapse was calculated as one year reflecting the actual amount of time elapsing between offence disclosure and adjudication.

Although the Territorial and Supreme Courts of the Northwest Territories have been criticized for delay in the trial and sentencing process (see Griffiths and Patenaude 1988), the delay between the commission of an offence and trial and sentencing is not necessarily a function of the court schedule or the system of circuit court justice delivery as evidenced by the findings of the study. In at least one instance relative to the offender sample (Offender 25), the offence was not disclosed by the complainant for some two years after it had been committed with a further year elapsing between offence disclosure and sentencing. And in yet another instance (Offender 9), the approximate nine month delay between offence commission and sentencing was at least partially attributable to the removal of the offender from the Northwest Territories to Alberta for a psychiatric assessment because no mental health resources of this type were available in the Northwest Territories at the time.

All 57 of the transcribed sentencing decisions reflect sentencing hearings at which both Crown and Defence Counsel were present. Thus, all of the 57 offenders in the sample were represented by counsel at the time of sentencing.

Notwithstanding representation by counsel, the majority of the offenders in the sample (70.17%) pleaded guilty to the sexual assault offence(s) confirming previous assertions that a large number of offenders in the Northwest Territories pleaded guilty (see Finkler 1976). In contrast, nine (15.78%) offenders entered a plea of not guilty and were subsequently found guilty at trial. Plea datum was not provided for eight (14.03%) offenders. For the 40 offenders who pleaded guilty there was substantial variation in <u>when</u> the plea was entered, with some offenders pleading guilty at the first instance and others initially electing trial by judge

alone or judge and jury and subsequently changing their plea at the last moment. For the nine offenders who pleaded not guilty, five offenders chose to be tried by judge and jury, two offenders chose to be tried by judge alone, and the type of trial was not specified for the remaining two offenders.

Information on the preliminary hearing for the offender sample is scant, with preliminary hearing datum specified for only eight (14.03%) of 57 offenders. For the eight offenders for whom datum was provided, three had a preliminary hearing and five waived their right to a preliminary hearing through their early entry of a guilty plea.

Remand information was specified for 23 (40.35%) of the offender sample but not for the remaining 34 (59.64%) offenders. For the 23 offenders for whom remand datum was provided, the amount of time that offenders were remanded to custody ranged from 24 hours to nine months. Omitting the one offender who was remanded to custody for 24 hours, the mean average length of time spent in custody for the remaining 22 offenders was 3.6 months, the median three months and the mode two months. A majority of the 23 offenders remanded to custody, 13 or 56.50%, spent three months or less in custody (see Appendix N: Time Spent in Custody).

As noted below, the plea entered by the accused and the amount of time spent in custody are important variables in the judicial assessment of sentence, the former as a mitigating factor and the latter in calculation of sentence length.[4]

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[4]For a discussion of the effect of an early entry of a plea of guilty, see R. v. Sandercock (1985), 40 Alta. L.R. (2d) 265 (Alta.C.A.); for elaboration of the so-called "remand rule of thumb" in the Northwest Territories, see R. v. Peter, Shaqu and Ashoona, [1985] N.W.T.R. 12 (N.W.T.Terr.Ct.).

Although psychiatric reports were provided in evidence for 15 (28.07%) offenders (Offenders 4, 5, 8, 9, 12,, 14, 16, 18, 20, 21, 35, 36, 41, 46, 50, 52), the issue of "fitness to stand trial" was directly addressed by the court in relation to only four offenders. The "fitness" assessment in relation to these four offenders (representing 7.01% of the offender sample) can be briefly summarized as follows: (1) characterized by the psychiatrist as having "antisocial personality traits" compounded by his abuse of alcohol, Offender 14 was was found "fit" to stand trial; (2) characterized by the psychiatrist as not suffering from mental illness or psychosis on a regular basis but exhibiting strange psychotic symptoms when drinking, Offender 18 was found "fit" to stand trial; (3) characterized by the psychiatrist as having an abnormal mentality with recommendations for further treatment, Offender 20 was found "fit" to stand trial; (4) characterized in sentencing submissions as having low intellectual ability and a "personality disorder" stemming from the abuse of intoxicants, Offender 21 was found "fit" to stand trial.

The Sentence

A discussion of the sentences imposed by the Territorial and Supreme Courts of the Northwest Territories relative to the sexual assault offences committed by the offender sample must be prefaced with some general comments. Prima facie, the judiciary are granted broad discretionary powers in matters of sentencing by the Criminal Code. Although the sexual assault provisions of the Code provide for maximal sentences of imprisonment (a Section 246.1 offence, if proceeded by indictment, is punishable by a maximum penalty of 10 years imprisonment; a Section 246.2 offence is punishable by a maximum penalty of 14

years imprisonment; and, a Section 246.3 offence is punishable by a maximum penalty of life imprisonment), these provisions do not provide for minimal sentences. Thus, depending on the penalty provisions of the Code relative to the specific offence and judicial precedent, the sentencing judge generally is given wide latitude in determining both the type and length of disposition to be imposed (Hogarth 1971; Ruby 1976; Nadin-Davis 1982; Lindsey-Peck 1985; Canadian Sentencing Commission 1987; Griffiths and Verdun-Jones 1989).

As intimated, however, the sentencing discretion of the courts in relation to sexual assault offences is not unfetterred. Generally, the sentencing options available for offences contrary to the sexual assault provisions of the Code include imprisonment, with or without a fine; an absolute or conditional discharge; or a suspended sentence "subject to the conditions of probation" (Offender 8). As well, the courts in the Northwest Territories (as in other Canadian jurisdictions) are bound by judicial precedent.[5] In the Northwest Territories there are at least two "rules of thumb" stemming from the direction of appellate courts that must be borne in mind with respect to the sentencing of sexual assault offenders. The first of these "rules of thumb" is that a sentence of gaol is generally required for the offence of sexual assault unless the circumstances of the offence or the offender are so extraordinary as to militate against it. Commenting on the necessity of a gaol sentence for the offence of sexual assault, the Supreme Court of the Northwest Territories states:

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[5]See Hogarth (1971) for elaboration of the significance of appellate court direction in matters of sentencing.

> [i]n cases of sexual assault, then, except in the most minor cases, the cases with unusual or exceptional circumstances which favour the accused, a sentence of gaol will be required (Offender 3, p.6).

And, in the case of Offender 26, at p.4:

> These cases . . . establish that forced sexual intercourse by a man upon a woman is a crime for which the offender will be sentenced to a period of imprisonment except in the most exceptional circumstances . . . While imprisonment is generally the sentence of last resort in this Court, it is nevertheless the penalty that is generally imposed for this kind of sexual assault, even when no serious injury appears to have been inflicted and even where there are additional mitigating factors present, as here.

And, as stated by the Territorial Court in the case of Offender 2, at p.4:

> Other cases that have been referred to me . . . have shown that the Appeal Court in Alberta indicates that ordinarily sexual assaults and incest offences require a period of time in jail so as to express the community's and society's abhorrence for these matters and to denounce these acts . . .

Counterbalancing the requirement of "gaol", the second "rule of thumb" is that the maximal sentence available to the court in cases of sexual assault should be reserved for the "worst case and the worst offender". As elucidated by the Northwest Territories Supreme Court in the case of Offender 8, at p.5:

> If that were all I had to consider, I could well impose the maximum penalty of ten years on this offender for this offence. I am reminded, however, that the maximum is to be reserved for the worst case and the worst offender.

The rationale for not imposing the maximum sentence available in all cases of sexual assault is explained by de Weerdt, S.C.J., in relation to Offender 31, at p.6:

> It remains still for the courts to define the various degrees and kinds of sexual assault so as to take into account the appropriate factors when weighing the culpability to be attributed to the offender in any given set of circumstances. There is a danger that if distinctions are not made, offenders will progress from less serious to more serious offences without risk of experiencing a significantly greater punishment. An offender should know, surely, that if he has gone as far as the present case went, but no further, he will not be punished as if he had in fact "gone all the way". To fail to make that distinction is to encourage the offender, and others like him, to make the most of the occasion without fear of more severe consequences and without any incentive to exercise restraint. In former times, use of the death penalty for sheep stealing gave rise to the gallows tale that one "might as well be hung for a sheep as for a lamb".

Sentence Type and Length

Commensurate with the discretion granted the sentencing court under the section 246.1, 246.2 and 246.3 provisions of the Canadian Criminal Code (since revised), the types of sentences imposed on the offender sample ranged from conditional discharge to incarceration (see Appendix O: Frequency of Sentence Type). And, commensurate with the principle that a sentence of gaol is required for the offence of sexual assault except in the most exceptional of circumstances, the majority (94.73%) of the offender sample (54 of 57 offenders) received a sentence that included, or was restricted to a period of imprisonment.[6]

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[6]Notwithstanding the principle that a sentence of gaol is required for the offence of sexual assault except in the most exceptional of circumstances, the finding that 94.71% of the offender sample received a disposition including, or restricted to a period of incarceration should be interpreted with some caution as each of the two data sources used for the study are biased toward this particular disposition. The

In comparison to the overwhelming frequency with which sentences of incarceration were imposed, 27 (47.36%) of the offenders received dispositions involving probation (including each of the offenders receiving a suspended sentence and a conditional discharge). Of equal significance, given the social and cultural dynamics of the Northwest Territories, section 98 orders prohibiting the possession of firearms for a period of five (and in some cases ten) years following release from imprisonment were imposed on 13 (22.80%) offenders.[7] Fines in combination with either incarceration or probation were imposed in two instances only.

The aggregate length of incarceration for the offender sample for all offences ranged from one day to 2922 days (approximately 8.20 years). For the 54 offenders in the sample whose sentence included, or was restricted to a period of imprisonment the mean average aggregate length of incarceration for all offences was 683.64 days (approximately 22 months/1.92 years).[8]

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corrections data are restricted to dispositions involving incarceration and/or probation; and the transcribed sentencing decisions, particularly those of the Supreme Court, are heavily favoured toward dispositions of incarceration in accordance with the practice of the Supreme Court to transcribe all sentencing decisions involving a period of incarceration.

[7]The firearms probition sections of the Criminal Code were revised in 1989. Comparable provisions to section 98 are now found under section 100 of the Code. For a more detailed discussion of the effects of imposing section 98 orders in a socially and culturally diverse environment such as the Northwest Territories, see Lindsey-Peck (1985) and Bayly (1985).

[8]Corrections data were used to provide the rough estimate of "aggregate incarceration length for all offences" because complete data were provided for the offender sample.

As noted in the preceding chapter, excluding those offenders who were sentenced for multiple charges of sexual assault, 16 offenders were sentenced for offences additional to that of the sexual assault. All 16 of these offenders, representing 28.07% of the offender sample, received a sentence which included, or was restricted to a period of imprisonment. Generally speaking, the sentencing court will consider the "global effect of several sentences for several matters" (R. v. Sandercock (1985), 40 Alta. L.R. (2d) 265 (Alta.C.A.) at 273) or "totality of sentence" when sentencing an offender for multiple offences. The principle of totality is discussed by the Territorial Court in relation to Offender 10 at pp.4-5:

> We are dealing with two separate and distinct serious offences today. Ordinarily, each one of them might possibly bring a relatively substantial sentence, but because of the theory of totality the Court does not necessarily add one sentence to another, but tries to impose an overall or total sentence that would reflect the seriousness of the offences but still not cause unecessary or extra hardship to the accused since he is being dealt before the Court at one time.

Controlling for the sexual assault offence, there is no apparent logicity in the judicial decision to impose concurrent as opposed to consecutive sentences except as explained by the principle of totality (see Ruby 1976; Nadin-Davis 1982). Neither the close temporal proximity of one offence to another or the interconnectedness of one offence to another, nor the type of additional offence appear to be indicative of concurrent or consecutive sentences. Temporal proximity of one offence to another, for example, is used both as justification for concurrent sentences (as in the case of Offender 13 who committed two separate offences within two days of each other) and as justification for consecutive sentences (as in the case of Offender 37 who committed two separate offences within five days of each other). And, although Offenders 17, 28, 34 and 36 were

sentenced consecutively for multiple offences, the commission of which were separated by several months, in at least one instance (Offender 36) the rationale for imposing consecutive sentences was based on the accused's prior criminal record rather than the temporal distance or relative seriousness of the offences.

For those offenders whose multiple offences arose from the same incident, the concurrent sentences of Offenders 5, 14 and 52 can be juxtaposed to the consecutive sentences of Offenders 26, 29, 38 and 46. For those offenders whose offences were <u>not</u> interconnected, the concurrent sentences of Offenders 13 and 50 can be juxtaposed to the consecutive sentences of Offenders 17, 28, 34, 36, and 37. With respect to similarity of additional offence "type", three offenders committing breaches of court order (undertaking or probation) received concurrent sentences and five offenders committing breaches of court order received consecutive sentences (see Appendix "D" - Sentence for Additional Offences).

Controlling the sentence for <u>the sexual assault offence only</u>, the aggregate length of incarceration for the sexual assault offence(s) can be summarized as follows:

Table V
Aggregate Incarceration Length

Aggregate Incarceration Length Sexual Assault Offence Only	Number of Offenders N %	Cumulative Frequency N %
Under 1 month	4 (7.40)	4 (7.40)
1 - 3 months	6 (11.11)	10 (18.51)
4 - 6 months	7 (12.96)	17 (31.47)
7 - 12 months	8 (14.81)	25 (46.28)
13 - 18 months	6 (11.11)	31 (57.39)
19 - 23 months *	4 (7.40)	35 (64.79)
24 - 36 months	9 (16.66)	44 (81.45)
37 - 48 months	6 (11.11)	50 (92.56)
Over 48 months	4 (7.40)	54 (99.96)
Total	54 (99.96)	

Note: * For the purposes of analysis, two offenders sentenced to two years less one day were classified as though sentenced to 23 months.

Of the 54 offenders sentenced to a period of imprisonment, almost one-half (46.28%) received sentences of less than one year and almost two-thirds (64.79%) received sentences of less than two years. Only one-third of the 54 offenders (35.17%) received sentences of incarceration in excess of two years. Continuing to control the length of incarceration for the sexual assault offence only, the mean average aggregate length of incarceration for the offender sample was 635.87 days (approximately 21 months or 1.78 years), with a median of 420 days (14 months). The range of number of days incarceration was one day to 2848 days (8 years). The aggregate length of incarceration was bimodal with five offenders receiving sentences of 180 days (6 months) and five offenders receiving sentences of 1424 days (4 years).[9]

[9]Because a common unit of analysis for aggregate incarceration length was not specified in the sentencing transcripts, with sentences rendered in days/months/years, all sentences were converted to aggregate number of days in order to

The relatively short lengths of imprisonment imposed, with almost two-thirds (64.79%) of the offender sample receiving sentences of less than two years and over three-quarters (81.45%) of the offender sample receiving sentences of less than three years, is consistent with the generally accepted range of sentence for the "typical minimal violence rape" offence in the Northwest Territories (Offenders 26, 30, 43, 47) prior to introduction of the Sandercock (1985) (40 Alta. L.R. (2d) 265 (Alta.C.A.) sexual assault three year starting point approach to sentencing in this jurisdiction in 1986 (see R. v. J.N., [1986] N.W.T.R. 128 (N.W.T.C.A.).

The large proportion of offenders (64.79%) receiving sentences of less than two years imprisonment also is consistent with the long standing principle of the courts in the Northwest Territories to make every effort to ensure that northern offenders are not removed from their cultural and linguistic environment (Morrow 1981; Tallis 1985; Griffiths 1985; Lindsey-Peck 1985). In the absence of a penitentiary in the Northwest Territories, a sentence of two or more years generally necessitates the removal of the offender from the Northwest Territories to a southern penitentiary for the purposes of executing the sentence (Offenders 18, 20, 23, 40).

Notwithstanding the relatively short lengths of imprisonment imposed on the offender sample, it is interesting that only five (9.25%) offenders received intermittent sentences. The relative infrequency with which intermittent sentences were imposed on the offender sample is at least partially explained by the lack of

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determine the mean, mode and median aggregate incarceration length for the sexual assault offence only.

local resources (both physical and human) to accommodate the execution of this type of sentence in the Northwest Territories (Offenders 6, 38, 44).

Sentence Severity Relative to Charge

The eight offenders (representing 14.03% of the sample) sentenced under the Section 246.2 (sexual assault with a weapon/threats to a third party/causing bodily harm/party to the offence) and Section 246.3 (aggravated sexual assault) provisions of the Code received the following sentences:

Table VI
Sentence Severity Relative to Charge

Type of Offence	Aggregate Sentence Length
246.2(a)	4.5 years
246.3(2)	3 years
246.2(c)	4 years
246.3	8 years
246.2(a)	4 years
246.2(c)	8 months
246.2(a)	4 years
246.2(a) *	3 years

Note: * Committed more than one sexual assault offence, receiving 2 years imprisonment for the sexual assault simpliciter offence and 3 years consecutive for the sexual assault with a weapon offence.

As might be expected given the relative severity of, and higher maximal penalties for the types of offence under consideration, the eight offenders in the sample who were convicted of offences contrary to section 246.2 or 246.3 of the Criminal Code all received sentences of incarceration, with a mean average aggregate incarceration length of 1421.50 days (47.38 months/3.89 years) well in

excess of the mean average aggregate incarceration length imposed on the offender sample as a whole (635.87 days/21.19 months/1.78 years). However, as indicated by the above table, there is substantial range in the aggregate incarceration length imposed, from eight months to eight years. Although the "offence type" would appear, at least superficially, to suggest a lengthier period of imprisonment for those offenders convicted under the section 246.2 and 246.3 provisions of the Code, in the absence of a larger sample size and more sophisticated data analysis techniques it would be overly simplistic to associate the relative seriousness of offence with severity of sentence. Indeed, one of the offenders in the sample, Offender 4, who was convicted of one charge of sexual assault simpliciter received the second most severe sentencing disposition for the sample as a whole, six years imprisonment.

Comparable to those offenders convicted under the sexual assault with a weapon/causing bodlily harm and aggravated sexual assault provisions of the Criminal Code, the four offenders in the sample convicted of more than one charge/offence of sexual assault all received sentences involving a period of imprisonment, with a mean average aggregate incarceration length of 782.5 days (26.08 months/2.19 years) marginally in excess of the mean average aggregate incarceration length for the offender sample (635.87 days/21.19 months/1.78 years). However, as with the offenders committing sexual assault with a weapon/causing bodily harm and aggravated sexual assault offences, there is substantial range in the aggregate incarceration length imposed for multiple sexual assault charges, from thirty days to five years imprisonment.

Again, although multiple charges/offences of sexual assault, at least superficially, suggest a marginal increase in the severity of sentence imposed, the sample size and data analysis techniques do not afford the inference that there is an association between multiple charges/offences of sexual assault and severity of sentence.[10] And while the type of offence and number of charges would appear to indicate that a sentence of incarceration is likely, given that 94.73% of the offender sample received a sentence including, or restricted to incarceration irrespective of type and number of charges, it can be suggested that the type and number of sexual assault charges are no more indicative of a sentence of imprisonment than is conviction for one charge of sexual assault simpliciter. In other words, conviction for at least one charge of sexual assault under the sexual assault provisions of the Criminal Code is as likely to predict imprisonment as are multiple charges or the relative seriousness of the offence with which charged.

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[10]The four offenders who were sentenced for multiple charges of sexual assault received sentences of 14 months; 30 months; 5 years; 30 days respectively. Offender 7 who received 14 months in total was sentenced concurrently on both offences because of the close temporal proximity of the two offences. Offender 45 who received 30 months in total was sentenced to nine months on the first count, nine months consecutive on the second count, and 12 months consecutive on the third count. All offences involved the same victim but occurred at different times. Offender 48 who received five years in total was sentenced to two years on the section 246.1 offence and three years consecutive on the section 246.2 offence. Both of these offences occurred at different times and involved different victims. Offender 56 received 30 days intermittent in total for two charges of sexual assault simpliciter involving the same two victims who were assaulted together on two different occasions. Although there is no apparent logicity in the decision to sentence concurrently as opposed to consecutively, the case of Offender 48 illustrates the judicial approach to "totality" insofar as the court considered a total range of sentence between five and six years for both charges and then imposed sentence.

Temporal Variation in Incarceration Length

In addition to isolating the mean average aggregate incarceration length for type and number of sexual assault charges, it is possible to isolate temporal variation in the mean average aggregate incarceration length imposed on the offender sample for the four year time period under analysis. The variation in mean average aggregate annual incarceration length can be summarized as follows:

Table VII
Temporal Variation in Aggregate Incarceration Length

Offence Date/ Year	Average Aggregate Length of Incarceration	Frequency of Offenders N	%
1983	500 days	5	(9.25)
1984	454 days	13	(24.07)
1985	770 days	21	(38.88)
1986	683 days	15	(27.77)
Total		54	(99.97)

Controlling for the sexual assault offence only, the mean average aggregate incarceration length for the years 1983 (500 days) and 1984 (454 days) is lower than that for the offender sample as a whole (635.87 days) whereas the mean average aggregate incarceration length for the years 1985 (770 days) and 1986 (683 days) is higher than that for the sample as a whole (635.87 days). The variation in number of offenders sentenced per annum may explain the increase for the year of 1985, with the greatest proportion (40.35%) of offenders sentenced in this year, but does not explain the years 1983, 1984 and 1986. With the smallest proportion of the offender sample sentenced in 1983 (8.77%), and comparable percentages of

offenders sentenced in the years 1984 (24.56%) and 1986 (26.31%), there is no apparent association between the number of offenders sentenced per annum and the increase in mean average aggregate incarceration length.

Temporal variation in the mean average aggregate incarceration length is significant because of the introduction of the Sandercock (1985) three year starting point approach to sentencing for sexual assault offences in the Northwest Territories in 1986 (R. v. J.N., [1986] N.W.T.R. 128 (N.W.T.C.A.). Although not applicable to the year of 1985, the three year starting point approach may be a factor in the increase in mean average aggregate incarceration length for the year of 1986.

Prior to the introduction of the Sandercock (1985) starting point approach in the Northwest Territories, the range of sentence imposed for the "typical non-violent rape" offence was generally between 12 and 30 months as discussed in relation to Offenders 26, 30, 43 and 47. As stated by the Supreme Court in the case of Offender 26 at pp.3-4:

> In the Northwest Territories, the penalties for a rape of the kind now before the Court have been generally in the range of 18 months to 30 months for the last decade, with some sentences being heavier or lighter to meet the special circumstances of the individual case . . . This range of sentencing has been recognized and applied by a number of the deputy judges of this Court as well as by the resident judges who hear most of these cases . . . These cases . . . establish that forced sexual intercourse by a man upon a woman is a crime for which the offender will be sentenced to a period of imprisonment except in the most exceptional circumstances.

And, as stated by the Territorial Court in relation to Offender 30, at p.5:

> I note that in the Northwest Territories sentences for what used to be called rape, now sexual assault, in circumstances where there is absolutely no violence, in circumstances where the victim is more often than not unconscious because of the consumption of intoxicants, sentences of 18 months to two years are common.

And, as stated by the Supreme Court in relation to Offender 43, at p.4:

> In all those cases I have read, I have noticed that, with perhaps the exception of ---, there is practically no violence. The accused in all other cases seemed to have taken advantage of the intoxicated state of the victims or the age and infirmity of the victims. [range of 10 months to two years less a day imprisonment considered].

And, as stated by the Supreme Court in the case of Offender 47, at p.3:

> Basing myself on the actual jurisprudence in the Northwest Territories, where we can see that the sentences range generally from 12 to 30 months in jail, depending on the facts of each case . . .

At least on a conceptual level, the introduction of a three year starting point approach in accordance with Sandercock (1985) would seemingly increase the average sentence length, from between six to 24 months in length, for offences defined as "major sexual assaults". Of the fifteen 1986 sentences imposed relative to the offender sample, Sandercock (1985) was directly considered in 11 of 15 decisions (Offenders 3, 4, 7, 9, 18, 22, 24, 31, 35, 48, 57) with indirect reference to this approach in one additional decision (Offender 5). The Sandercock (1985) approach was not considered in relation to three of the fifteen 1986 sentencing decisions (Offenders 25, 36, 44).

Whether the increase in mean average aggregate incarceration length in 1986 can be attributed to the introduction of a three year starting point approach is difficult to ascertain. Although Sandercock (1985), 40 Alta. L.R. (2d) 265 (Alta.C.A.) was considered, directly or indirectly, in relation to 12 of the 1986 decisions, it was not considered in the remaining three cases. Equally significant, as early as 1985 and prior to the introduction of this approach in the Northwest Territories it was submitted that sentences for sexual offences in this jurisdiction were increasing in severity. As stated by the Territorial Court in August of 1985 in the case of Offender 37, at p.6:

> It seems to me that is an indication from what I have noted in the last year or two that sentences with regard to sexual offences seem to be getting a little lengthier.

Further, the Sandercock (1985) approach is restricted to sexual assault simpliciter offences and offences defined as "major" sexual assaults. Thus, even if considered, the three year starting point will not necessarily apply if the case at bar is not a section 246.1 offence or can be distinguished from the Sandercock (1985) definition of the "archetypical" sexual assault. As well, in binding the Northwest Territories courts with this approach, the Court of Appeal for the Northwest Territories recognized that the approach may be "modified for the north" (see R. v. J.N., [1986] N.W.T.R. 128 (N.W.T.C.A.). As stated by the Supreme Court in relation to Offender 57, at p.62:

> I find comfort in the majority decision of tbe Court of Appeal of the Northwest Territories . . . the Naqitarvik decision. In this decision, the Honourable Chief Justice Laycraft writing for the majority says, and I quote, 'I follow Sandercock in using a sentence of imprisonment for three years as a starting point in cases of major sexual assault. No doubt some of the aggravating and mitigating factors mentioned in

> that case may be somewhat modified when applied to Northern Canada. In particular, one must have careful regard to the degree of sophistication of both the offender and the victim. Nevertheless, Sandercock offers a general guideline of a starting point and of the various factors involved in upward or downward revision of that starting point in the light of aggravating or mitigating factors'.

The most plausible explanation for the increase in the mean average annual aggregate incarceration length for the years of 1985 and 1986 appears to lie in a complexity of factors including the number and type of sexual assault charges sentenced in each of these two years. For the four offenders convicted for multiple charges of sexual assault, only one offender (Offender 46) was sentenced in 1984 whereas two offenders (Offenders 48 and 56) were sentenced in 1985 and one offender (Offender 7) was sentenced in 1986. For those offenders convicted under the section 246.2 provisions of the Criminal Code, only one offender (Offender 29) was sentenced in 1984 whereas four offenders (Offenders 11, 21, 37, 48) were sentenced in 1985 and one offender (Offender 9) was sentenced in 1986. Both offenders (Offenders 10 and 14) convicted under the section 246.3 provisions of the Code were sentenced in 1985.

The Problem of Imprisonment and Section 98 Orders

As the most frequent "type" of disposition imposed on the offender sample, the use of imprisonment as a sentencing option in the Northwest Territories is problematic for several reasons. First, imprisonment is, perhaps, the least culturally relative of all dispositions that can be imposed on aboriginal peoples (Graburn 1969; Finkler 1976, 1983, 1985; Tallis 1980, 1985; Carswell 1984; Dickson-Gilmore 1987; Griffiths and Patenaude 1988). As well, the courts in the Northwest Territories are cognizant of the limited potential of imprisonment to

rehabilitate the offender or to effect the reconciliation of the offender with his family, the victim and the community. As stated by the Territorial Court in relation to Offender 38, at pp.13-14:

> The very things that the Inumarit are trying to do is what the court is trying to do: rehabilitating the offender, and reconciling the offender, the victim and the community so that there is unity in the community . . . Can any of us really say that jails do that . . . Jail hardens an individual. Of the approximately 170 people that are in jail right now, 60 percent or more of them have been there before. In other words, most people that go to jail once end up going back again. These offenders have not been reformed.

Compounding the lack of cultural relativity associated with the disposition of imprisonment and its limited potential to effect rehabilitation, a sentence of incarceration may necessitate the removal of an offender from his "cultural and linguistic environment" (or community) to a different region in the Northwest Territories, and for sentences in excess of two years from the Northwest Territories to a "southern" penitentiary. As stated by the Supreme Court in the case of Offender 18, at p.13:

> As to whether or not the sentence should be served in a Federal or Territorial institution, I will only say that unless in exceptional circumstances, a sentence of two years less a day will be served in the Northwest Territories, among prisoners of a generally similar cultural background to that of the accused . . . A sentence served in a Federal penitentiary is more likely to be served outside the Northwest Territories, although arrangement can be made in exceptional cases for it to be served in the Territories.

Even attempts to "localize" a sentence of imprisonment, for terms of 90 days or less, through the imposition of intermittent sentences may be circumvented by the inadequacy or nonexistence of criminal justice resources at the local (or

community) level. As stated by the Territorial Court in the case of Offender 6 at pp.4-6:

> In some communities, from time to time intermittent sentences are imposed, local guards are hired; but its always a problem to get local guards. In many instances, it means the RCMP member and his wife are virtually the prisoners, because they have to stay there and guard and feed the prisoner. On the other hand, there is provision in the Criminal Code for the imposition of intermittent sentences when the justice exercises his discretion and the prerequisites are complied with, if it's in the interest of the community and in the interest of the accused. That's a right that's available to everyone across Canada, and that means Grise Fjord to Toronto to Vancouver and Halifax. It doesn't just mean the southern jurisdictions . . . So, what do I do, impose an intermittent sentence without regard to the consequences, or at least impose a sentence that reflects the reality of the situation . . . Well, I'm really unhappy about what is going to happen here, and I'm unhappy because I am constrained in what I cannot order, for practical purposes . . . .

And, in the case of Offender 44 at p. 4 the Territorial Court states:

> I feel in this instance before me today that I also have to impose a short jail term on the accused . . . for the purposes of general deterrence only in this instance I am going to impose 25 days in jail. I will allow that to be served intermittently, recognizing that that might be very inconvenient locally, but taking into account that the Appeal Courts have directed in the past that the trial Judge must not concern himself with the inconvenience or the inability of the facilities to provide the necessary services.

Of equal significance, notwithstanding appellate court direction that a sentence of jail is required in cases of sexual assault (Offenders 2, 3 26), the courts in the Northwest Territories have suffered substantial criticism for their "overuse" of imprisonment as illustrated by the following case excerpts:

> We in the courts get criticized constantly for sending too many people to jail. I would suggest strongly looking at the recidivist rate in the Northwest Territories that the criticism is wrongly placed (Offender 5, p,4);

> Our courts have been criticized for being too severe by sending too many people to jail for too long. We have also been criticized for being too soft or too lenient by not sending some people to jail or not for long enough . . . It's been said by our critics that we even send people to jail for a little push or a shove, but I have never seen that done in my 25 years in connection with the North, nor have I seen dangerous or violent offenders go free without proper punishment (Offender 28, p.6).

The imposition of section 98 orders, as per 13 (22.80%) of the offender sample (Offenders 7, 9, 10, 11, 14, 18, 20, 25, 29, 31, 41, 50, 54), in the Northwest Territories also is controversial because of the potential for this "type" of disposition to interfere with an offender's pursuit of a traditional lifestyle based on the land (see R. v. Weyallon, [1985] N.W.T.R. 264 (N.W.T.C.A.); R. v. Tobac, [1985] N.W.T.R. 201 (N.W.T.C.A.); Lindsey-Peck 1985; Bayly 1985).

In addition to the "unintended consequences" of this type of penalty in a culturally diverse northern jurisdiction such as the Northwest Territories, the imposition of section 98.(1) orders is problematic because of the criteria on which such a restriction is based. Conceptually all three classifications of offence under analysis should require the imposition of a section 98.(1) order because all three classifications of sexual assault, if proceeded by indictment, are offences of violence punishable by a maximum term of ten or more years imprisonment. Section 98.(1) of the Criminal Code (since revised) provides:

> Where a person is convicted of an indictable offence in the commission of which violence against a person is used, threatened or attempted and for which the offender may be sentenced to imprisonment for ten years or more . . . the court shall, in addition to any other punishment that may be imposed for that offence, make an order prohibiting him from having in his possession any firearm or ammunition or explosive substance for . . . (a) in the case of a first conviction for such an offence, five years, and (b) in any other case, ten years, after the time of his release from imprisonment . . . .

As exemplified by the findings of the present study, wherein a section 98.(1) order was imposed on only 13 (22.80%) of the offenders, the presupposition of violence in an offence is a relatively vague criterion on which to base the imposition of a section 98.(1) order restricting the possession of firearms. Section 98.(1) orders were not imposed for all offences committed by the offender sample, all 62 of which, at least conceptually, were offences of violence against the person; section 98.(1) orders were not imposed for all section 246.2 and 246.3 offences, all eight of which, at least conceptually, were the most violent of the offences under analysis; and, section 98.(1) orders were not imposed for all offences for which there was a finding of violence, all 33 of which involved the overt (either threatened or actual) use of violence against a person. The vagueness of the "violence criterion", leading to differing interpretations of the section 98.(1) provisions, is exemplified in the case of Offender 18 wherein counsel for the accused states at pp. 17-19:

> . . . sometimes there is a question as to whether or not the violence in a particular offence is sufficient to come within that section . . . I think it's simply in your Lordship's discretion to determine whether, in fact, since the word "violence", as opposed to "force", or simply the characterization of an offence as an assault, is used, my only submission would be that there may be some question in the particular case whether the violence in the particular case is, in fact, sufficient or can, in fact, be described as violent, so as to come within that section . . .

And, in the words of the Court:

> It does speak of violence, generally, I grant you, that is language that could be read, perhaps, in different senses . . however, I would only say that to me, the plain meaning is that where violence is used, an offence otherwise falls within the section. And the clear intent appears to be that a prohibition will be made.

In brief, it is not at all clear in what circumstances a firearms prohibition may be imposed. Indeed, given that a section 98.(1) firearms prohibition is not restricted to offences involving weapons but extends more generally to offences involving violence, it is not at all clear what a firearms prohibition is intended to achieve as a "mandatory" rather than "discretionary" provision of the Code.[11]

Probation: Aggregate Length and Conditions

Twenty-seven (47.36%) of the 57 offenders in the sample, including the offender who received a suspended sentence and the offender who received a conditional discharge, received dispositions including a period of probation. The aggregate length of probation for the 27 offenders in the sample ranged from less than one year to three years. Of the 27 offenders sentenced to probation, two (3.50%) were sentenced to a period of probation for less than one year; 11 (19.29%) were sentenced to a period of probation for one year; two (3.50%) were sentenced to a period of probation for one and a half years; 10 (17.54%) were sentenced to a

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[11]For discussion of the mandatory versus discretionary debate over the imposition of section 98.(1) orders, see R. v. Weyallon, [1983] N.W.T.R. 394 (N.W.T.S.C.), [1985] N.W.T.R. 264 (N.W.T.C.A.); R. v. Tobac, [1985] N.W.T.R. 201 (N.W.T.C.A.).

period of probation for two years; and, two (3.50%) were sentenced to a period of probation for three years.

The conditions of probation varied considerably for the 27 offenders receiving this disposition as part of their sentence. Of the 27 offenders in the sample who were sentenced to a period of probation, only three (5.26%) were ordered to perform community service work as a condition of probation, with two offenders ordered to perform 200 hours of community service and one offender ordered to perform 300 hours of community service. The relative infrequency of community service orders with respect to the offender sample may be due, at least in part, to the "unintended consequences" that such orders can have in the northern context.[12] Indeed, in one of the three cases in which community service work was ordered by the Court, testimony regarding the efficacy of this type of disposition in the community of Eskimo Point was solicited. According to the witness, community service was not regarded as a serious punishment by the community and there was hesitancy by some community members to become involved with community service orders, with particular reference to the question of finding appropriate work for the offender in this community (Offender 28).

Notwithstanding that it is the one mandatory condition of probation (Griffiths and Verdun-Jones 1989), "to keep the peace and be of good behavior" was overtly imposed in relation to only 16 (59.25%) of the 27 offenders receiving probation. The most frequently imposed condition was that the offender "report to the probation officer as required" with 21 offenders bound by this condition as

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[12]See Lindsey-Peck (1985) and Griffiths (1985) for elaboration of the problems affiliated with imposing community service orders in the North.

part of their probation order. The second most frequently ordered condition of probation was that the offender "participate in such educational and/or counselling and/or treatment programs as recommended by the probation officer", with 17 offenders bound by this condition. Consistent with appellate court direction emphasizing the need for its sparing use (see Saila v. R., [1984] N.W.T.R. 176 (N.W.T.S.C.); R. v. Malboeuf (1982), 68 C.C.C. (2d) 544 (Sask.C.A.), the least frequently ordered condition of probation, banishment from the offender's community, was imposed in one instance only (Offender 18). Conditions of probation were not specified for three of the 27 offenders. The conditions of probation are rank ordered in terms of their frequency as follows:

Table VIII
Conditions of Probation

	Probation Conditions	Frequency (N=27) N	%
1.	Report to the probation officer as required;	21	(77.77)
2.	Participate in educational/counselling/ treatment programs as recommended by the probation officer (psychiatric, alcohol, drug, unspecified);	17	(62.96)
3.	Keep the peace and/or appear before the court as required;	16	(59.25)
4.	Abstain from the possession and/or consumption of alcohol and/or premises where alcohol is sold, distributed or consumed;	11	(40.74)
5.	Provide a breath sample on demand;	6	(22.22)
6.	Make reasonable efforts to secure and maintain employment;	4	(14.81)
7.	Remain within the jurisdiction of the court (NWT) unless permission to leave is granted;	3	(11.11%)
8.	Perform community service work;	3	(11.11)
9.	Refrain from contact with the complainant;	2	(7.40)
10.	Refrain from associating with any persons as directed by the probation officer;	2	(7.40)
11.	Refrain from using, possessing, trafficking in prohibited drugs;	2	(7.40)
12.	Remain outside of the community during the tenure of probation.	1	(3.70)

The conditions of probation imposed relative to the offender sample are significant, not only as an indicator of the frequency with which the judiciary are able to "enforce" treatment, especially applicable to the sexual assault sentencing context, but as a mechanism by which the judiciary can infuse cultural relativity in the sentence imposed. Paradoxically, the conditions of probation illustrate the extent to which the sentencing practices of the Northwest Territories courts, bound by the normative standards of the dominant criminal justice system, are

infused with cultural bias. Such bias is clearly exemplified by the overt judicial emphasis on "education", "training", "employment" and "treatment" in the probation conditions imposed.

Although generally given broad discretion in matters of sentencing, the sentencing court is proscribed from directly imposing a "treatment sentence" (see Ruby 1976). The sentencing court may, however, indirectly enforce treatment by requiring that the offender, as a condition of probation, "participate" in any treatment or counselling program "directed", "recommended" or "deemed necessary" by his/her probation officer (see Nadin-Davis 1982).

With respect to the offender sample, treatment or counselling was attached as a condition of probation for 17 (62.96%) of the 27 offenders receiving this disposition. Notably, "treatment" and/or "counselling" cover a broad range of programs, with the precise nature of treatment and counselling unspecified for seven of the 17 offenders. Nine of the 17 offenders were required to participate in alcohol/drug/or psychiatric programs,[13] and one of the 17 offenders was required to participate in social/family counselling through a traditional Inumarit

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[13]The frequency with which "alcohol" conditions were imposed relative to the offender sample (exemplified by the requirement that the offender participate in alcohol treatment or counselling and the condition that an offender abstain from the possession and consumption of alcohol and, in some instances, provide a breath sample on demand) is explained by the interrelationship of alcohol consumption to at least 64.51% of the offences committed by the offender sample. As stated by Lindsey-Peck (1985:5):

> Alcohol features in approximately 95% of all crimes that occur in the Territories. Due to the alcohol problem, many offenders may be recommended for alcohol addiction counselling or may be bound by probation orders prohibiting the use of alcoholic stimulants.

Committee. The absence of required participation in a "sex offender treatment" program as a condition of probation may well be a reflection of the nonexistence of this type of program in the Northwest Territories during the time period under analysis (Offender 5).

Equally interesting, however, is the infrequency with which the sexual assault offender was restrained from having contact with the victim of the sexual assault offence as a condition of probation, with only two (7.40%) of the 27 offenders required to refrain from such contact. Notably, in one of these two cases, a case of incest, the offender was required to leave the community when the complainant returned to visit. Given the small size of many of the communities in the Northwest Territories (Griffiths and Patenaude 1988), however, and the finding that a large proportion of the offences committed by the offender sample were "incest/breach of trust/loco parentis" offences it may well be that ordering the offender to refrain from contact with the victim was not a practicable condition to impose.

The conditions of probation illustrate at least three instances in which the courts attempted to infuse cultural relativity in the sentence imposed. In one case, the conditions were such as to allow the offender to report to the elders in the community who in turn were responsible for reporting the progress of the offender to the probation officer. And, in deference to the traditional lifestyle of the offender, he was not required to report when he was in the bush. As stated by Marshall, S.C.J., in the case of Offender 13 at pp.9, 12-13:

> In this case the Dene chiefs indicated that the native community could handle the problem, and I agree insofar as they can do that within the criminal law of Canada, they should be encouraged to do so . . . The terms of the Probation Order will be that he keep the peace and be of good behavior. He will report monthly to the named chiefs, who have, I understand, volunteered to undertake this duty. The chiefs will, in turn report his progress to Social Services.

In a separate case (Offender 38), the court again attempted to allocate some measure of responsibility for the offender to the community through the incorporation of a condition of probation enabling the supervision of the offender by the traditional Inumarit Committee in the community. As stated by the sentencing judge in this case at p.19:

> You are to comply and cooperate with all directions and counselling efforts made by the Inumarit. In each of the next two years you are to perform 100 hours of Community Service under the direction of your probation officer or the Inumarit.

It is worthy of note that the latter reporting condition was rejected by the majority of the Northwest Territories Court of Appeal and a sentence of 18 months imprisonment was substituted for the sentence imposed by the court of first instance.

Although imposed in one instance only, the incorporation of banishment as a condition of probation in the case of Offender 18 also suggests some measure of cultural relativity in the sentence imposed (Saila v. R. [1984] N.W.T.R. 176 (N.W.T.S.C.); R. v. Malboeuf (1982) 68 C.C.C. (2d) 544 (Sask.C.A.). As stated by the Court in the case of Offender 18 at p.15:

> . . . what I propose to do is to include a condition that the accused remain outside the Hamlet of Coppermine during those three years, except as he may be permitted to visit it by his probation officer, in which event the terms and conditions of any such visit shall be set by the probation officer and shall be strictly observed by the offender.

As emphasized in the case of Offender 18, "banishment" as a condition of probation is to be used sparingly. A similar approach, stressing the conservative use of banishment as a condition of probation was adopted by the Saskatchewan Court of Appeal in R. v. Malboeuf (1982), 68 C.C.C. (2d) 544 (Sask.C.A.) at 547 where, notwithstanding judicial recognition of banishment as culturally appropriate, especially in the Canadian North, it was held that "judicial banishment decrees should not be encouraged" and used only with the agreement of the community involved.[14]

Judicial Recommendations

Judicial recommendations, ranging from the facilitation of treatment/counselling/training within the correctional institution to the specification of region or jurisdiction in which the accused be allowed to serve his sentence, were made in 21 (36.84%) of the 57 sentencing decisions. The various judicial recommendations made within the context of the sentencing decision have been rank ordered according to their frequency below. Notably, recommendations for

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[14]See also Saila v. R. [1984] N.W.T.R. 176 (N.W.T.S.C) for further discussion of the banishment issue as applied to the Northwest Territories. In the case of Saila (1984) the imposition of a condition of banishment was imposed, at least in part, to reflect a lack of adequate resources in the community to deal with an habitual or disruptive offender. For additional commentary on the Saila (1984) decision, see Lindsey-Peck (1985); Griffiths and Patenaude (1988).

treatment/counselling, either for alcohol/drugs or for psychiatric/psychological problems, predominate as the most frequent recommendation made, closely followed by the recommendation that the accused be given the opportunity to participate in vocational/educational/training programs for the purposes of employment following execution of sentence.

Table IX
Judicial Recommendations

	Judicial Recommendation		Frequency (N = 21) N	%
1.	That the accused be given every opportunity to obtain treatment/counselling of a psychiatric/ psychological nature;	*	10	(47.61)
2.	That the accused be given every opportunity to participate in alcohol/drug rehabilitation/ treatment/counselling programs;		10	(47.61)
3.	That the accused be given every opportunity to participate in vocational/training/educational programs;		8	(38.09)
4.	That the accused be allowed to serve his sentence in the Northwest Territories because removal from this jurisdiction would result in cultural isolation;	**	3	(14.28)
5.	That the accused be considered for work release or parole at the earliest opportunity;		2	(9.52)
6.	That the accused be allowed to serve his sentence outside the Northwest Territories as the accused no longer resides in the Northwest Territories.		1	(4.76)

Note: * Includes the recommendation that two of the offenders be allowed to obtain treatment for sexual offenders in a sexual offender treatment program. ** Includes one sentencing decision where remarks on sentencing were attached to the warrant of committal to apprise the correctional authorities of the cultural and linguistic background of the accused as opposed to an overt request that the accused be allowed to serve his sentence in the Northwest Territories.

Comparable to the conditions of probation, judicial recommendations are a mechanism by which the Northwest Territories courts indirectly "enforce"

treatment as well as infuse cultural relativism in the disposition rendered. In this manner a sentencing judge can "recommend", inter alia, to correctional administration that an offender receive "treatment" or "counselling" in the correctional facility during the period of imprisonment or that there be follow-up treatment in the community once the offender is released from custody. As stated by the sentencing court in the case of Offender 5, at pp. 4-5, 7, for example:

> I recognize I cannot impose a treatment oriented sentence. I cannot calculate various time off provisions and then impose a sentence taking these into account. I cannot impose a sentence of treatment of eighteen months to keep him in custody for nine months . . . In any event, in this particular case, I make it abundantly clear and I will endorse the warrant of committal that this man be considered an absolute priority for admission to the Phoenix Program . . . .

One of the more interesting recommendations made in relation to the offender sample, however, is the recommendation that the offender be allowed to serve his sentence in the Northwest Territories, or a specific region of the Northwest Territories, for cultural and linguistic reasons. Although this recommendation usually is made in relation to offenders sentenced to federal time (in other words the court recommends that the offender be allowed to serve his sentence in the Northwest Territories as opposed to a southern penitentiary as per Offender 23), as reflected by the offender sample there may also be attempts to "regionalize" the location of the sentence so that offenders from the Eastern Arctic are allowed to serve their sentence in Frobisher Bay (Offender 40). Notably, in the case of one offender in the sample who was not a "northern offender" and who had moved home to Nova Scotia subsequent to the commission of the offence, the court recommended that the offender be allowed to serve his sentence in that jurisdiction where he would be closer to family and friends. As well, in at least one other instance where

the court did not overtly recommend that the offender be allowed to serve his sentence in the Northwest Territories, the court directed that a copy of the remarks on sentencing be attached to the warrant of committal so that the federal correctional authorities would be aware of the offender's linguistic background and "cultural isolation" (Offender 9).

The Judicial Reasoning Process

Although there is "only one criminal law in Canada" and although the penalties that can be applied for criminal offences are defined by the Canadian Criminal Code, the dynamics of the sentencing process in the Northwest Territories are, to some extent, unique (Griffiths 1985; Crawford 1985; Lindsey-Peck 1985; Griffiths and Patenaude 1988).

To accommodate the vast geographic land mass and sparse population of this jurisdiction, "criminal justice" continues to be dispensed through a system of circuit courts with the court and court party flying into the community for trial and sentencing (Delisle 1983; Griffiths 1985; Lindsey-Peck 1985; Patenaude and Griffiths 1988). Relative to the offender sample, the Territorial and Supreme courts sentenced 43 (75.43%) of 57 offenders in the same community where the offence was committed. In many of the communities, the circuit court continues to be viewed as a "community event" wherein large numbers of people in the community attend court to observe the proceedings (see Griffiths 1985). The "communal" aspect of court sittings, with particular reference to sentencing, is illustrated by a statement of the Supreme Court in the case of Offender 13 where

it was said at p. 5 that "the court room was replete with people".[15] In addition, the services of an interpreter may be required in the context of trial or sentencing to accommodate linguistic barriers between the court and community members (see Morrow 1981; Griffiths 1985; Crawford 1985). Relative to the offender sample, the services of an interpreter were required in four cases (Offenders 13, 23, 28 and 38).

Sources of Information

The judicial assessment of a "fit and proper sentence in all of the circumstances" is largely contingent on arguments and evidence presented by counsel for the crown and the accused in the context of sentencing submissions (personal communication with His Honor, Judge R. Michel Borassa 1986). Thus, while the present analysis is restricted to the judicial consideration of evidence submitted at the sentencing hearing, it is important to bear in mind that the evidence judicially considered is, to a large extent, contingent on the sentencing submissions of counsel. In addition to the submissions of counsel, there are at least three sources of documented information that may or may not be raised in the sentencing hearing, namely the criminal record of the offender,[16] presentence

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[15]See also Lindsey-Peck (1985:54) who states:

> A sentencing hearing in the Northwest Territories normally involves some participation and usually a great deal of interest on the part of members of the settlement. The effect which this may have on the court is no doubt important, but difficult to assess.

[16]Hogarth's (1971) findings suggest that criminal record is a very significant "offender" variable in the sentencing process, ranked second only to the family background of the offender, as information considered "essential" to sentencing. For elaboration of criminal record information in relation to the present study, see

and/or psychiatric reports (Ruby 1976; Nadin-Davis 1985; Lindsey-Peck 1985). As evidenced by the findings discussed below, all three of these documented sources of information play a significant role in the subsequent judicial characterization of the offender.[17] Indeed, as suggested in the case of Offender 5, at p.5, psychiatric reports may be taken in aggravation if it is indicated that the accused is unable to control sexual deviance "and constitutes an ongoing danger to the public". In essence, contingent on the nature of the information contained within, presentence and psychiatric reports may serve to aggravate or mitigate in relation to the sentence imposed by the court (see Lindsey-Peck 1985).

Presentence and psychiatric reports were specified for 30 (52.63%) of the offenders in the sample. In contrast, presentence or psychiatric reports were not specified for 27 (47.36%) offenders. For the 30 offenders for whom "reports" were specified, there were presentence reports for 19 (33.33%) offenders (Offenders 2, 3, 6, 9, 15, 16, 18, 19, 20, 27, 30, 32, 34, 35, 36, 38, 42, 45, 51) and psychiatric reports for 15 (26.31%) offenders (Offenders 4, 5, 8, 9, 12, 14, 16, 18, 20, 21, 35, 41, 46, 50, 52). Notably, both presentence and psychiatric reports were indicated for four (7.01%) of these offenders (Offenders 9, 18, 20 and 35).

The following excerpts reflect the varying information and recommendations contained in the presentence reports:

Chapter IV.

[17]For discussion of research on the significance of presentence reports in the criminal sentencing context see Griffiths and Verdun-Jones (1989).

> The assessment of the social worker has indicated that [the accused] is well liked in the community; despite the fact of previous offences, the community did not feel remiss to having him back. According to the information collected by the social worker, [the accused's] problem is mostly his drinking (Offender 9, p.5);

> The predisposition report which indicates that other people have known the accused as a good worker, also indicates that he becomes dangerous when drinking. It also indicates that the accused is very sorry and ashamed for what has happened and that he has had a very difficult and tough background when he started excessive drinking at only 15 years of age (Offender 19, p.7);

> The presentence report . . .is on the whole extremely favourable to the offender and holds out high hopes for his eventual full rehabilitation. It appears from this, and related documentary material filed with it, that this offence was completely "out of character" for this offender. His clean record confirms that (Offender 20, p.5);

> There are indications in the Presentence Report that the accused has various and complex personal problems which require professional intervention (Offender 45, p.5);

> The probation report . . . and the presentence report, indicate that [the accused] appears to have suffered a great deal mentally and physically by this incident . . . The report also indicates that a number of people feel that he has been punished enough . . . (Offender 51, p.7).

Comparable to the presentence reports, the psychiatric reports vary in their assessment of the offender as reflected in the following summaries:

> (1) characterized as having a "curable" psychological problem with the recommendation that the offender would benefit from treatment (Offender 5);

(2) characterized as having "low self esteem" and as having experienced hostile feelings toward himself and others. His personal history is characterized as showing "a deep-seated basis for his antisocial behavior" (Offender 8);

(3) characterized as suffering from "emotional problems" and as having contemplated suicide with recommendations for treatment because of his tendency toward depression (Offender 35);

(4) characterized as "psychologically disturbed" exhibiting psychotic symptoms leading to the "conclusion that the accused is unable to function responsibly in society" (Offender 41);

(5) characterized as having "limited intellectual potential" and "antisocial behavior that is so tenacious" that "little can be done to help him from a psychiatric point of view". Also described as having "violent propensities and propensities toward sex offences" (Offender 46).

In addition to the documented presentence and psychiatric reports that may be presented within the context of the sentencing hearing, on occasion sentencing submissions will include community testimony or evidence from expert witnesses (see R. v. Akilak, [1983] N.W.T.R. 210 (N.W.T.Terr.Ct.); R. v. Innuksuk, N.W.T.Terr.Ct., Slaven, C.T.C.J., August 4, 1978, unreported; Griffiths 1985; Crawford 1985; Lindsey-Peck 1985). In the case of Offender 28, for example, the Court solicited testimony from a witness regarding community attitudes toward community service orders. In the case of Offender 38, the court heard testimony from the traditional Inumarit Committee expressing support for the offender and the desire to participate in the "rehabilitation" of the offender. In the case of Offender 57, counsel for the accused "presented two witnesses to establish a good character of the accused" and the probability of the accused's rehabilitation in the case of a lighter sentence being imposed. As stated by the Court at p.61:

> I will not analyse the testimony of both witnesses. I am rather favourably impressed by the fact that the victim's grandfather pleads that a second chance be given to the accused because he is a good boy, helps his parents, helps him occasionally by bringing him fish, he is now too old to catch for himself . . . I am also favourably impressed by the testimony of --- who in the past has looked after the accused as his own son and is still ready to help him rehabilitate as soon as possible.

In the case of Offender 13, substantial testimony was provided by the elders and chiefs in the community, as well as a social worker, with respect to community attitudes toward the offences of spousal and sexual assault, the social utility of the offender in the community, and the desire of the community to "handle the problem of the offender". In the words of the presiding justice at p. 2:

> This case raises new and difficult issues, and for that reason I took some time in considering its decision. In the course of sentencing, important and surprising submissions were made, and it became clear on the evidence of the elders and chiefs that by native custom in the Village of Snare Lake it was said that it was quite in order for a husband to beat his wife when it was thought required. Also, it was indicated by the elders and others that the question of the sexual abuse of children was not a problem that the native people are familiar with in Snare Lake. For these reasons, it was argued that blameworthiness or blame should be reduced, and because of this the penalty should be less.

And at pp. 5-6:

> . . . I was told that a large number of the native people of Snare Lake, Northwest Territories, had come to Fort Rae to tell the Court the same thing, that is, that [the accused] was needed in Snare Lake to care for his family. The show of community support was impressive . . . A Mr. --, an elderly gentleman of great experience in Snare Lake, acted as a spokesman for a group of elders who had met [the accused] at Snare Lake. Their message was that they felt that [the accused] could best be handled by the people of Snare Lake . . . Next, Mr. --- took the stand. He is 81 years old, an active hunter and trapper and former councillor. He is now an elder statesman of Snare Lake. He was an impressive, august and strong man, who stated that

> [the accused] is a good worker and that was the main concern of the native people . . . Next, -- took the stand. He is the Chief or the Sub-chief of Snare Lake now. He made a number of very frank statements to the Court . . . He felt that it would have been okay for [the accused] to have sexual intercourse with the two older girls up until he married their mother. He said that tampering with the stepdaughters was not approved of. He said that this teaching was that of the Catholic Church, and that because they are Catholics that a man should sleep only with his wife.

As suggested by Lindsey-Peck (1985), the participation of communities and the desire of communities to be involved in the "rehabilitation" of an offender is a key determinant of the sentencing process in the Northwest Territories. Lindsey-Peck (1985:55) states:

> The courts in the Northwest Territories administer justice according to law, but the involvement of the communities is often essential to effective sentencing in the 'North'. The willingness of community members to participate in the sentencing hearing . . . shows their concern for the offender . . . The need for the community to assist in rehabilitating a young offender . . . again illustrates the important functions of the community in relation to the sentencing process . . The courts of the Northwest Territories, with their close ties to the communities, attempt to impose sentences which reflect the needs of the specific offender and his community as well as those of the larger Canadian society.[18]

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[18]See also Griffiths 1985; Crawford 1985; Griffiths and Patenaude 1988; Jackson 1989 for a consideration of the role of communities in the sentencing process in the Northwest Territories. See also Lilles (1989:10) who speaks to the "relatively short periods" of time spent by the circuit court in the community. Lilles (1989:10) states:

> For a number of understandable reasons, they often remain in the community for relatively short periods and leave before they are fully in tune with it and the culture of its residents.

Legal Factors Relevant to the Judicial Assessment of Sentence

While it is beyond the purview of the present analysis to describe all aspects of the judicial reasoning process in detail, it is possible to provide a synopsis of the frequency with which the principles of sentencing, aggravating and mitigating factors, and jurisprudence were judicially considered in the context of the sentencing hearing relative to the offender sample.[19] The various legal factors that were considered in relation to the offender sample are rank ordered on the basis of their frequency as follows:

Table X
Factors Relevant to the Judicial Reasoning Process

Factor	Specified N %	Not Specified N %	Total N %
Sentencing Principles	54 (94.73)	3 (5.26)	57 (99.99)
Mitigating Factors	52 (91.22)	5 (8.77)	57 (99.99)
Range of Sentence	45 (78.94)	12 (21.05)	57 (99.99)
Aggravating Factors	44 (77.19)	13 (22.80)	57 (99.99)
Cases	39 (68.42)	18 (31.57)	57 (99.99)
Prior Dispositions	31 (54.38)	26 (45.61)	57 (99.99)

Note: As quantified above, "range of sentence" encompasses both the type and length of sentence judicially considered.

[19]Again bearing in mind that counsel for the crown and the accused play a figurative role in determining the type and amount of information presented to the sentencing judge (personal communication with Judge R. Michel Bourassa 1986), it should be noted that the present analysis is restricted to the judicial consideration of the principles of sentencing, aggravating and mitigating factors, and jurisprudence rather than the emphasis placed on these factors by legal counsel.

The Principles of Sentencing

As suggested above, principles of sentencing were judicially considered in 54 (94.73%) of the 57 sentencing decisions. The principles of sentencing that were judicially considered are rank ordered on the basis of their frequency as follows:

Table XI
Principles of Sentencing Judicially Considered

Sentencing Principle	Frequency of Consideration (N = 54) N %
General Deterrence	48 (88.88)
Specific Deterrence	43 (79.62)
Protection of the Public	39 (72.22)
Rehabilitation	33 (61.11)
Denunciation/Repudiation	24 (44.44)
Totality/Global	8 (14.81)
Punishment	7 (12.96)
Retribution	4 (7.40)
Community Peace/Harmony	4 (7.40)
Prevalence of Crime	4 (7.40)
Other (restitution, reparation, proportionality)	3 (5.55)
Incapacitation	2 (3.70)
Uniformity	2 (3.70)

Note: No attempt was made by the researcher to quantify or rank order the principles of sentencing on the basis of judicial emphasis or application. As identified above, the principles of sentencing were quantified on the basis of their overt mention, only, within the context of the sentencing transcript.

Not surprisingly, given the nature of the offence under consideration (see Regina v. Sandercock (1985) 40 Alta. L.R. (2d) (Alta.C.A.), considerable

emphasis was placed on the principles of deterrence and denunciation.[20] As stated by the Supreme Court in relation to Offender 40, at pp.3-4:

> I have set out in general the offence with which we are concerned today. The object of any sentence is not only to deter the individual but to give a message to the community, how seriously that offence is viewed and to try to discourage others from engaging in that kind of activity. There is a strong concern to discourage men from forcing their sexual desires upon a woman, whether she is willing or not to participate in that kind of activity. The repudiation of such acts by the community is a very important factor. That repudiation, we hope, will have the effect of discouraging or deterring others from engaging in that kind of activity, and to indicate that if they do, and are convicted, then they face serious consequences.

The frequency with which deterrence (general and specific) and denunciation (or repudiation) were considered is explainable, not only in relation to the offence under consideration, but in relation to the young age of many of the victims of the offender sample with virtually three-quarters of the complainants under the age of 18 years at the time of the offence. The principles of deterrence and denunciation in relation to the "protection of children" from this type of offence is elucidated by the Supreme Court in the case of Offender 31, at p.10:

> The governing principles to be applied in a case such as this can be summed up, I think, in two words: denunciation and deterrence. The Court, by its sentence, asserts that offences such as this are to be

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[20]Lindsey-Peck (1985:8) suggests that the principle of "denunciation" in the Northwest Territories extends beyond its mere statement in the passing of sentence. According to Lindsey-Peck (1985) this principle is given "life" through the system of circuit court justice delivery and the educational nature of the trial process in small remote communities in the Northwest Territories. Notably, Lindsey-Peck's (1985:8) assertion that "general deterrence is not usually a primary principle in sentencing in the 'North'" is not supported by the findings of the present study, with judicial consideration of general deterrence in 88.88% of the 54 cases in which principles were overtly mentioned.

> condemned and punished so that it will be clear to all that children are not to be violently molested, and are not to be made fearful to be out of doors on their own. The Court must therefore impose a sentence which will deter the accused and others from this type of crime.

In comparison, the frequency with which rehabilitation was considered as a principle of sentencing (as per 61.11% of the sentencing decisions) is not surprising in light of the relatively young age of the offender sample (with virtually three-quarters (73.67%) of the offender sample aged 32 years or less at the time of sentencing), the number of offenders in the sample without criminal records (36.84% of the offender sample having no prior criminal record), and the role of alcohol (specified as a factor in 64.51% of all offences) in the offences committed by the offender sample (see Nadin-Davis 1982; Lindsey-Peck 1985). It should be emphasized, however, that this principle is downplayed by the Northwest Territories courts in instances where the accused has an extensive criminal record and is no longer a young offender. This shift in emphasis (from rehabilitation to specific deterrence) is described by the Supreme court in relation to Offender 54, at p. 6:

> One must, as well, look at the offence, of course, and the offender in deciding sentence. [The accused] is thirty-five years old, and . . . has spent a great deal of his life to this point in jail. Considering the principles of sentencing, rehabilitation, retribution, denunciation and deterrence, general and specific, and what might be termed an older recidivist . . . unfortunately, reformation in a case such as this begins to pale. It seems to me that in a case such as this deterrence, specific deterrence to protect the public becomes a more forceful consideration.

As in any sentencing hearing, the principles of sentencing create considerable difficulty for the judicial decision-maker who often is forced to balance the competing values underlying the principles (Canadian Sentencing

Commission 1987). In the Northwest Territories, balancing the principles of sentencing is perhaps an even more complex task because of the geographic and demographic dynamics of this jurisdiction.[21] It is argued in some instances, for example, that deterrence may be as effectively achieved through the public censure of arrest, trial and sentencing in a small remote community as through the imposition of a gaol sentence (Lindsey-Peck 1985). As stated by the Territorial Court in the case of Offender 2, at p.7:

> Noting the background of the accused and his involvement with the community, the fact that he has today apologized to the community and his family publicly in Court and recognizing that the sentence today and the appearance in Court and the conviction today probably will substantially change his entire way of life in the future and, therefore, will be a long lasting effect on him, I feel that I can probably impose a shorter jail term than otherwise would be expected for this offence.

And as stated by the Supreme Court in the case of Offender 15, at pp. 5-6:

> The proceedings before the court coupled with the preceding police investigation and the actions taken by the social welfare authorities cannot but serve to denounce this offence as one which is contrary to our criminal law and contrary to the values of our Canadian society. The public exposure of such offences is in itself a denunciation and a deterrent. The stigma which must attach to a sexual assault of this kind is one which amounts in itself to a very severe punishment.

Equally significant, as evidenced by the finding that "community peace" was was considered as a principle of sentencing in four cases, the courts in the

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[21]See R. v. Qitsualik [1984] N.W.T.R. (N.W.T.S.C.) 233 for a discussion of the difficulty in applying the "established principles of sentencing" in a manner that is "sensitive" to local conditions with particular reference to the lack of resources at the local level.

Northwest Territories are willing to consider "local conditions" (as per R. v. Ayalik (1960), 3 W.W.R. 377 (N.W.T.C.A.) and have recently attempted to infuse the established principles of sentencing with values that are more culturally appropriate to the aboriginal peoples in this jurisdiction.[22] The recognition of "community peace or harmony" as a principle of sentencing in four of the sentencing decisions, then, can be viewed as an attempt to bridge the fundamentally divergent purposes of activating the Anglo-Canadian normative and sanction system and aboriginal normative and sanction systems in response to deviant behavior: the penultimate purpose of the former articulated in terms of "the protection of the public through deterrence and denunciation" and the latter articulated in terms of "restoring peace and harmony within the community" (Graburn 1969; Finkler 1976, 1983, 1985; Carswell 1984; Dickson-Gilmore 1987; Griffiths and Patenaude 1988). As stated by the Supreme Court in the case of Offender 15, at p.7:

> His plea is some indication of excellent prospects for his rehabilitation and the restoration of harmony within his family and this community. By his plea he has, to a great extent, made an effort at expiation and the restoration of normalcy with the community and his family.

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[22]The principle of "community peace" is enunciated in the case of R. v. Ettagiak [1986] N.W.T.R. 203 (N.W.T.S.C.) by de Weerdt, S.C.J., at 208:

> Expiation or atonment is, therefore, often of particular importance as an objective of sentencing an accused from such a community. Linked to this is the need to help restore peace within the community by settling old scores. In an earlier time . . . this was referred to as bringing about "peace in the valley". Restoration of social peace is of prime importance in the small indigenous community, more particularly where there is still a strong tradition of community co-operation based on the needs of subsistence living on the land. Reconciliation of the offender with his own local community in the long term is, therefore, often also a legitimate and important sentencing objective.

And in the case of Offender 20, at p. 12, the Supreme Court states:

> By suffering a punishment which may be seen as just, the accused will have an opportunity to expiate and atone for his crime, thus paving the way for eventual reconciliation with his home community and for his hoped for rehabilitation.

There is long standing precedent in the Northwest Territories as per appellate court direction in R. v. Ayalik (1960), 3 W.W.R. 377 (N.W.T.C.A.) for the courts in the Northwest Territories to consider "local conditions" in relation to sentence (see also R. v. Ittigaitok, [1984] N.W.T.R. 21 (N.W.T. Terr.Ct.); Crawford 1985). Although not a factor specific to the sentencing process in the Northwest Territories (see Ruby 1976; Nadin-Davis 1982), the "prevalence of crime in the community", as recognized in four (7.40%) of the sentencing decisions under analysis, is a significant "local condition" in the Northwest Territories given the potentially disruptive effects of criminal behavior in communities that are small in size and geographically isolated from one another (Lindsey-Peck 1985; Griffiths and Patenaude 1988).[23] As stated by the Supreme Court in relation to Offender 29, at pp.3-4:

> The second principle I must keep in mind is what is called deterrence, that is to say, the imposition of a sentence which will discourage this accused and others from committing this type of offence. It is sad to say that sexual assaults upon women in the North are only too frequent, and have been regrettably frequent in the past, not only at Rae-Edzo, but elsewhere, and this is generally associated with over-indulgence in alcohol.

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[23]See Saila v. R. [1984] N.W.T.R. (N.W.T.S.C.) 176, for example, wherein a sentence of banishment was imposed because of the lack of adequate resources in the community to deal with the offender.

And in the case of Offender 38, at p. 10, the Territorial Court states:

> I can look at how often this kind of crime happens in the Northwest Territories. I don't have any statistics, but unfortunately using women like this happens all too frequently.

And in the case of Offender 8, at p. 7, the Supreme Court states:

> It is, nevertheless, to be remembered that offences of this kind are much too frequent in the Northwest Territories, and that they must be punished with sufficient severity to serve as a deterrent to others as well as to this accused. Young girls here, as in other parts of Canada, deserve to be protected from this type of crime.

In contrast to its recognition in four decisions, in one of the decisions under analysis the request by crown counsel that the sentencing court take judicial notice of the prevalence of sexual assault offences in a specific community was rejected by the court in the absence of supporting statistics (Offender 21).

Paralleling the stated position of the courts in the Northwest Territories (Lindsey-Peck 1985), judicial de-emphasis on the principle of "retribution" is exemplified by its "mention" in only four of the 57 sentencing decisions.[24] As stated by the Supreme Court in the case of Offender 11, at p. 9:

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[24]Relative to the offender sample, the stated judicial reasons for de-emphasizing the principle of retribution do not provide any overt evidence of Lindsey-Peck's (1985:5-6) contention that this principle is de-emphasized because it is not a "concept easily understood by many indigenous people" (Offenders 10, 11, 14, 16).

> The final principle of sentencing is retribution, and that is something akin to "an eye for an eye and a tooth for a tooth", and that is generally not held to be a strong principle in sentencing in our courts . . . .

Aggravating and Mitigating Factors

Although not intended as an exhaustive listing, some of the mitigating factors that may be taken into consideration by the sentencing court relative to sexual assault offences include: "a prompt guilty plea" (interpreted as an expression of remorse, saves the complainant from testifying, and a waiver of "constitutional rights in deference to expeditious justice"), drunkeness (insofar as it indicates spontaneity or lack of full appreciation) (R. v. Sandercock (1985), 40 Alta. L.R. (2d) 265 (Alta.C.A.) at 272-274; "the age of the accused and an indication that rehabilitation is possible", "the moral standards and behavior of the victim", prior acquaintance between victim and offender (Boyle 1984:176-177); joint intoxication of complainant and offender, the cultural background of the offender, "minimal violence", spontaneity or lack of premeditation, no breach of trust, "ignorance of the law" (as related to assessment of the offender's culpability), weapons not used, lack of premeditation, "the accused not an inherently violent person", and the type of sexual act (indecent assault as compared to rape) (Lindsey-Peck 1985:22-37). Other mitigating factors may include the age of the offender (as per the youthful offender), the offender's "conduct after the offence" (as per attempts at rehabilitation), the character of the offender ("of previous good character"), and the amount of "time spent in custody" (Ruby 1976:138-160).

Mitigating factors were considered in 52 (91.22%) of the 57 sentencing decisions, with the presence or absence of mitigating factors not specified for five offenders in the sample. The mitigating factors that were judicially considered are rank ordered in accordance with their frequency as follows:

Table XII
Mitigating Factors Judicially Considered

	Mitigating Factor	Frequency of Consideration N	%
1.	Nature of the Sexual Assault (desisted in the assault of own volition or when requested, no intercourse, no substantive physical violence, no weapons or injury, age of victim not in aggravation, "minor" nature of the assault, prior contact between offender and victim);	25	(48.07)
2.	Guilty Plea (saves victim from testifying, speeds up the administration of justice, indicates offender is remorseful);	21	(40.38)
3.	Good Community Record (good work record, well educated, intelligent, supports family, positive role in the community, community and familial support for the offender);	20	(38.46)
4.	Remorse (Accused expresses or indicates his remorse or acceptance of responsibility);	19	(36.53)
5.	Role of Alcohol in the Offence (indicates lack of premeditation, also "joint state of intoxication" of accused and complainant taken in mitigation);	15	(28.84)
6.	Time Spent in Custody (awaiting trial/sentence);	13	(25.00)
7.	Personal Background of Accused (history of psychiatric/psychological problems, disadvantaged background, low level of intelligence, lack of education, low self-esteem, problems with alcohol, lack of effective socialization, "level of sophistication");	13	(25.00)
8.	Age of the Accused (young offender);	11	(21.15)
9.	First Offender (no criminal record);	9	(17.30)
10.	First Offence of Violence or Sex;	8	(15.38)
11.	Cultural Background of Offender (adherence to a traditional lifestyle, linguistic barriers, cultural transition and community isolation isolation are relevant to the assessment of the offender's blameworthiness);	7	(13.46)
12.	Cooperation With the Authorities (police or court);	7	(13.46)

13.	Post-Offence Behavior (accused has stayed out of trouble between the commission of the offence and trial, or has made efforts at his own rehabilitation);	5 (9.61)
14.	Effect of the Sanction on the Accused or his Family (includes the effect of removal from cultural and linguistic environment);	4 (7.69)
15.	Potential for Rehabilitation (the accused is desirous of, or a good candidate for rehabilitation);	4 (7.69)
16.	No Premeditation;	2 (3.84)
17.	Other (totality);	1 (1.92)

Of particular significance to the present study, is the finding that the cultural background of the offender (adherence to a traditional lifestyle, linguistic barriers, cultural transition and community isolation as related to the assessment of "blameworthiness") and the effect of the sanction on the offender and his family or community (including the effect of removal from the offender's cultural and linguistic environment) were factors considered in mitigation by the sentencing courts in the Northwest Territories. Comparable to the conditions of probation imposed on the offender sample and the judicial recommendations made with respect to sentence, the mitigating factors illustrate judicial sensitivity to geographic and demographic circumstances as exemplified by the consideration of the "cultural background" of the offender in seven instances and the "effect of sanction" on the offender in four instances. Further, this finding provides support for Lindsey-Peck's (1985:53-50) contention that the "community isolation factor" and the "effect of the sanction on the community" are factors related to the sentencing process in the Northwest Territories.

As with the conditions of probation and judicial recommendations, however, it is difficult to counterbalance those mitigating factors that are sensitive to local

conditions in the Northwest Territories with those mitigating factors that serve to reinforce the dominant Anglo-Canadian normative and sanction system. Thus, while the judicial consideration of the "cultural background of the accused" as a factor in mitigation of sentence suggests relativity, the simultaneous consideration of educational achievement and exemplary work record paradoxically reinforces adherence to the dominant Anglo-Canadian normative and sanction system.

Although not intended as a comprehensive statement, some of the factors that may be taken in aggravation of sexual assault offences include: "protracted forcible confinment or kidnapping", "repeated assaults or other acts of degradation", "the invasion of the sanctity of a home", "the display or use of a weapon", "several offenders acting together", "more than one victim" (R. v. Sandercock (1985), 40 Alta. L.R. (2d) 265 (Alta.C.A.) at 272-273; "use or threat of violence", "an element of breach of trust", prior criminal record, the type of sexual invasion (for example rape versus indecent assault), (Boyle 1982:175-177); "an exceptionally youthful or elderly complainant", "an offender who has a personality disorder", the relationship between offender and victim (as per the "stranger rape"), and planning and premeditation (Lindsey-Peck 1985:22-36). Other aggravating factors, not necessarily specific to the sexual assault offence, may include violation of previous court orders and the prevalence of crime in a community (Ruby 1976).

Aggravating factors were specified in 44 (80.70%) of the 57 sentencing decisions but not in 13 (19.29%) of the decisions. Rank ordered on the basis of their frequency, the aggravating factors judicially considered in relation to the offender sample are as follows:

Table XIII
Aggravating Factors Judicially Considered

	Aggravating Factor	Frequency of Judicial Consideration (N = 44) N	%
1.	Prior Criminal Record (including number and type of priors, especially priors of a violent or sexual nature);	22	(50.00)
2.	Vulnerability of the Victim (including age, size, physical accesibility, disability or infirmity);	21	(47.72)
3.	Offence Dynamics (including the use of weapons, threats, excessive violence, a disguise, or inducement);	14	(24.56)
4.	Effect of Assault on the Complainant (including adverse psychological or physical injury, fear, removal of the complainant from family);	11	(25.00)
5.	Relationship of Offender to the Victim (loco parentis, position of trust, stranger);	10	(22.72)
6.	Type of Sexual Contact (including the number of acts, whether ongoing or isolated, the type of sexual acts such as penetration sodomy, cunnilingus, homosexual or heterosexual);	8	(18.18)
7.	Violation of Prior Court Order (whether the offender was on probation/parole/judicial interim release or recently released from jail);	7	(15.90)
8.	Physical Location of the Offence (illicit or clandestine entry of a dwelling house);	5	(11.36)
9.	Psychiatric Assessment (including inability of the offender to control behavior, proclivity toward violence or sex offences, continued abuse of alcohol);	4	(9.09)
10.	Planning and Premeditation;	4	(9.09)
11.	Confinement of Victim During Assault or Assault in Presence of Third Party;	4	(9.09)
12.	Seriousness of the Offence;	3	(6.81)
13.	Other (frequency of the offence, attempt to over up the offence, complainant forced to testify in Court).	3	(6.81)

Jurisprudence: Cases Judicially Considered

Although the explication of all cases and prior dispositions is well beyond the scope of the present discussion, some cursory observations with respect to the cases judicially considered relative to the offender sample are worthy of note. As quantified above, judicial consideration of case law was specified for 39 (68.41%) of the 57 sentencing decisions and not for 18 (31.57%) of the decisions. Distinguishing between jurisprudence from the Northwest Territories and other Canadian jurisdictions, case law from the Northwest Territories was considered in 31 of 39 sentencing decisions and case law from "other" jurisdictions was considered in 25 of 39 sentencing decisions.

Of particular interest to the present analysis is the frequency with which the case of Regina v. Sandercock (1985), 40 Alta. L.R. (2d) 265 (Alta.C.A.), was considered given its provision for a "three year starting point approach" for section 246.1 offences defined as "major" sexual assaults. Restricted to 1986 sentencing decisions (see R. v. J.N. [1986] N.W.T.R. 128 (N.W.T.C.A.), there was direct reference to the Sandercock (1985) approach in 11 of the fifteen 1986 sentencing decisions (Offenders 3, 4, 7, 9, 18, 22, 24, 31, 35, 48, 57) with indirect reference to this approach in one additional decision (Offender 5). The Sandercock (1985) approach was not considered in relation to three of the fifteen 1986 sentencing decisions (Offenders 25, 36, 44).

The Judicial "Typification" of Offender and Offence

Given that factors relating to the offender and the offence are a central consideration in the sentencing process, with more or less emphasis placed on the offender or the offence depending on the individual preference (or attitudes) of the sentencing judge (Hogarth 1971; Nadin-Davis 1982), one of the more interesting findings relative to the offender sample pertains to the "judicial characterization" of the offender and the offence.

Relative to the offender sample, it appears that the courts in the Northwest Territories "characterize" the offender based on the overriding consideration of whether the offender, in lieu of all of the evidence, can be "rehabilitated" or whether it is necessary to "incapacitate" the offender for the protection of society. In providing an overall assessment of the offender and his behavior in relation to the sexual assault offence(s) there appears to be a behavioral continuum onto which the offender is placed, with the judicial "characterization" of those offenders who have a very positive community record and whose behavior in relation to the sexual assault offence was "out of character" placed at the "rehabilitative" end of the continuum and those offenders who have had "a sad and difficult life" and whose behavior in relation to the sexual assault offence was consistent with a "continuing pattern of antisocial conduct" placed at the "incapacitative" end of the continuum. The juxtaposition of those offenders whose personal circumstances and history suggest that they were "acting out of character" with those offenders whose personal circumstances and history suggest that they were acting on a "continuing course of antisocial conduct" at the time of

the offence also is illustrative because it points to the extreme variation of the personal background and histories of the offender sample.

As illustrated by the following excerpts, the offenders who are characterized as "acting out of character" at the time of the offence (Offenders 3, 20, 32, 40, 42, 51) are variously described in terms of their positive role in the community (including the level of community and/or family support for the offender at the time of sentencing), their exemplary work record, their high level of educational achievement relative to other individuals in the community, their absence of a criminal record, and personal efforts at rehabilitation:

> The presentence report on [the accused] indicates that he has no record of crime, at all, and generally that this type of conduct is out of character. It shows that the accused does have remorse and he did co-operate with the police. As counsel for the accused . . . points out, the report would indicate that this individual may not require specific deterrence . . . The circumstances of the accused are that he is the seventh of a family of 15 children. He is a native of Chesterfield Inlet, where this event occurred. He has a grade nine education, he is a very good worker. In spite of high unemployment statistics in the north, he has apparently always been steadily employed, until . . . taken into custody for this offence . . . To quote from the report, he is "not known to fight or provoke others". Also, he is not a problem drinker. All in all, it seems he has a rather good community record, certainly in comparison to the community record that we often see in this court (Offender 3, p.3);

> What has happened here appears to be completely out of character for the accused, but partly appears to have resulted from his consumption of alcohol. This is another incident where alcohol and the adverse effects seem to interfere with a person's reputation . . . Both the accused and his family feel embarrassed about this matter . . . [U]sually the accused is a person who participates in community affairs and is a respectable and responsible person. At twenty-eight years of age he has done extremely well in his employment . . . He speaks well of the community of Pangnirtung, where he has lived for years, and it appears that the people in the community have thought

highly of him. He is the kind of person that has shown concern for others. . . He seems to have made substantial efforts at his own rehabilitation to get away from drinking (Offender 32, pp.2-3);

The accused appears to be remorseful to some extent . . . He is a shy person, and he is embarrassed by what has happened today. He is not a person who confides substantially in very many people, but his family indicate that he prefers to live his life without causing trouble or hardship to other family members. He has had many jobs in the past and appears to have regular work and is an excellent employee at the present time. He earns about $21,000.00 a year and, therefore, seems to be able to maintain himself and . . . his child from an earlier common-law relationship . . . [He] is presently employed . . . and often volunteers to do over-time work and is very co-operative and is considered an excellent technician in his field that he has taken some specialized training in. He usually is in a good mood, and he gets along well with the people with whom he works. The report indicates that some of his friends thinks that he drinks a little too much, and it is my opinion that on the occasion of this offence it might have been partially due to the fact that he was intoxicated at the time. Having considered . . . the fact the accused is a responsible person ordinarily, that this seems to be out of the ordinary, I am going to impose a very short period of time in jail . . . (Offender 42, pp.2-3);

I have heard evidence about the accused, who certainly seems to have acted out of character in this charge and ordinarily is considered to be a respectable and good citizen of the community (Offender 51, p.7).

As illustrated by the following excerpts, the offenders who are characterized as "continuing on a course of antisocial conduct" at the time of the offence (Offenders 11, 14, 19, 30, 37,41, 46, 54), subsume those offenders who are described as having had a "sad" or "difficult" life in terms of their relative exposure to alcohol abuse, violence and death within the family (including exposure to alcohol abuse, neglect, physical/sexual/emotional abuse and welfare dependency) and removal from their cultural environment at an early age for prolonged medical treatment in the south. The offenders themselves are variously described in terms of their abuse of alcohol/intoxicants, below or abnormal range

of intelligence, long-term conflict with the law, poor work record, lack of education and training, conflict between the traditional and wage economy, and history of psychiatric illness and/or personality problems.

> I will deal now with the accused himself. First off . . . the accused has a substantial criminal record, one that can only count against him in sentencing . . . There are 6 Criminal Code convictions for violence . . . One can only conclude that such a serious record over a period of ten years - all his adult life, in fact - can only indicate that he has not learned to live according to the law and that he is a violent person and clearly a danger to the public (Offender 11, pp.3-4);

> The accused comes before the Court as a 29-year-old person who has a good work record and who is a competent and able mechanic. He is married and has two children . . . and has a grade 12 education himself . . . The predisposition report which indicates that other people have known the accused as a good worker, also indicates that he becomes dangerous when drinking. It also indicates . . . that he has had a very difficult and tough background when he started excessive drinking at only 15 years of age . . . He also has had some unfortunate family circumstances . . . He has lost a number of relatives who have died, including his own child recently . . . [The accused] also comes before the Court on charge similar to a rape that occurred before in . . . 1983 . . . It is necessary, therefore, for the Court to recognize that the public must be protected from persons who do not have the ability to control themselves (Offender 19, pp.7-9);

> Next, the accused comes from a very sad background. The Court is now dealing with a man who has been virtually in and out of jails for his whole adult life . . . This accused person is not like many who have come before the Court for sexual offences, who were apparently acting out of character or acting in a way that is not particularly compatible with their antecedents. This accused, from the presentence report -- and its obvious from his criminal record -- has been on an unending cycle of antisocial conduct for years (Offender 30, pp. 4-5);

> At the time of the offence, the accused was under mandatory supervision for a prior rape . . . The accused at that time was shown to have a sad personal history and a long history of social rejection and a difficult upbringing . . . His counsel states he was the

> laughing-stock of his peers, was not liked by the community, and subjected to mental and physical abuse by the community, and was in numerous foster homes where he was refused adoption. A long story of social and psychological difficulties and upsets . . . [The psychiatric report] indicates the accused is psychologically disturbed . . . Counsel for the Crown submits the record of the accused, which is a substantial record . . . So the accused has had considerable punishment in the past, and clearly remains a problem . . . . (Offender 41, pp. 2-3);

> The accused has an extensive criminal record of some thirty-three criminal convictions . . . I am concerned with one aspect of the assessments at least vis-a-vis the sentence, that he has limited intellectual potential and is in the borderline range. That he has antisocial behavior that is so tenacious that there was unfortunately little that can be done to help him from a psychiatric point of view . . . Given the accused's propensity for criminal behavior as evidenced by his record up until 1979, and the less than optimistic statements made in the psychiatric report, I don't think that a subjective sentencing process will have any positive effect (Offender 46, pp.2-4):

In addition to "characterizing" the offender, the findings of the study suggest that the courts in the Northwest Territories classify the sexual assault offence in terms of its perceived seriousness (Offenders 4, 6, 7, 15, 18, 26, 28, 30, 31, 32, 35, 36, 38, 42, 54). Given the widely divergent types of behavior that are defined as sexual assault, the courts may "classify" the offence as either a "minor" or a "major" sexual assault depending on the type of sexual activity involved in the offence (whether fondling or penetration, isolated or ongoing), the degree of violence used (whether minimal or excessive) and the presence or absence of other aggravating or mitigating factors (such as the use of weapons, injury to the victim, the extent of planning and premeditation, joint intoxication of victim and offender). Notably, judicial classification of the sexual assault predates the introduction of the Sandercock (1985) benchmark approach to sentencing in the Northwest Territories (see R. v. J.N., [1986] N.W.T.R. 128

(N.W.T.C.A.). As suggested by the Sandercock (1985) starting point approach to sentencing, which is contingent on the definition of the sexual assault as a "major" or "archetypical" sexual assault, the judicial classification or "typification" of the sexual assault offence is not unique to the Northwest Territories (Lindsey-Peck 1985; Nadin-Davis 1982).[25]

Comparable to the judicial "characterization" of the offender, on the basis of all of the evidence provided in the sentencing hearing, the offence is placed on a continuum from the least serious type of sexual assault to the "worst" type of sexual assault to ever come before the court. Underlying the judicial "classification" of the sexual assault offence is an apparent preconception of the "typical minimal violence rape offence", an offence which involves forcible sexual intercourse, minimal violence, and a complainant who is either intoxicated or asleep or who is physically vulnerable to the attack (see "Social Situation Acquaintance Sexual Assault" and "Sleeping Complainant Sexual Assault" discussed in Chapter IV; see also Lindsey-Peck (1985:41) "Acquaintance Sexual Assault").

The "typical minimal violence forcible sexual intercourse offence", at least prior to the introduction of Sandercock, appears to be used as the median (or measuring rod) by which to guage the relative seriousness of the offence before the court. Thus, at the "least serious end" of the continuum are those offences falling short of "forcible sexual intercourse" and involving minimal violence (see Lindsey-Peck (1985:37) "Minimal Sexual Assault") and at the "worst case" end of

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[25]See R. v. Sandercock (1985) 40 Alta. L.R. (2d) 265 (Alta.C.A.) for elaboration of the rationale for distinguishing between sexual assault offences and the classification of the "archetypical" sexual assault offence.

the continuum are those offences involving substantial violence, injury to the victim, the use of weapons, and forcible sexual intercourse coupled with other aggravating factors such as "other degrading acts", "breach of trust", "planning and premeditation", "break and entry", and the "stranger relationship" (see "Exceptional Violence Sexual Assault" and "Sexual Assault in the Presence of a Third Party" discussed in Chapter IV; see Lindsey-Peck's (1985:22,29) "Exceptional Aggravating Factor Sexual Assault" and "Stark Terror Sexual Assault").

The judicial classification, or typification, of the sexual assault offence is evidenced in the following excerpts:

> It's not as though the circumstances of this offence are totally novel, this court has run into them in the past on a few occasions [sleeping complainant, fondling] (Offender 6, p,.2, 1985);

> Fortunately, I am not today called upon to deal with either the worst kind of assault or the worst class of offender [incest, touching, not an isolated incident] (Offender 15, p.2, 1985);

> At the same time, these are not the worst kind of assaults that have come before this Court [sexual intercourse, forcible confinement] (Offender 28, p.2, 1984);

> This is another incident where alcohol and the adverse effects seem to interfere with a person's reputation [alcohol, crime, sleeping complainant, asked to leave, out of character] (Offender 32, p.2, 1985);

In attempting to place this offence on that scale from one to ten, I can look at how much premeditation or forethought was involved. A planned and deliberate, carefully executed crime is worse than one that just happens on impulse . . . So all in all, there was some violence, but no injury thankfully [forcible sexual intercourse, prior contact between victim and offender] (Offender 38, pp. 6-7, 1985);

I therefore have entered a conviction under section 246.1 ofthe Code, but classify this particular act of the accused as a less serious matter than I might otherwise consider such an assault, because the accused had had previous contact with the victim [sleeping complainant] (Offender 42, p.2, 1985);

Ten years in prison is the maximum. That, of course, would be reserved for the worst case, the most difficult case. But the case before the Court, in any event, one would say is a grave example, though not perhaps the absolute worst [incest, forcible sexual intercourse, considerable violence] (Offender 54, p.6, 1985).

For post-1986 decisions, Sandercock (1985) provides for the "archetypical sexual assault" to be defined as a "major" sexual assault.

This is a major sexual assault, sexual intercourse, being a 32 year old man with a ten year old girl. The Sandercock case lays down that for major sexual assault three years imprisonment is the minimum, is the starting point in considering what term of imprisonment should be imposed (Offender 4, p.2, 1986);

There are a number of matters that are classified as factors, both mitigating and the opposite . . . I don't think, basically, that [defence counsel] missed any of the mitigating factors referred to, and for the purposes of my sentence today I am going to just briefly summarize the factors that I have taken into account, because I feel that the assaults before the Court today were of a sexual nature, they did involve adults and they did involve force or violence, and although the submissions were such that there was a possibility that I should be able to or could consider the assaults not to be within the definition, I, at this time, must indicate that I find the assaults do fall within the category of the broad definition of the Sandercock case (Offender 7, p.3, 1986);

> While I am unable to say that this was clearly a major sexual assault, in that none of the named acts included specifically in that category . . . in R. v. Sandercock fits the precise outlines of the present offence, it was clearly a most serious sexual assault, given the respective ages of the offender and his victim, and all the circumstances. I propose to use two years instead of three as my starting point [sexual assault child, fondling] (Offender 31, p.8, 1986);
>
> I, therefore, on the sentencing of the accused before me today, must acknowledge that this is, if anything, a sexual assault of a somewhat minor nature, compared to the forced violation of a person through penetration, in that there was no penetration and there appears to be no violence and, possibly, no force (Offender 35, p.4, 1986);
>
> In this instance the child was very young, and it appears that although there was ejaculation that had occurred, I can classify it still as a minor sexual assault because there was no penetration and no injury, and really not much violence, although there certainly was an intrusion with force on another person (Offender 36, p.3, 1986).

Judicial Accommodation of Geographic and Demographic Requirements

The findings of the study evidence that, commensurate with established historical and contemporary precedent (Morrow 1965, 1967, 1971, 1981; Bucknall 1967; Schmeiser 1968; Sissons 1968; Finkler 1976; Schuh 1979; Tallis 1980, 1985; Delisle 1983; Griffiths 1985; Crawford 1985; Lindsey-Peck 1985; Government of the Northwest Territories 1985a; Jackson 1985; Griffiths and Patenaude 1988; Jackson 1989), the judiciary in the Northwest Territories accommodate extraordinary geographic and demographic requirements in the criminal sentencing context.

The geographic requirements of this jurisdiction, namely its vast land mass and scattered population, are accommodated through a system of circuit court justice delivery whereby the Territorial and Supreme Courts "fly in" to the

community where the offence was committed for trial and sentencing (Griffiths 1985; Griffiths and Patenaude 1988). As illustrated by the findings of the study, 43 (75.43%) offenders in the sample were sentenced in the same community in which the offence was committed, with the Territorial Court more frequently achieving congruence between offence and sentencing location than the Supreme Court.

The system of circuit court justice delivery is a significant attribute of the criminal sentencing process in the Northwest Territories insofar as it is a mechanism used by the trial courts to effect the socio-legal education of the aboriginal inhabitants of this jurisdiction (Offender 13).[26] In this regard, as discussed infra, "deterrence" and "denunciation" are facilitated through the public censure of arrest, trial and sentencing of offenders in small and remote communities (see also Lindsey-Peck 1985; Griffiths 1985). Furthermore, the system of circuit court justice delivery in this jurisdiction facilitates community involvement in the criminal sentencing process (Offenders 13, 28, 38, 57) as well as judicial familiarity with, and sensitivity to "local conditions" (Lindsey-Peck

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[26]As stated by the Supreme Court in the case of Offender 13, at pp.9-10:

> It is not only this Dene village that is struggling with the problem of the equal treatment of women and the problem of child abuse. These are inchoate areas of our law that are developing throughout Canada even today . . . The ancestors of the white Canadians, or non-native Canadians, if you like, in their nomadic days, that is when they too, were hunters, abused their wives physically and I am sure, their offspring sexually . . . As agriculture developed and prosperity came, and new and enlightened religions with beliefs in charity and gooodwill . . . evolved, those ideas were put aside as no longer proper. The Catholic church . . . has taught these principles in Snare Lake. So it is a process of development for all of us. We came to see that it is not proper to beat a wife or abuse one's children . . . We all learned this. It took a long time, and it has become our law. But it is wrong to do these things now, and we punish our people for doing it, so that it will not happen anymore. So our criminal law sets a standard.

1985; Griffiths 1985; Crawford 1985; Griffiths and Patenaude 1988; Jackson 1989). Judicial familiarity with, and sensitivity to "local conditions" (such as the frequency and public perceptions of crime in the community, the relationship between alcohol and crime in the community, the sociocultural composition and level of acculturation of the community, the type of socio-legal resources available at the local level, and the physical isolation of the community) is clearly evidenced in the words of the Territorial Court in the case of Offender 38 at pp.12-14:

> I have been coming to Baffin Island for three years now, and I think I can say quite fairly that there is something here in Arctic Bay that isn't found in very many other communities. I don't know exactly what it is, I don't know how it works. I only had a small description this afternoon from the testimony of the Inumarit members. But what is important to the court is that whatever control mechanism there is in this community, it has kept it crime free. There are few other communities like Arctic Bay, but not many, Igloolik and Lake Harbour for example are two. In each of those communities, and Arctic Bay, it seems as though there are enough people that care and are involved in such a way that people don't commit crimes. If all of the communities in the Northwest Territories were like Arctic Bay and Igloolik, we wouldn't need any jails . . . It is obvious to me that what has been said in evidence today that the community is willing to act, the Inumarit is willing to act and social services are willing to act in this case . . . It is proven in the past by the very absence of crime or disturbance. This very special part of Arctic Bay is something that I would be very sad to see in any way taken away or diminished. The very things the Inumarit are trying to do; rehabilitating an offender, reconciling the offender, the victim and the community so that there is unity in the community and a program of education. Can any of us really say that jails do that?

Unquestionably, with Inuit, Indian and Metis offenders accounting for 92.82% of the offender sample, there is justification for the judicial consideration of cultural factors in sentencing although, consistent with the approach of the Saskatchewan Court of Appeal in the case of R. v. Beatty (1982), 17 Sask. R. 91

(Sask.C.A.), the findings of the study suggest that such consideration is not axiomatic to the establishment of ethnicity.[27]

In examining the judicial accommodation of sociocultural factors in sentencing, the findings of the study illustrate that, on occasion, the courts in the Northwest Territories may take the offender's "cultural background" into consideration as relevant to the assessment of the offender's "blameworthiness". Thus, the cultural background of at least seven (12.28%) offenders was considered by the sentencing court as a "mitigating" factor in passing sentence. Reminiscent of the suggested historical approach to sentencing in this jurisdiction (see Schuh 1979), at least one of these offenders was assessed by the sentencing court as "quite unkowledgeable and unsophisticated in Canadian law". As expressed by the Supreme Court in the case of Offender 22, at pp.3-4:

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[27]The case of R. v. Beatty 17 Sask. R. 91 (Sask.C.A.) establishes the principle that relevancy of an accused's "cultural background" to sentence is to be determined on a "case-by-case" basis. Speaking for the majority of the Court, Tallis, J. at p. 99 states:

> During the course of the argument this court was invited to consider R. v. Fireman (1971) . . . as authority for the proposition that the different cultural background of the respondent would traditionally warrant a sentence of two years or less for the offence of manslaughter. I agree that the cultural background of the defendent in R. v. Fireman . . . was a proper factor to be considered in the sentencing process. Each case must be considered on its own merits and one must bear in mind that the respondent is a sophisticated and articulate young man who has enjoyed many opportunities not available to Fireman. I must say that no general sentencing principle exists to support the proposition that a person of native ancestry should traditionally be dealt with on the basis of sentence of two years or less . . . Furthermore, I categorically reject any suggestion that the ancestry of the victim should be considered a mitigating factor because it is axiomatic that the life of a person of native ancestry is not as sacred as that of any other resident of Saskatchewan.

> The circumstances of the accused are that he is 48 years old. He is basically without education, he is a native of Arctic Bay. He has no criminal record. He is a steady worker. He has a good community reputation . . . He is now employed by the town . . . He has been married for 15 years and has five children, and he supports all the family . . . the next factors to consider should be the factors or things in mitigation or good things about the accused . . . I've considered the following things in mitigation. The accused is 48 years old and has no criminal record. He is a good community worker and has a good family record. He has had little education to help him understand the law or his responsibilities. He expressed great remorse for what he has done . . . When the victim . . . told him to stop, he did. He speaks no English and is, I think, quite unknowledgeable and unsophisticated in Canadian law.

Similarly in the case of Offender 13, at p. 2, the Supreme Court expounds:

> In the course of sentencing, important and surprising submissions were made, and it became clear on the evidence of the elders and chiefs that by native custom in the Village of Snare Lake it was said that it was quite in order for a husband to beat his wife when it was thought required. Also, it was indicated by the elders and others that the question of the sexual abuse of children was not a problem that the native people are familiar with in Snare Lake. For these reasons, it was argued that blameworthiness or blame should be reduced, and because of this the penalty should be less.

And in the case of Offender 1, at pp.4-5, the Supreme Court states:

> What circumstances must be considered so that the penalty is fitting? Punishment or penalty should, in logic, only be meted out for culpability or blameworthiness. What are the circumstances that would affect blameworthiness? First, there is what you might call a cultural milieu, often so different here. A person in a culture, for example where drunkeness is the norm, will not be , it seems to me as culpable as one that is raised with an awareness of its social price . . . Social milieu clearly is another consideration. The circumstances of the accused, the opportunities or lack thereof, the depravation of his youth, should be taken into account, his family background, his possibilities, his training, his plans, his hopes, his attitudes . . . How blameworthy was [the accused]? . . . Clearly when considering all these various things, disparity in sentencing will occur over the

> cases. Cultural rubric or fabric in the North . . . will set this situation apart from others . . . [The accused] is not all bad. He has had a bad time . . . .

And as provided by the Supreme Court in the case of Offender 31 at p. 9:

> It should also be mentioned that I have not ignored the offender's origins and cultural milieu in assessing his character.

Also relative to the "cultural background" of the offender, the findings of the study evidence that the courts, on occasion, consider the "effect of the sanction" on the accused (see Lindsey-Peck 1985; Government of the Northwest Territories 1985) and in some instances may adjust the type or length of sentence imposed to accommodate the cultural and linguistic requirements of the offender.

The most overt example of judicial accommodation of "the effect of the sanction on the accused" is the imposition of a sentence of less than two years so that the offender is not removed from his "cultural and linguistic environment" (in other words, the Northwest Territories) for the purposes of imprisonment in a southern penitentiary. Two cases illustrate the adjustment of sentence length so as to avoid the removal of the offender from the Northwest Territories for the purposes of imprisonment:

> As to whether or not the sentence should be served in a Federal or Territorial institution, I will only say that unless in exceptional circumstances, a sentence of two years less a day will be served in the Northwest Territories, among prisoners of a generally similar cultural background to that of the accused, the offender in this case [Sentence of two years less a day imposed] (Offender 18, p.13);

> It bears in mind his circumstances and the fact that his cultural background and family responsibilities make it undesireable that he be exposed, as a first offender from the Arctic Coast, to life in a southern penitentiary as a sex offender [Sentence of two years less a day imposed] (Offender 20, p.13).

For sentences of imprisonment that are less than two years in length but which may necessitate removal from a specific locality in the Northwest Territories, the sentencing court may "regionalize" the sentence of imprisonment by recommending to correctional authorities that the offender be allowed to serve his sentence in a designated correctional institution as in the following case:

> I am very sensitive to the distances and the difficulties regarding imprisonment in the Northwest Territories. It is a matter of great concern to me to learn that there is, in fact, no penitentiary as such in the Northwest Territories. Thus a prisoner is often removed far from his own community with no possible contact with his family and placed in an environment that is very, very different from his own. I have addressed that problem in other circumstances. It does not apply here, but I think the principle is important, and I shall, indeed, make the kind of recommendation [that the "time be served at Frobisher Bay where a large number of those of the accused's background are incarcerated"] [Sentence of 18 months imposed] (Offender 40, pp.6-7).

In those instances where a penitentiary term is required "in all of the circumstances" but removal of the accused from his "cultural and linguistic environment" likely would have adverse effects, the sentencing judge may attach a recommendation to the warrant of committal requesting that the offender be allowed to serve his sentence in the Northwest Territories. As the findings of the study indicate, a recommendation that the accused be allowed to serve his sentence in the Northwest Territories or in a specific region of the Northwest Territories if the sentence is less than two years was made for three of the offenders in the sample. Specific to Offender 23 who was sentenced to a penitentiary term, the

following excerpt exemplifies judicial sensitivity to this offender's "cultural and linguistic" background and the anticipated adverse effects of incarceration in a southern penitentiary:

> . . . I will make that recommendation, that [he] not have to go to a penitentiary. I should say to you that the penitentiary is not a place for Inuit people. I will recommend at this time that you not be sent there. [Sentence of two-and-a-half years imposed] (Offender 23, p.9);

And, although not attaching a recommendation, in the case of Offender 9 a copy of the remarks on sentencing was attached to the warrant of committal so as to apprise the correctional authorities of the accused's cultural and linguistic background:

> Because the accused is a native of the Baffin area, his counsel has asked that he serve his sentence there, and I acknowledge that he has problems with culture and language. I would ask the clerk to send a copy of these remarks with his warrant of committal, so that any linguistic problems and problems of potential cultural isolation can be considered by the authorities in whose charge he will be [Sentence of four-and-a-half years imposed] (p.10).

Another mechanism used by the courts in the Northwest Territories to prevent the removal of an offender from his "cultural and linguistic environment", and "localize" the term of imprisonment imposed, is the intermittent sentence. As the findings of the study indicate, however, notwithstanding that ten offenders were sentenced to a period of incarceration for 90 days or less, intermittent sentences were imposed in five cases only (Offenders 6, 38, 42, 44, 56). The relative infrequency of this disposition as applied to the offender sample is at least

partially explained by the inadequacy or absence of criminal justice resources, both physical and human, at the local level as exhibited by the following excerpts:

> I am going to address the problem of deterrence, or at least, intermittent sentencing. I think an intermittent sentence would be proper in all the circumstances. I think a jail sentence is proper; and having regard to this particular offender and his position here, I think an intermittent sentence would be proper. The detachment in Clyde River is a small one. While I haven't personally visited the jail, I believe . . . it to be a small room. I am advised there is no running water . . . In some communities, from time to time intermittent sentences are imposed, local guards are hired; but it's always a problem to get local guards. In many instances, it means the RCMP member and his wife are virtually prisoners, because they have to stay there and guard and feed the prisoner. On the other hand, there is provision in the Criminal Code for the imposition of intermittent sentences when the justice exercises his discretion and the prerequisites are complied with, if it's in the interest of the community and the interest of the accused . . . That's a right that's available to everyone across Canada, and that means from Grise Fjord to Toronto and Vancouver and Halifax. It doesn't just mean southern jurisdictions. There is going to be an obligation on the executive to provide the facilities for intermittent sentences . . . So, what did I do, impose a sentence without regard to the consequences, or at least impose a sentence that reflects the reality of the situation? I think very shortly the court is simply going to have to impose intermittent sentences where proper, and the executive is just going to have to do something so that it's not an impossible situation for the police that it does become in many instances. Especially on April 17th, I think it is, when Section 15 will be proclaimed, this man is not receiving full benefit of the law. He is not receiving it . . . because he is in Clyde River, and that's not right (Offender 6, pp.4-7);

> On the charge of sexual assault I am going to sentence you to ninety days imprisonment which is to be served intermittently . . . I recognize that this may cause difficulties for the police in that the accused will be serving his time at the detachment in Nanisivik. I recognize as well that there is one law for Canada, and that law says I am entitled to impose an intermittent sentence. I don't want to be blind to the realities of the situation in the Northwest Territories, but I am of the view that a jail sentence is called for and that under all the circumstances an intermittent one is best . . . . (Offender 38, pp.18-19);

> . . . for the purposes of general deterrence only in this instance I am going to impose twenty-five days in jail. I will allow that to be served intermittently, recognizing that that might be very inconvenient locally, but taking into account that the Appeal Courts have directed in the past that the trial judge must not concern himself with the inconvenience or the inability of the facilities to provide the necessary services (Offender 44, p.4).

In addition to removal from the offender's "cultural and linguistic environment", the sentencing court may consider the "unintended consequences" of the sentencing disposition on the accused. Although arguments for and against the imposition of a section 98.(1) order were presented with respect to only one of the 11 offenders in the sample on whom such a disposition was imposed (Offender 18), arguments have been entertained by the Northwest Territories courts in cases external to the offender sample with respect to the unintended, indeed adverse, effects that may result from the imposition of this type of disposition in a culturally diverse jurisdiction such as the Northwest Territories (see R. v. Weyallon [1985] N.W.T.R. 264 (N.W.T.C.A.); R. v. Tobac [1985] N.W.T.R. 201 (N.W.T.C.A.); Lindsey-Peck 1985; Bayly 1985).

Lindsey-Peck's (1985:53-55) contention that the sentencing courts in the Northwest Territories consider not only the effect of the sanction on the offender but on the offender's community is borne out by the findings of the study. In relation to the offender sample, there were at least four instances where the sentencing court, either directly or indirectly, considered the effect of the sanction on the community. In the case of Offender 13 the sentencing court heard community testimony that the offender was needed in the community and that the community "could take care of the offender". In deference to the community evidence presented in this case, responsibility for the reporting condition of the

probation order was devolved to the elders in the community. Similarly, in the case of Offender 38 partial responsibility for the "rehabilitation" of the offender was devolved to the traditional Inumarit Committee with the offender ordered to "comply and cooperate with all directions and counselling efforts made by the Inumarit" (at p.19) as well as perform community service work under the shared direction of a probation officer and this committee. Although not overtly stated by the sentencing court, the judicial consideration of the effect of the sanction on the community is implied in the case of Offender 18 who was banished from his community for a three year period of probation. Paralleling the rationale in Saila v. R., [1984] N.W.T.R. 176 (N.W.T.C.A.), considerable emphasis was placed by the sentencing court on this offender's extensive criminal history in the community from which he was banished. Last, in the case of Offender 28, expert evidence was solicited by the sentencing court from a community member to determine the consequences, intended or otherwise, of imposing a community service order in the community (see also Griffiths 1985; Lindsey-Peck 1985).

The "Level of Sophistication" Prerequisite

As suggested above, the judicial consideration of the "cultural background" of the offender is not axiomatic to the establishment of ethnicity. Indeed, as in the case of Regina v. Beatty (1982), 17 Sask. R. 91 (Sask.C.A.), the findings of the study evidence that a prerequisite of "cultural" accommodation is the judicial assessment of the offender's "level of sophistication", with subsequent judicial differentiation between the "sophisticated" and "unsophisticated" offender.

As illustrated by the following excerpts, the judicial assessment of an offender's "level of sophistication" (or, as conceptualized by Lindsey-Peck 1985: 56, the "community isolation factor") is both explicitly and implicitly stated in the criminal sentencing process. And, as intimated by Lindsey-Peck (1985), the judicial assessment of the offender's "level of sophistication" entails consideration of a complexity of factors, inclusive of the physical isolation of the offender's community, the offender's record of employment (employment in the wage economy as juxtaposed to adherence to a "traditional lifestyle"), the offender's educational achievement (level of formal training and education relative to others in the community), the linguistic traditions of the offender (fluency in English as juxtaposed to retention of an aboriginal language), and the criminal history of the offender, which are interpreted as evidence of the offender's relative exposure to "southern cultural values" and Canadian law ways.

> In this circumstance, I must also acknowledge that the accused is not an unsophisticated person, in that he has lived in the south, he has had experience and was a well thought of and highly respected person in his position (Offender 7, p.6);

> [The accused] is described as having a grade eight level of schooling at Frobisher Bay. He is of average intelligence. He speaks and understands English sufficiently. He has been before the courts on a number of occasions previously . . . He is no longer a youngster. And he is certainly no mere first offender. He is not ignorant of the law (Offender 8, pp.3,5);

> I will refer to only one more case which, although it is based upon special circumstances and is a case from outside the Northwest Territories, is nevertheless most apposite to many cases coming before the Courts of the Territories. That is the case of R. v. Fireman . . . in which a unanimous court gave careful consideration to the sentencing of a native Indian from a remote and small community. Inuvik is, today, no longer such a community, but there are communities in the Northwest Territories and so care must be

taken not to confuse cases arising in such communities with cases arising in towns, even small towns, such as Inuvik. At the same time, cultural factors recognized in the Fireman case are very often present in cases before our courts in the Northwest Territories, even in places such as Inuvik, and even if only in a somewhat modified form, as here, and this must not be ignored (Offender 20, pp.9-10);

As for the involvement of liquor, both [of the accused] knew they had a liquor problem. They knew what liquor does to people and would do to them if consumed in excess . . . Hall Beach is not an isolated tent camp any more. People here may use snow houses when travelling in winter on a hunting trip, but not for regular living in the settlement, which is a hamlet with its own council, houses and streets and so on. People here, [like the accused], have gone to school for some years. [The accused] has held responsible jobs, has spent time in Ontario and in other parts of the Northwest Territories. Neither [accused] is a primitive person who might claim ignorance of the law (Offender 23, p.7);

It should be noted that these cases deal with Native northerners from isolated communities for the most part, each of whom, due to background, culture or education and a number of other reasons were to a degree ignorant of the law . . . The accused in this case is well educated. He was raised in Nova Scotia with southern values and, for all intents and purposes, has lived with the values of middle-classed southern society. It seems to me that except for the fact that the offences physically occurred in the Northwest Territories, the cases from Alberta and Ontario . . . are more relevant as to penalty than the cases from the Northwest Territories (Offender 45, p.9);

With respect to the Selamio decision in which his Lordship Mr. Justice Tallis, as he then was, imposed a $200.00 fine and probation on what we would now call a sexual assault case whose facts were very, very close to this one, I have to, I think, distinguish that case. His Lordship was dealing with someone who was unaccustomed and unfamiliar with the ways of town living. He was socially inept. He had no criminal record, and there were significant cultural problems in terms of conflict . . . But this isn't the case with the accused before me today. The accused before me today has lived in the largest community in the Northwest Territories for a number of years. He has been socialized in large communities. It is not as though his cultural background is similar to that of Selamio (Offender 46, pp.4-5);

> . . . indicating that the accused is really quite a bright, well educated and accomplished man. He has upgraded his skills . . . As a child he spent four years in the south in hospital . . . It seems he had a troubled youth, glue sniffing, alcohol and crime. When out of jail he seems to have been quite resourceful . . . He has been active in many things including work with the Courts . . . In Stoney Mountain he achieved first year university status . . . So, we have quite a sophisticated man that the Court is dealing with (Offender 54, pp.7-8);

> I have also to take into consideration the fact that the accused is still very young, is confused and torn between the lifestyle of his parents and his ancestors and the life-style of a specialized labourer in a more modern or maybe more southern society or lifestyle . . . the degree of sophistication of both the offender and victim applies to most cases in the Territories as compared to similar cases in urbanized areas . . . Here the accused has a seventh grade, is torn apart between the life-style of his parents and his ancestors and a more modern life-style (Offender 57, pp.62-63).

As a prerequisite to the judicial accommodation of cultural factors in the criminal sentencing context, the assessment of the offender's "level of sophistication" is troublesome because of the conceptual juxtaposition of offenders who are "sophisticated" with those who are "unsophisticated" or "primitive". In this regard, there is an implicit assumption of the cultural superiority of the dominant society given that "acculturation" is equated with "sophistication" and "cultural intactness" is equated with the more pejorative terms, "unsophisticated" or "primitive". This conceptual juxtaposition also assumes cultural homogeneity insofar as aboriginal "culture" is presumed to be inferior to the dominant "culture" of non-native society.[28]

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[28]For elaboration of cultural and linguistic diversity among Canada's aboriginal peoples, see Griffiths and Yerbury (1983, 1984). See also Griffiths (1985) for acknowledgement of the diversity among the non-native populace of the Northwest Territories.

As well, the criteria used by the sentencing courts to measure an offender's "level of sophistication" raise a number of questions. Are level of formal education and training, and participation in the wage economy commensurate with the loss of aboriginal cultural values and absorption of the normative standards and structures of the dominant society? Is experience outside of a geographically isolated community equivalent to the loss of aboriginal cultural values and absorption of the mores of the dominant society? Does the existence of an extensive criminal history necessarily infer familiarity with, and acceptance of the principles and structures of the Canadian criminal justice system? On the other hand, do adherence to the land based economy and an aboriginal language necessitate a "lack of sophistication in, and knowledge of" the Canadian criminal law? And, do the absence of formal education and prior criminal record necessarily infer "ignorance of" the Canadian criminal law?

All of the criteria presently used by the trial courts in the Northwest Territories to assess an offender's "level of sophistication" prior to according recognition of "cultural factors" infer that "culture" is a static phenomenon; that aboriginal peoples cannot participate in the dominant society while simultaneously maintaining their cultural identity. Taken to its logical extremity, as in the majority decision of the Northwest Territories Court of Appeal in the case of Offender 38, access to electricity, telephone, nursing facilities, grade school education and the proximity of a "large and modern mine" were used to refute the geographic and cultural isolation of a community and hence any semblance of "ignorance of the law" on behalf of the offender (Reasons for Judgement, pp. 1-2).

Notwithstanding the significance of the Northwest Territories courts' recognition, and at times accommodation, of the extraordinary geographic and cultural requirements of the jurisdiction in which they operate, it is equally important to acknowledge the limits imposed on such recognition and accommodation as well as the contradictions that inevitably result when divergent cultural values are accommodated within existent criminal justice structures.

Limits to Geographic and Cultural Accommodation: The Rejection of Substantive Cultural Arguments

Although the findings of the study evidence that the courts in the Northwest Territories are, on occasion, willing to accommodate geographic and demographic factors in the criminal sentencing context, it is equally evident that such accommodation is infrequent. Accordingly, it is significant that a probation condition of banishment was imposed in one of 57 cases only; that community involvement in enforcing the conditions of probation was facilitated in two of 57 cases only; that judicial recommendations requesting the regionalization of sentence were made in three of 57 instances only; that the "cultural background" of the offender was recognized as a mitigating factor in seven of 57 cases only; and, that the "effect of the sanction" on the offender and the offender's community was considered as a mitigating factor in four of 57 cases only.

The findings of the study also evidence that there are very clearly prescribed limits to the judicial accommodation of geographic and demographic factors (see also Griffiths and Patenaude 1988; Jackson 1989). Thus, while arguments that an offender is "unsophisticated in, or ignorant of" the criminal law may be acknowledged by the courts in relation to reduced blameworthiness and

hence reduction in penalty at the level of sentencing, the courts invariably reject arguments pertaining to conflict between the substantive core of the criminal law and aboriginal cultural values and customs at the level of finding.[29] As stated by the Supreme Court in the case of Offender 13, at pp.8-9:

> It is my view that the point here is simply this: no matter how these matters are seen in any community, there is only one criminal law in Canada and for all Canadians ... This is so where there is a conflict between their native custom and valid criminal law. Canadian criminal law applies to all Canadians. This, of course, does not mean that native traditions and customs will not be honoured; they will; but where they conflict with the Criminal law of Canada, the criminal law must be followed . . . In this case the Dene chiefs indicated that the native community could handle the problem, and I agree that insofar as they can do that within the criminal law of Canada, they should be encouraged to do so.
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> It has been said, and I agree, that there is one law in Canada, and that law is the same for everybody, rich man, poor man, judges, lawyers, politicians, the same laws apply to everybody. Sometimes I feel as ... your mayor, when he says that there are unwritten laws in

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[29]A consideration of the limits to judicial accommodation of cultural factors is not restricted to the offender sample. The posture of the Northwest Territories courts is equally evident in the case of R. v. Baillargeon [1986] N.W.T.R. 121 (N.W.T.S.C.) where at 126 Marshall, S.C.J., states:

> Native people, like all Canadians, are subject to our criminal law. Spousal assault is no less serious because it occurs in a Dene Village rather than a depressed or even affluent section of Toronto or Halifax . . . There may indeed be more spousal assaults in the North because of isolation, severe climate, crowded quarters, and great cultural changes -- these may even account for it. But they do not in any way change the applicable law so that we in the courts should condone it. They, if anything, speak out for deterrent sentences to address the problem. In my view to take account of culture isolation and other attitudes which are not in accord with clear Canadian law is just to delay the day of atonement. It only puts off the inevitable.

See also R. v. Curley, Issigaitok and Nagmalik, [1984] N.W.T.R. 263 (N.W.T.Terr.Ct.), [1984] 281 (N.W.T.C.A.), for a consideration of the limits to judicial accommodation of "ignorance of the law" in the Northwest Territories.

> the community and there is the written law, (the Code), and he wants to see the two work together. I don't think that really they are that far apart . . . (Offender 38, pp.2-3);

> Deterrence must be as well be an element, not an insignificant element . . . [The accused] was involved with the same daughter [as for his previous conviction] . . . He had been told by the court at that time that there are serious repercussions for this kind of offence, that they are grossly and totally unacceptable. They are unacceptable in the Inuit culture. They are unacceptable in every culture around the world (Offender 5, pp.5-6).

It is worthy of comment, however, that the limits imposed on judicial recognition and accommodation of the extraordinary geographic and demographic requirements of the Northwest Territories do not necessarily emanate from the trial court level of proceedings. Notwithstanding recognition and accommodation of "cultural factors" in matters of sentencing by the Northwest Territories' trial courts, limits may be imposed on such accommodation at the appellate court level of proceedings if the sentencing decision is subsequently appealed. Relative to the offender sample, there were at least seven appeals by crown against sentence, with all sentences varied on appeal (see Appendix P: Appeals from Sentence).

Of relevance to the present study, judicial acknowledgement and accommodation of the communal context for sentencing in the case of Offender 38 was rejected by the majority of the Northwest Territories Court of Appeal on the basis that the community, relatively speaking, was not isolated nor was the Inumarit Committee a "traditional" counselling committee in the "historic" sense of the word (Reasons for Judgement). Irrespective of the specious reasoning on which this judgement was based, the majority judgement in this appeal is of considerable import, not only for its apparent rejection of the position of the

Northwest Territories Court of Appeal in R. v. Ayalik (1960), 3 W.W.R. 377 (N.W.T.C.A.) wherein the trial courts' familiarity with "local conditions, habits, ways of life, customs and characteristics" was recognized, but because of its implication for the future accommodation of geographic and demographic factors by the sentencing courts in the Northwest Territories.[30]

The Inherent Contradictions in the Sentencing Process

The findings of the study reveal that the judicial accommodation of divergent cultural values within the dominant Anglo-Canadian normative and sanction system inevitably creates contradictions, especially when viewing the sentencing decisions for the offender sample as a whole. Underlying the sentencing process in the Northwest Territories there is pervasive ethnocentrism evidenced in the emphasis of the sentencing courts on factors that facilitate assimilation into the dominant society, namely "education", "training", and "employment". In this sense, it is significant that 17 of 57 offenders were required to participate in education/counselling/treatment programs as a condition of probation; that eight of 57 offenders were recommended for participation in vocational/training/educational programs during incarceration; and, that the assessment of "community record" as a mitigating factor in sentencing revolves on the offender's educational achievement, exemplary work record, financial support of family, and absence of prior criminal record.

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[30]For more detailed discussion of the limits placed on the judicial accommodation of geographic and cultural factors by appellate court direction in the Northwest Territories, see Griffiths and Patenaude (1988) and Jackson (1989). Conversely, see Hogarth (1971) who expounds on the limited influence of appellate court direction in matters of sentencing.

This underlying ethnocentrism also is evidenced in the use of the criminal sentencing process as an "educational forum" in the Northwest Territories,[31] a mechanism by which the offender and the community can be "taught" the appropriate normative and sanction system by which to abide. Although generally phrased in terms of the principles of sentencing, with particular reference to "protection of the public" through "deterrence" and "denunciation" (or "repudiation"), the community and the offender may be given a "lecture" by the sentencing court during the course of the sentencing hearing. For the purposes of the present study two types of lecture were identified, namely the "Community and Accused Must be Taught to Respect the Integrity of Women" lecture (Offenders 13, 21, 25, 27, 33, 53) as exemplified in the case excerpts that follow, and the "Time to Stop Drinking, Learn a Trade, Get a Job, and Get Your Life in Order" lecture.

> The court at some point has to be concerned and very concerned about protecting the public. I perceive my role in imposing a sentence today as reflecting one of the most important elements in other words to try and protect the community. This man is out of control. The community has to be protected. Surely in 1985 a young girl can go to sleep in her house without worrying about a man appearing at the foot of the bed carrying a rifle demanding intercourse . . . Surely one can say that [the accused] has reached the point where he understands

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[31]Commenting on the contemporary "educational role" of the courts in the Northwest Territories, Judge Halifax (as cited in Griffiths 1985:3.9) states:

> The role of the court in this enterprise is facilitated by the fact that there is not the factory court system that exists in the south where there are two and three hundred cases being run through a docket. The courts in the North have the time to explain to people what the charges are, what the procedure is, why they are found guilty or not guilty and the reasons for sentence. The court is thus able to play a major role in public legal education and this role should be jealously guarded.

See also Lindsey-Peck (1985) for elaboration of the sentencing hearing as an "educational forum" in the contemporary context.

that that is wrong . . . I think the court does have to have some concern with respect to general deterrence. Sometimes one is almost ashamed of the male sex. After hearing of the nonstop litany from one community to another of men beating their women, beating wives, beating daughters, raping and having sexual intercourse with women here without their consent, expecting it almost as a right, treating women like they would treat a snowmobile or piece of equipment . . . and it is an attitude that the courts will not tolerate. A woman is to be respected just as much as any other person. A woman has a right to say no. A woman has the right to the integrity of her own body. No man owns, and no man may use a woman as he sees fit when and as he feels like it, administering blows or having intercourse regardless of her view of the situation. That kind of attitude, reaching an extreme here, has to be deterred. Women are important partners in life, and must be respected and acts like this, as they reflect upon male and female relationships, have to be deterred in clear terms [Sentencing Location: Coppermine] (Offender 21, pp.5, 10-11);

I am sure you have been sitting here all night and have heard that everyone who's before the courts was drunk when they committed their offence . . . It has to be understood that people can't walk into other people's houses and commit sexual assaults on sleeping women. That is just something that is grossly unacceptable. And I think the sentence imposed must be one that is going to deter that class of person who might be inclined to do something like this. If anyone else here is ever in the same position as the accused, they're going to have to think twice before they run away with their feelings into someone else's house [Sentencing Location: Frobisher Bay] (Offender 27, p.3);

With regards to general deterrence . . . The community must be shown that one cannot give alcohol to young girls and sexually abuse them, minors, in a true sense of the word. This type of activity must be shown to be clearly illegal an activity [sic], that the Courts will not tolerate, society will not tolerate [Sentencing Location: Aklavik] (Offender 33,p.4);

I am not at all tempted to be lenient towards male adults who voluntarily get intoxicated and then sexually assault young girls. This is a very serious crime and it should be understood by everyone in the community that the Courts will be severe in dealing with cases like this [Sentencing Location: Frobisher Bay] (Offender 53, p.4).

The "Time to Stop to Drinking, Learn a Trade, Get a Job and Get Your Life in Order" lecture that is given to individual offenders is illustrated in the following excerpts:

> It seems to me that you are a young man, and that if you get yourself straightened around and stop drinking and get yourself involved in some lasting relationships with people who would appreciate you and who you might appreciate, I think that you could still make a useful life . . . I want to say to you that your situation, your life, has been very tough, I can see that. You have had a lot of trouble, but you are a very young man, and surely you can get yourself together and get a job, learn a trade when you are there, and get rid of your alcoholism, get away from drink, learn to do something and come out of there and get a job and try to play the game according to the rules. It really isn't that difficult. You certainly haven't learned yet because you have an extensive criminal record. Society has certain rules . . . that everybody has got to follow. You are not following those rules, and it keeps getting you into trouble and making your life miserable. It really is not that difficult to follow the rules. All you have got to do is get a job, work steadily, and stay within the rules. You will make friends and relationships that will make it all worthwhile . . . Do try to do that. You are getting older, you should be getting smarter, you should be getting to know what you should and should not do [Sentencing Location: Yellowknife] (Offender 1, pp.6-7):

> . . . you are now a grown man and it will be for you in the next few months to do some hard thinking about your life and what you are going to do with it. I am going to suggest to you that during that time that you will have to do that you also try to get some more schooling. You have grade VII, and if you get some schooling and training of any kind that may help you get jobs, that perhaps is the best help you can give yourself . . . Secondly, other people have said to you that if you take the chance you can get help to solve your liquor problem. If you do not take that help and do not take that chance, I think we may see you back here or in some other court, and it would be very sad if you were back here or in some other court . . . . [Sentencing Location: Yellowknife] (Offender 34, p.4).

The Dilemma of Sentencing in the Northwest Territories

As a function of accommodating the geographic and demographic realities of the jurisdiction in which they operate, the courts in the Northwest Territories have been subject to criticism for their "leniency" in sentencing (Offender 10). Paradoxically, because such "leniency" tends to occur within the context of a sentence of incarceration, which itself may be a function of the socio-legal resource constraints under which the courts operate, the courts in the Northwest Territories also are criticized for their "overreliance" on incarceration in sentencing (Offender 28). Each of these respective criticisms is worthy of comment.

While the "leniency" argument would seem to have some validity in the sexual assault sentencing context given that range of sentence for the "typical" sexual assault offence in the Northwest Territorities was between 18 and 30 months (Offenders 26, 30, 43, and 47) prior to the advent of the Sandercock (1985) benchmark approach to sentencing in this jurisdiction in 1986,[32] at the present time there is no methodologically sound cross-comparative research to support the assertion that the trial courts in the Northwest Territories sentence "more leniently" than do their counterparts in southern jurisdictions. However, if one is to accept Lindsey-Peck's (1985:49) cross-comparative analysis of sexual assault sentencing trends in the Northwest Territories, it could be asserted that the trial courts in this jurisdiction are not necessarily more lenient in their sentencing practices than are "southern" trial courts. Even if the assertion that the courts in

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[32]For elaboration of sentence range for sexual assault offences in Canada, see Nadin-Davis and Sproule (1985, 1987).

the Northwest Territories sentence "more leniently" could be proven, the issue of inter-regional sentencing disparity begs the question of whether uniformity in sentencing is a valid, or even desireable, objective given the extraordinary sociocultural diversity of a northern Canadian region such as the Northwest Territories and absence of alternative mechanisms by which to accommodate such diversity (see Verdun-Jones and Muirhead 1980; Jackson 1985; Jackson 1989).

With respect to the criticism that the courts in the Northwest Territories "overuse" incarceration (Offender 28), evidenced by the findings that 34 of the 36 offenders with prior criminal records had been incarcerated on one occasion or more and that 54 (94.73%) of 57 offenders in the sample received sentences for the sexual assault offence(s) including, or restricted to a period of incarceration, it is premature to criticize the courts in the Northwest Territories for their "overreliance" on imprisonment without first considering the type of offence for which sentence is imposed or the criminal justice resource constraints of the environment in which these courts operate.

In relation to the sample of sexual assault offenders under analysis, criticism that the courts in the Northwest Territories overrely on imprisonment is, to some extent, unfounded in lieu of appellate court direction that a term of imprisonment in cases of sexual assault should be imposed except in the most "unusual or exceptional circumstances" (Offenders 2, 3, 26). And, as will be discussed below, the courts in the Northwest Territories are to a large extent constrained in the dispositions they impose by the availability of sentencing alternatives in this jurisdiction (see Finkler 1982b, 1982c; Lindsey-Peck 1985; Griffiths and Patenaude 1988).

In examining the limits to the judicial accommodation of cultural and geographic factors in the Northwest Territories and the "inherent contradictions" that inevitably result from the judicial accommodation of divergent cultural values within the dominant normative and sanction system, one has to acknowledge the socio-legal resource constraints under which the courts in the Northwest Teritories operate and the essential dilemmas that trial courts in this jurisdiction face in attempting to balance competing demands in the criminal sentencing context. On the one hand, the courts seek to make geographic and cultural accommodations within the constraints imposed by their being "only one criminal law in Canada". Indeed, the trial courts are themselves bound by the laws with which they are charged to uphold (in other words, the provisions of the Criminal Code, the principles of sentencing and appellate court direction or, as conceptualized by Hogarth (1971), the "socio-legal constraints" to sentencing). On the other hand, the courts are constrained by the geographic or, as referred to by Hogarth (1971), the "situational" realities of the jurisdiction in which they operate (see R. v. Qitsualik, [1984] N.W.T.R. 233 (N.W.T.S.C.).

In seeking to accommodate geographic and cultural factors, the trial courts in the Northwest Territories are faced with the dilemma of accommodating divergent aboriginal cultural values within existent criminal justice structures. As previously suggested, in the area of criminal law the historically preferred approach in the Northwest Territories has been procedural rather than substantive accommodation. Although some of the arguments for refusing adaptation of the substantive core of the criminal law in deference to the "special circumstances" of northern aboriginal peoples are indeed specious (see Schuh

1979), there are valid reasons for not recognizing aboriginal cultural values and customs within the confines of the substantive criminal law.

As suggested by Richstone (1983) and Yabsley (1984), the use of non-native standards to validate native custom may introduce an "unconscious ethnocentric" (or culturally biased) component to the interpretation of the custom. Accordingly, customs that are found to be repugnant to the dominant standards may not be validated or may be unalterably modified through judicial interpretation. Indeed, as suggested by the findings of the study (the "level of sophistication prerequisite" to cultural accommodation and the simultaneous reinforcement of values and structures specific to the dominant society), the introduction of such bias is not restricted to substantive accommodation but extends to the procedural accommodation of "cultural circumstances" or "customs" in matters of sentencing.

In attempting to understand the sentencing process in the Northwest Territories, one also has to consider, the criminal justice resources that are available to the court. Indeed, it is premature to criticize the courts in the Northwest Territories for their "overuse of imprisonment" without first considering the criminal justice resource constraints of the jurisdiction in which they operate. The geographic dynamics of the Northwest Territories (enormity of land mass and scarcity of population) are such that it has not been economically feasible to implement physical and human criminal justice resources in all regions and in all communities.[33] As a result, there is discrepancy between those sentencing options which are conceptually available to the sentencing courts in the

[33]For elaboration of the "incomplete development of socio-legal recources" in the Northwest Territories, see Finkler (1982a, 1982c).

Northwest Territories (as defined by the relevant provisions of the Criminal Code) and those that are available in practice.

Some examples of inadequate or non-existent criminal justice resources and services evidenced through the findings of the study were: (1) the lack of appropriate facilities in some individual communities to execute intermittent sentences necessitating either the imposition of an intermittent sentence without regard to the circumstances or the removal of an offender for the purposes of a "deterrent" sentence (Offenders 6 and 44); (2) the lack of mental health resources during the time frame under analysis, necessitating the removal of offenders requiring psychiatric assessments from the Northwest Territories to a southern jurisdiction (Offender 14); (3) the absence of sexual assault offender treatment programs in the Northwest Territories during the time frame under analysis requiring the removal of the offender from the Northwest Territories to a southern jurisdiction for the purposes of securing such treatment (Offenders 5 and 45).

The "scarcity" of criminal justice resources also creates problems for the courts in the Northwest Territories given Section 15 of the Charter which provides for "equal benefit of the law" to all Canadians, irrespective of where they live (Offender 6). Appellate Court direction in this regard, that the trial courts should simply ignore the inadequacy or absence of criminal justice resources, is of little assistance to the sentencing courts in the Northwest Territories who are forced to balance the competing demands of geographic and sociocultural diversity within existent criminal justice structures.

CHAPTER VI

CONCLUSION

Results

To recapitulate briefly, the thesis was conceptualized as an exploratory examination of the sentencing process in the Northwest Territories, with particular reference to the judicial accommodation of extraordinary geographic and demographic requirements in the criminal sentencing context.

In deference to the methodological inadequacy of the literature reviewed in Chapter II, it was submitted that there was need for methodologically guided and data supported research on the criminal sentencing process in the Northwest Territories. Accordingly, based on the examination of Territorial and Supreme Court sentencing decisions relative to adult male offenders convicted and sentenced for the commission of at least one sexual assault offence contrary to section 246.1, 246.2, or 246.3 of the Criminal Code) between 1983 and 1986, inclusive, three research objectives were enumerated at the outset of the thesis:

> (1) to examine what geographic and demographic factors are considered by the Northwest Territories trial courts in the process of sentencing a criminal offender;
>
> (2) to determine how the judicial consideration of geographic and demographic circumstances affects the judicial reasoning process relative to the sentencing of a criminal offender, and;
>
> (3) to examine when the trial courts are willing to consider geographic and demographic circumstances in the process of sentencing a criminal offender.

The subsidiary objectives identified for the thesis subsumed eliciting information on the "northern" criminal offender and the "northern" criminal offence.

Sexual Assault in the Northwest Territories

Although identified as subsidiary research objectives, the study is a positive contribution to the existent literature on sexual assault (see Boyle 1984) and offers a number of valuable observations with respect to the "northern" criminal offender and the "northern" criminal offence. Keeping in mind the limitations of the two studies as already articulated, the findings presented in Chapters IV and V of the present study both confirm and refute Lindsey-Peck's (1985) assertions pertaining to the frequency and dynamics of specific "types" of sexual assault offences in the Northwest Territories as well as her contention that the "northern" sexual assault offender and offence are unique and distinguishable from their counterpart in the south. To the extent that judicial adjustment in matters of sentencing in the Northwest Territories is predicated on the notion that the "northern" criminal offender and the "northern" criminal offence can be distinguished from their southern counterpart, confirmation or refutation of Lindsey-Peck's (1985) findings is significant.

According to Lindsey-Peck (1985:22), the "Exceptional Aggravating Factor" sexual assault is characterized by the presence of one or more of the following aggravating factors:

> two or more defendants (group rape); the presence of unusual sexual practices or indecencies; breach of trust; an exceptionally youthful or elderly complainant; excessive violence; the use or threat of weapons, and an offender who has a personality disorder (dangerous offender)".

Lindsey-Peck (1985:22) further asserts:

> These elements are rarely present in sexual assaults committed in the Northwest Territories, with the exception of cases involving youthful complainants and breaches of fiduciary relationships . . . The type of criminality in the North which usually involves a social maladjustment as opposed to professional criminality may explain the rarity of certain types of crimes.

The second type of sexual assault offence identified by Lindsey-Peck (1985:29), the "Stark Terror Sexual Assault", is used to describe "a form of behavior which may also be classified as aggravated sexual assault, or may include other charges involving use or possession of a weapon, forcible abduction, threatening or break and enter". According to Lindsey-Peck (1985:29, 32),

> When picturing a 'rape', the common image is a young woman being assaulted as she walks down a lonely and deserted street, or being accosted in her bedroom late at night . . . This type of offence is very uncommon in the Northwest Territories. The few cases available usually involve less violence. No case of using a weapon in committing a sexual assault has come to notice in the Northwest Territories at the time of writing this paper.

Lindsey-Peck (1985:33) further maintains that the "Stark Terror Sexual Assault" in the Northwest Territories can be distinguished from its southern counterpart because the dynamics of this "type" of offence in the Northwest Territories include excessive alcohol abuse, almost complete absence of premeditation, and minimal violence. As stated by Lindsey-Peck (1985:36):

> In the Northwest Territories, although numerous crimes are committed, the criminality of the offenders is more a cultural-social problem than a strictly criminal one. "Stark Terror" sexual assaults do not occur in such a serious form or as frequently as in other parts of the country. Aggravating factors, such as premeditation and possession of a weapon, which generally increase the severity of the sanction imposed, are rarely observed in sexual assaults committed in the Northwest Territories.

Although not directly comparable to any of the "types" of sexual assault described in Chapter IV of the present study, "Sexual Assault in the Presence of a Third Party" and the "Exceptional Violence Sexual Assault" closely parallel Lindsey-Peck's (1985) conceptualization of "Exceptional Aggravating Factor" and "Stark Terror" sexual assault offences. Each of these "types" of offence tend to involve considerable violence as well as additional aggravating factors such as the threat or use of a weapon, and the presence of "unusual sexual practices" (at least two of nine "exceptional violence" offences involving forcible rape in conjunction with sodomy and fellatio). The "Exceptional Violence Sexual Assault", as described in Chapter IV, for example, is almost identical to the "common picture" of "stark terror" rape described by Lindsey-Peck (1985) insofar as this "type" of offence relative to the findings of the present study involves either the surreptitious entry of an adult female complainant's home and her subsequent brutal rape or the youthful complainant who is, in essence, "grabbed off the street" and subsequently sexually assaulted.

Notwithstanding similarity between these four offence types, the findings presented in Chapter IV of the study refute, to some extent, Lindsey-Peck's (1985:22,32) assertion that "Exceptional Aggravating Factor" and the "Stark Terror" sexual assault offences are "extremely rare" or "uncommon" in the Northwest Territories. At least nine of 62 offences in the present study were

classified as an "Exceptional Violence Sexual Assault" and at least four of 62 offences were classified as "Sexual Assault in the Presence of a Third Party". Indeed, as suggested in Chapter IV, eight of the offences committed by the offender sample were prosecuted as "sexual assault with a weapon/causing bodily harm" and "aggravated sexual assault" contrary to sections 246.2 and 246.3 of the Code (since revised) suggesting that "Exceptional Aggravating Factor" and "Stark Terror" types of sexual assault may be more frequent in the Northwest Territories than is submitted by Lindsey-Peck (1985).

Lindsey-Peck's (1985) assertion that the dynamics of both "Exceptional Aggravating Factor" and "Stark Terror" sexual assaults are distinguishable from similar types of offences in the "south" (the former differentiated by "breaches of fiduciary relationships" and "youthful complainants" and the latter by excessive alcohol abuse, absence of premeditation, and minimal violence) is similarly diminished by the general findings in Chapter IV which suggest the threat or use of a weapon in at least five of 62 offences and some form of violence and injury in at least 30 of 62 offences. As illustrated by the "Exceptional Violence" and "Third Party" offence case excerpts in Chapter IV, each of these types of offence tends to be characterized by "exceptional" rather than "minimal" violence.

Furthermore, scrutiny of the "Exceptional Violence Sexual Assault" offence (as described in Chapter IV) indicates that the aggravating characteristics of this "type" of offence are not restricted to "youthful complainants" and "breaches of fiduciary relationships", these latter dynamics more generally encompassed under the "Incestuous Sexual Assault" category. The judicial consideration of "offence dynamics", "the effect of the assault on the victim", "the type of sexual contact",

and the "physical location of the offence" as aggravating factors, enumerated in the Chapter V findings, also refutes Lindsey-Peck's (1985) intimation that factors in aggravation in the Northwest Territories are restricted to "breaches of fiduciary relationship" and "youthful complainants". As well, while all of the offenders in the present study were assessed as being fit to stand trial, the psychiatric profile findings contained in Chapter V suggest a number of offenders who were assessed as having a "propensity towards violence", an "antisocial personality", or "personality disorder", indicating that the "personality disorder" aggravating factor dynamic may be more frequent in the Northwest Territories than is suggested by Lindsey-Peck (1985).

Notably, the general findings in Chapter IV, suggesting that a majority of complainants were related to their offender by blood or marriage and a significant proportion of the offences involved the breach of a fiduciary relationship, and that a majority of complainants were under the age of eighteen at the time of the assault, lend support to Lindsey-Peck's (1985:24) assessement of the frequency with which these aggravating factor dynamics exist in the Northwest Territories, although not necessarily Lindsey-Peck's (1985) isolation of these dynamics to the "Exceptional Aggravating Factor" sexual assault. The "complete absence of premeditation" dynamic is difficult to assess because the absence, or presence of pre-existing intention was rarely specified in the context of the sentencing trasncripts. However, the finding in Chapter V, that "planning and premeditation" was considered as an aggravating factor in four of 57 cases only, provides some support for the relative absence of this dynamic, although not necessarily in relation to the offence type specified by Lindsey-Peck (1985).

The third type of sexual assault offence, the "Minimal Sexual Assault", is characterized by Lindsey-Peck (1985:37) as subsuming behavior that previously would have been defined as indecent assault, with particular reference to assaults involving the fondling of young children.

Lindsey-Peck's (1985) "Minimal Sexual Assault" most closely parallels certain dynamics of the "Sleeping Complainant Sexual Assault" and "Incestuous Sexual Assault" offence types identified in Chapter IV of the present study, the former because of its "minimal violence" attribute and the latter because of the nature of sexual contact (a number of offences restricted to fondling or touching) and the young age of many of the complainants (the one common attribute of this offence type being the adult/child dichotomy between offender and victim). The general findings discussed in Chapter IV provide some support for the existence of the "Minimal Sexual Assault" offence dynamics identified by Lindsey-Peck (1985), with specific reference to sexual contact restricted to fondling and complainants who are children; the type of sexual contact in at least 17 of 62 offences restricted to fondling or touching and almost one-half of the (47.44%) of the 59 complainants under the age of 18 at the time of the assault.

According to Lindsey-Peck (1985), the most frequent "type" of sexual assault offence in the Northwest Territories is the "Acquaintance Sexual Assault". Lindsey-Peck (1985:41-42) states:

> The greatest number of sexual assaults committed in the Northwest Territories fit under this section. Here the complainant and offender know each other, the violence is minimal, and alcohol usually plays an important part in the perpetration of the offence. There are many explanations for the number of sexual assaults of this type in the Northwest Territories. Although these explanations do not excuse,

> they may assist in understanding the particular offence and therefore may be recognized as mitigating factors in sentencing . . . The cultural differences . . . partially explain different social and sexual mores.

Noting a sentence range of nine months to two years for this "type" of sexual assault, Lindsey-Peck (1985) concludes that this "type" of offence tends to attract a less severe sentence.

Again, although not directly analogous to any of the types identified in Chapter IV of the present study, the "Social Acquaintance Sexual Assault" identified by Lindsey-Peck (1985) most closely parallels the "Social Situation Acquaintance Sexual Assault" and the "Sleeping Complainant Sexual Assault" offences insofar as each of these "types" may involve less violence, intoxication of both offender and complainant, and an offender and complainant who were "acquainted" with one another prior to the assault. As suggested by the general findings in Chapter IV, at least 12 of 59 complainants were acquainted with their offender prior to the sexual assault offence.

Although the isolation of the "Social Situation Acquaintance Sexual Assault" and "Sleeping Complainant Sexual Assault" types provides support for Lindsey-Peck's (1985:41) identification of the "Acquaintance Sexual Assault", the findings of the present study do not support Lindsey-Peck's (1985) proclamation that "Acquaintance Sexual Assault" is the most frequent "type" of sexual assault offence in the Northwest Territories. Unless one is to interpret the "Incestuous Sexual Assault" as analogous to Lindsey-Peck's (1985) "Acquaintance Sexual Assault" category, the "social situation acquaintance sexual assault" and the "sleeping complainant sexual assault" were far more infrequent than assaults

wherein the complainant was related, or in a fiduciary relationship to the offender. Even as combined categories, the "Sleeping Complainant" and "Social Situation Acquaintance" sexual assaults account for only 18 of 62 offences committed by the offender sample whereas the "Incestuous Sexual Assault" as a singular category accounts for 23 of 62 offences. Indeed, careful scrutiny of the general findings on the relationship between offender and complainant in the present study suggests that, in contrast to the 12 complainants who were "acquainted" with their offender prior to the sexual assault, at least 19 complainants were related to their offender by blood or marriage and at least 15 offences involved the breach of a fiduciary relationship.

Furthermore, the findings of the present study do not provide exact replication of Lindsey-Peck's (1985) identification of a sentence range between nine months and two years for the "Social Acquaintance Sexual Assault". As elucidated in Chapter V, prior to the introduction of the Sandercock (1985) three year starting point approach to sentencing, the specified range of sentence for the "typical minimal violence forcible sexual intercourse offence" in the Northwest Territories (the dynamics of which are similar to the Lindsey-Peck's (1985) "Acquaintance Sexual Assault") was between 12 and 30 months incarceration, marginally in excess of the nine month to two year range specified by Lindsey-Peck (1985).

The refutation, or at least partial negation, of Lindsey-Peck's (1985) assertions pertaining to the frequency and dynamics of specific "types" of sexual assault offences in the Northwest Territories is significant insofar as Lindsey-Peck (1985:50) contends that the presence or absence of "certain types of sexual

assaults" in the Northwest Territories may account for perceived leniency of sentencing in this jurisdiction. As Lindsey-Peck (1985:50) states:

> The absence of certain types of sexual assaults in the Territories and the predominance of 'acquaintance sexual assaults' may in part account for the publicly perceived leniency of sentences for such offences in the 'North'. Ignorance of the law in the Territories and other factors pertaining to the accused from a small community may also operate to reduce a sentence.

While the findings of the present study do not refute that the "types" of sexual assault offence identified by Lindsey-Peck (1985) exist in the Northwest Territories, the findings in Chapter IV and V do suggest that the frequency and characteristics attributed by Lindsey-Peck (1985) to specific "types" of sexual assault offences in the Northwest Territories, so as to distinguish them from their "southern" counterparts, may not be wholly accurate.

While it remains an interesting proposition, whether the sexual assault offender and offence in a northern jurisdiction, such as the Northwest Territories, substantively differ from their counterpart in the "south" was not possible to ascertain from the present study, the parameters of which were restricted to an examination of the sexual assault offender and the sexual assault offence in the Northwest Territories. The findings of the study indicate, however, that there is an apparent judicial "perception" that the sexual assault offender and offence in the Northwest Territories are distinct insofar as there is judicial "typification" of both "offender" and "offence" at the level of sentencing in this jurisdiction.

Although not specific to the Northwest Territories (see Nadin-Davis 1982; Lindsey-Peck 1985; R. v. Sandercock (1985), 40 Alta.L.R. (2d) 265 (Alta.C.A.)

and, indeed, quite explainable given the widely divergent types of behaviors that may be classified as "sexual assault", the Chapter V findings evidence that the trial courts in the Northwest Territories use the "typical minimal violence forcible sexual intercourse" offence as a median by which to guage the relative severity of sexual assault offences coming before the court for the purposes of sentencing. Thus, there are offences which fall short, and offences which are in excess of the "typical sexual assault" in this jurisdiction. As previously suggested, the set range of penalty for the "typical minimal violence forcible sexual intercourse" offence in the Northwest Territories was between 18 and 30 months incarceration prior to the introduction of the Sandercock (1985) starting point approach to sentencing in this jurisdiction in 1986 (see R. v. J.N., [1986] N.W.T.R. 128 (N.W.T.C.A.).

The Chapter V findings also evidence a "behavioral continuum" onto which offenders are placed by the court at the time of sentencing. Consisting of two extremes, those offenders who are characterized as "acting out of character" in relation to the sexual assault offence (inferred by an exemplary work record and educational achievement, responsibility for family obligations, constructive role in the community and positive views of the community toward the offender, and absence of prior criminal record) placed at one end of the behavioral continuum and those offenders who have had a "sad and difficult life", who cannot claim "good character" because of an extensive criminal history, and whose behavior in relation to the sexual assault offence can only be construed as a "continuing course of antisocial conduct" placed at the other end of the behavioral spectrum. The identification of the "behavioral spectrum" is significant, not only for the purpose of future cross-comparative research, but because there is different judicial

emphases on the principles of sentencing, the "acting out of character" extreme warranting a rehabilitative sentence and the "continuing course of antisocial conduct" extreme an incapacitative sentence for the purpose of protecting the public.[1]

Whereas the Chapter IV and V findings negate, to some extent, Lindsey-Peck's (1985) assertions pertaining to the absence and predominance of certain "types" of sexual assault offences in the Northwest Territories, the findings presented in Chapter V provide support for Lindsey-Peck's (1985:50) contention that that "ignorance of the law . . . and other factors pertaining to the accused from a small community" are considered in the criminal sentencing context.[2]

The Judicial Reasoning Process

Although conceptualized as an "exploratory" examination of the criminal sentencing process in the Northwest Territories, the study is a positive contribution to the existent literature on the criminal sentencing process in this jurisdiction (see Chapter II). Commensurate with the central research objectives identified for the study, the Chapter V findings provide data supported evidence with regard to "what" geographic and demographic factors are considered by the Northwest Territories trial courts in the criminal sentencing process; "how" the judicial consideration of extraordinary geographic and demographic circumstances

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[1]See also Lindsey-Peck (1985) who more extensively canvasses judicial emphasis on the principles of sentencing in relation to the "type" of crime and criminality in the Northwest Territories.

[2]It again should be emphasized that both the present study and Lindsey-Peck's (1985) analysis are subject to the limitations as noted in Chapters I and III.

affects the criminal sentencing process; and, "when" the trial courts are willing to consider geographic and demographic factors in the process of sentencing a criminal offender. In sharp contrast to much of the existent literature reviewed in Chapter II, the isolation of "Northwest Territories factors" in the present study relative to the criminal sentencing process is supported by data which were gathered, sampled and analyzed in a methodologically consistent manner; the study maintains consistency by offence type and time frame.

As the findings in Chapter V evidence, the geographic and demographic dynamics of the Northwest Territories (with particular reference to enormity of land mass and a small, dispersed and culturally diverse population) continue to be accommodated through a system of circuit court justice delivery (see Price 1986; Sissons 1968; Morrow 1981; Lindsey-Peck 1985; Griffiths 1985; Griffiths and Patenaude 1988) whereby the Territorial and Supreme Courts "fly in" to the community where the offence was committed for trial and sentencing. As illustrated by the findings of the study, 43 of 57 offenders were sentenced in the same community in which they committed their offence.

The findings presented in Chapter V affirm that congruence between the offence and sentencing location remains a significant attribute of the criminal sentencing process in the Northwest Territories insofar as the sentencing hearing continues to be used as a mechanism by which to achieve the "sociolegal" education of aboriginal peoples. Congruence between the offence and sentencing location also facilitates judicial familiarity with, and sensitivity to "local conditions" as well as the communal dynamic of the sentencing process in this jurisdiction (see Sissons

1968; Morrow 1981; Lindsey-Peck 1985; Crawford 1985; Griffiths 1985; Griffiths and Patenaude 1988).

With specific reference to the judicial accommodation of "demographic" factors at the level of sentencing, the findings of the study provide support for the assertion that there are "sociocultural" factors specific to the Northwest Territories that are considered at the level of sentencing (Sisson 1968; Morrow 1981; Tallis 1980, 1985; Lindsey-Peck 1985; Government of the Northwest Territories 1985; Griffiths and Patenaude 1988).

Consistent with Finkler's (1976:110-111) identification of a shift in judicial emphasis from "shorter lifespan" and inability to adapt to confinement" factors to "criminogenic" factors, the "Northwest Territories Factors" identified in the contemporary literature reviewed in Chapter II, namely "the effect of the sanction on the offender", "the effect of the sanction on the offender's community and family", "the size and isolation of the offender's community", and "the offender's awareness of Canadian laws and any conflict that may exist between Canadian law and native custom" (Government of the Northwest Territories 1985a:1-10; Crawford 1985; Lindsey-Peck 1985; Griffiths and Patenaude 1988) are evidenced in the context of Chapter V findings. Thus, the findings suggest that there is judicial consideration of the potentially disruptive or negative effects of removing an offender from his cultural and linguistic environment, as well as consideration of the unintended, indeed adverse, effects of imposing a specific sanction such as gaol, community service, or banishment on both the offender and the offender's community. In considering the "effect of the sanction on the offender and the offender's community", the findings evidence that the trial courts are willing, on

occasion, to facilitate community involvement in the "rehabilitation" of the offender (Lindsey-Peck 1985).

The findings of the study also evidence that the trial courts in the Northwest Territories are willing, on occasion, to consider at the level of sentencing the "offender's awareness of the laws of Canadian society and any conflict that may exist between those laws and native customs" (Government of the Northwest Territories 1985).

Although the researcher was proscribed from correlating the judicial consideration of extraordinary geographic and demographic factors with the specific type and length of sentence imposed by the court in the absence of inferential statistics, the qualitative findings presented in Chapter V suggest that sentence type and length may be adjusted to prevent the removal of an offender from the region of, or a specific locality in the Northwest Territories (as per a sentence of two years less one day and the imposition of an intermittent sentence). In assessing "how" the consideration of extraordinary geoographic and demographic circumstances affects the judicial reasoning process in the Northwest Territories, the Chapter V findings suggest that correlation of geographic and demographic factors to the type and length of disposition imposed may be overly simplistic in that judicial consideration of geographic and demographic circumstances affects the sentencing process as a whole (from circuit court justice delivery to community participation in the execution of the sentencing disposition) and not just the sentence imposed.

In contrast to the existent literature reviewed in Chapter II, which isolates "Northwest Territories Factors" but makes no attempt to identify the frequency with which such factors are judicially considered, an essential contribution of the present study pertains to the determination of the frequency with which "geographic and demographic" factors are accommodated in the criminal sentencing context in the Northwest Territories (see Chapter V). As clearly evidenced in Chapter V, the judicial accommodation of "sociocultural" factors at the level of sentencing is infrequent, especially if viewed for the offender sample as a whole and in juxtaposition to the judicial consideration of "legal factors" or values and structures specific to the dominant criminal justice system. Indeed, paralleling appellate court direction in R. v. Fireman (1970) (Ont.C.A.) and R. v. Beatty (1982) (Sask.C.A.), judicial accommodation of "sociocultural factors" at the level of sentencing in the Northwest Territories is not axiomatic to the establishment of an offender's ethnicity but is contingent on a "level of sophistication prerequisite" (or as conceptualized by Tallis (1980) the "offender's level of acculturation" and by Lindsey-Peck (1985) the "community isolation factor"). As suggested in Chapter V, the judicial assessment of an offender's "level of sophistication" is both explicitly and implicitly stated by the sentencing court and encompasses consideration of a complexity of factors, all of which are specific to the values and structures of the dominant society and which infer the cultural superiority of the dominant society while simultaneously negating the multiplicity and evolutive nature of the cultures of northern aboriginal peoples (Bayly 1983; Griffiths and Yerbury 1983, 1984).

Confirming the assertion of Griffiths and Patenaude (1988) discussed in Chapter II, the findings of the study suggest that there are clearly prescribed

limits to the judicial accommodation of geographic and demographic factors in the criminal sentencing context insofar as such accommodation must occur within a posture that there is "only one criminal law for Canada". As noted in Chapter V, while limits to the accommodation of "sociocultural factors" may well be imposed by the court of first instance, it is equally plausible that such limits will be imposed at the appellate court level (see Jackson 1989). The trial courts in the Northwest Territories may also be constrained in their decision making by the inadequacy or absence, both regional and local, of sociolegal resources in the jurisdiction in which they operate (Finkler 1982b, 1982c; Lindsey-Peck 1985).

The Problem of Accommodation Within Existent Criminal Justice Structures

As evidenced by the findings of the study, with particular reference to Chapter V, there are a number of attendant problems affiliated with the accommodation of geographic and demographic circumstances at the level of sentencing. Not only is systemic bias not avoided, as an approach to the "special circumstances" of northern aboriginal accused (assuming that such circumstances continue to exist) accommodation at the level of sentencing is fragmentary and precludes the more fundamental question of how to achieve substantive "justice".

Accommodating the extraordinary geographic and demographic requirements of the Northwest Territories within existent criminal justice structures, in this instance at the level of sentencing, is problematic because of the potential for systemic bias. The criminal justice system is founded on values and structures that are, in many ways, antithetical to the circumstances and cultures of the aboriginal peoples of the Northwest Territories (Graburn 1969; Finkler 1976, 1983, 1985;

Dacks 1981; Jefferson 1980; Carswell 1984; Dickson-Gilmore 1988; Griffiths and Patenaude 1988; Lilles 1989). As well, the "criminal justice decision making network" in the Northwest Territories is comprised largely of individuals whose value systems and socioeconomic backgrounds are, in many ways, divergent to the disproportionate numbers of aboriginal peoples who are processed by the them (Lilles 1989; Griffiths 1985; Moyer et al., 1985).

As suggested by Lilles (1989:10), who defines cultural bias as a "subconscious proclivity", the potential for systemic bias to affect all decision making stages of the criminal justice process is far greater in remote and isolated northern communities than in large urban centres because of the dichotomy between those individuals administering criminal justice and those individuals being processed by the criminal justice system. This dichotomy is clearly exemplified by the findings of the present study, with eleven non-native resident and deputy judges applying the criminal law to an offender sample overwhelmingly, and disproportionately comprised of aboriginal peoples.

The findings of the study strongly evidence systemic bias throughout the sentencing process in the Northwest Territories. Phrased in terms of the "inherent contradictions" of sentencing in the Northwest Territories, it was found that, while there is accommodation of geographic and demographic factors, the sentencing courts place simultaneous, and much greater emphasis on values and structures specific to the dominant society. Arguably, such bias is as much a function of accommodating the "sociocultural" circumstances of northern aboriginal peoples within the norms and structures of the dominant criminal justice system as it is a function of the "subconscious proclivities" of individual judicial decision

makers in this jurisdiction. As suggested in Chapter V, judicial decision makers in the Northwest Territories are themselves bound by the confines of the criminal law which they are charged with upholding.

"Systemic bias", or at the very least unconscious ethnocentrism, emerges in the "level of sophistication" prerequisite. As a precondition to the accommodation of "cultural factors" at the level of sentencing, the "level of sophistication prerequisite" is troublesome because of the assumptions on which it is based; the criteria used for such an assessment infer the cultural superiority of the dominant society and view the "cultures" of the Dene, Inuit and Metis as a homogeneous and static phenomena. In this regard, there is a failure by the sentencing courts to measure "cultural intactness" (or "cultural retention") using criteria that are specific to, and which acknowledge the multiplicity and evolutive nature of, aboriginal cultures in the Northwest Territories (see Berger 1977; Bayly 1983; Griffiths and Yerbury 1983, 1984). Of equal significance, the "level of sophistication prerequisite" raises the spectre of the "doctrine of repugnancy" and the incorporation of unconscious ethnocentric bias in the judicial interpretation of the cultural circumstance or custom in question, notwithstanding that such accommodation is only accorded in a procedural rather than substantive sense (Richstone 1983: Zlotkin 1983; Yabsley 1984). Thus, as illustrated in Chapter V, cultural arguments raised in relation to offenders who are assessed as being "sophisticated" will be rejected, or given limited weight, by the sentencing court (see also Lindsey-Peck 1985). As illustrated in the limits to judicial

accommodation discussed in Chapter V, incest is assumed to be inappropriate in all cultures without benefit of supporting evidence.[3]

Unconscious ethnocentric bias resurfaces in the use of the sentencing hearing as an educational forum. Comparable to the analyses presented in the historical and contemporary literature reviewed in Chapter II wherein the trials of northern aboriginal accused included an "educative function" (Schuh 1979; Price 1986; Finkler 1976; Moyles 1979; Crawford 1985;Lindsey-Peck 1985; Griffiths 1985), the findings of the study evidence that the criminal sentencing process is used as an educational forum (whether phrased in terms of "general deterrence" or a lecture administered to the community and offender in passing sentence); a mechanism by which to effect the socio-legal education of the aboriginal inhabitants of this jurisdiction. The use of the sentencing hearing as an educational forum is perhaps the most overt example of "unconscious ethnocentrism", insofar as a non-native judiciary presumes to "teach" northern aboriginal inhabitants the appropriate values by which to abide. Notably these values are specific to the dominant criminal justice system rather than aboriginal normative and sanction systems.

And, notwithstanding judicial accommodation of geographic and demographic factors at the level of sentencing, systemic bias emerges in the overwhelming and simultaneous emphasis placed by the trial courts in this jurisdiction on the enforcement of values and structures specific to the dominant society. Notably,

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[3]For elaboration of the potential for conflict between the sexual "mores" of northern aboriginal peoples and the dominant society, see Finkler (1976), Lindsey-Peck (1985), and Jackson (1988).

the most frequent, and least culturally relative, disposition imposed was incarceration; the most frequently imposed conditions of probation accentuate "education", "training", "treatment", and "counselling"; and, the legal factors judicially considered place primacy on denunciation and deterrence, the offender's level of educational achievement, employment stability, and absence of prior criminal record.

Accommodation of geographic and demographic factors at the level of sentencing is unquestionably a piecemeal approach to resolution of conflict between the "special circumstances" of northern aboriginal accused (including lack of knowledge in, or ignorance of the criminal law as well as adherence to aboriginal normative and sanction systems) and the existent criminal law. Indeed, the fact that accommodation at the level of sentencing proceeds "on an ad hoc basis" and forms "no binding precedents" (Schuh 1979:98) is at least one of the reasons advanced for historical acceptance of this approach in the Northwest Territories.

The findings of the present study, which evidence the "selective application of cultural relativism" on a case-by-case basis, support Hogarth's (1971) landmark study on sentencing insofar as judicial accommodation of "cultural factors" is contingent on the individual attitudes and perceptions of the sentencing judge. It is submitted that ad hoc, non-binding adjustment of the criminal law at the level of sentencing is problematic given the potential for fragmentary interpretation of aboriginal cultural values and circumstances. Consistent with the approach of the Saskatchewan Court of Appeal in R. v. Beatty (1982), and as evidenced by the findings of the study, these values and circumstances may be recognized in one case but not in another. An additional difficulty associated with the case-by-case

accommodation of "cultural factors" at the level of sentencing is that such an approach unquestionably results in sentencing disparity, not only between aboriginal and non-aboriginal offenders but between aboriginal offenders, which in turn may be a violation of the equality provisions of the Charter (Finkler 1976; Jackson 1985).

As intimated by Finkler (1976), perhaps the most profound difficulty associated with the procedural accommodation of "cultural factors" at the level of sentencing is that such accommodation precludes the more fundamental question of whether the offender would have been found guilty had there been adjustment to the substantive core of the criminal law. Thus, while procedural fairness or justice may be achieved through the accommodation of geographic and demographic factors at the level of sentencing, it does not follow that substantive justice or fairness is so accomplished.

Considering the Alternatives

Although an exhaustive consideration of the alternatives to judicial accommodation of geographic and demographic circumstances at the level of sentencing is well beyond the scope of the present analysis,[4] some cursory observations are worthy of note.

Certainly one alternative to procedural adaptation of the criminal law at the level of sentencing in deference to the "special circumstances" of northern

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[4]For a comprehensive review of alternatives to accommodation within existent criminal justice structures, see Jackson (1989).

aboriginal offenders would be to make no adjustment at all. As has been more eloquently argued elsewhere (see Verdun-Jones and Muirhead 1980; Jackson 1985), however, the equal application of the criminal law to aboriginal peoples who may be different in circumstance does not necessarily result in equality of treatment. In lieu of evidence that aboriginal peoples in the Northwest Territories have not been assimilated into the dominant society and are disproportionately represented throughout the criminal justice process (Finkler 1976; Berger 1977; Morrow 1981; Havemann, Couse, Foster and Matonovich 1984; Bayly 1985; Government of the Northwest Territories 1985; Lindsey-Peck 1985; Jackson 1985; Crawford 1985; Griffiths 1985; Tallis 1985; Moyer et al., 1985; Griffiths and Patenaude 1988; Jackson 1989; Lilles 1989), it can be suggested that there is need for the continued adaptation of the criminal law or for the creation of alternative criminal justice structures in this jurisdiction.

At least one alternative to the accommodation of "cultural factors" at the level of sentencing would be adjustment of the substantive core of the criminal law (as per the concept of mens rea or recognition of the validity of customary law defences) in deference to the "special circumstances" of northern aboriginal peoples. Insofar as it would be binding, and hence consistent, adaptation of the substantive core of the criminal law overcomes two of the central difficulties associated with procedural adaptation at the level of sentencing.

While the argument that adaptation of the substantive core of the criminal law (adjustment to the concept of mens rea or the express recognition of the validity of customary law defences) would be difficult to restrict to aboriginal peoples (as per the "foreign immigrant theory") is indeed specious (Schuh 1979), such an

approach does not overcome the central difficulties associated with judicial accommodation of extraordinary geographic and cultural requirements at the level of sentencing, namely the use of non-native standards to interpret aboriginal cultural circumstances and customs. As Richstone (1983) and Yabsley (1984) contend, the use of non-native standards to validate aboriginal cultural norms and customs may introduce an unconscious ethnocentric bias into the interpretation of the cultural circumstance in question resulting in its unalterable modification. As well, given that the "doctrine of repugnancy" is equally applicable to both substantive and procedural accommodation, adaptation of the substantive core of the criminal law does not alleviate the difficulty that those cultural values and circumstances found to be repugnant to the dominant society will not be validated.

An alternative to "accommodation within the existing structures" (Jackson 1988:255), is the creation of separate and autonomous aboriginal justice structures. Clearly the reasons profferred by the Carrothers Commission in 1966, anticipating the assimilation of northern indigenous peoples into the dominant society which would have rendered a "dual system of law" obsolete (as cited in Schuh 1979:98-99, f.n.78), are of limited weight given that aboriginal peoples in the Northwest Territories have not as yet been assimilated into the dominant society (Berger 1977; Bayly 1985).

Autonomous aboriginal justice structures overcome many of the difficulties associated with accommodation within existent criminal justice structures. Aboriginal normative and sanction systems are not subject to the "doctrine of repugnancy" or unalterable modification through non-native interpretation (see Richstone 1983; Zlotkin 1983; Yabsley 1984). As well, because the "special

circumstances" of northern aboriginal accused are accommodated outside of existent criminal justice structures, the potential for systemic discrimination is substantially decreased. Equally significant, autonomous aboriginal justice structures are not premised on assimilation into the dominant society; responsibility for mechanisms of social control is devolved to indigenous peoples.

There are, however, problems associated with the initiatives for the "autonomization" of social control (Jackson 1985). As suggested by Jackson (1985:18), a number of complex questions have to be addressed prior to the creation and implementation of separate justice structures and programs:

> . . . what law would the separate justice system apply, customary or traditional [Canadian] law? Federal law, provincial law, or some mix? Where would it apply and to whom? What happens to the individual who travels off a reserve or from one reserve to another? Would disputes be resolved by negotiations and consensus rather than the adversarial process? What about the right to legal representation and appeal . . . ?

In brief, there are no simple solutions to the problems of applying the criminal law to a majority aboriginal population in the Northwest Territories. As intimated at the outset of the thesis, there are a number of complex variables that would have to be considered in relation to any changes to criminal justice in the Northwest Territories, ranging from physical barriers to the delivery of criminal justice (with commensurate fiscal implications) to the multiplicity of aboriginal cultures in this jurisdiction. In considering the two central questions posed by Jackson (1985) - what law will be applied and to whom will it apply - careful thought must be given to the demographic composition of the Northwest Territories, with particular reference to the approximate 63 communities which

differ markedly on social, cultural, economic and political dimensions (Verdun-Jones and Muirhead 1980; Griffiths and Yerbury 1983, 1984; Griffiths 1985; N.W.T. Data Book 1986). The accommodation of the extraordinary geographic and demographic requirements of this jurisdiction in relation to criminal justice are now caught up within the broader land claims process and impetus for change, if there is to be any, likely will come about as a consequence of this process (Dickson-Gilmore 1987).

Implications for Future Research

At least partially a function of its exploratory nature, the present study raises a number of questions and issues that are worthy of future research consideration.

Clearly to the extent that judicial adjustment in matters of sentencing in the Northwest Territories is predicated on the notion that the "northern" criminal offender and the "northern" criminal offence differ from their counterpart in the "south" there is a need for methodologically guided and data supported cross-comparative research oriented toward supporting or refuting this hypothesis. Coinciding with the need for cross-comparative research on offence and offender dynamics, there is a need for cross-comparative research on the sentencing practices of "Northern" courts as juxtaposed to their "southern" counterparts. Until such research is undertaken, arguments that the courts in the Northwest Territories do, or do not, sentence more leniently than their southern counterparts remain highly speculative. The suggestion that there is pressing need for cross-comparative sentencing research in Canada is not restricted to the

present analysis but has been identified elsewhere (see Verdun-Jones and Muirhead 1980; Havemann, Couse, Foster and Matonovich 1984).

The sexual assault sentencing foci of the study imposes limitations on the conclusions that can be drawn.[5] Both the present study and Lindsey-Peck's (1985) cross-comparative analysis of sentencing practices in the Northwest Territories are restricted to a consideration of sexual offences. Further research is needed to determine whether the judicial consideration of geographic and demographic factors is, or is not, "offence specific". If research were undertaken to determine whether judicial accommodation of geographic and demographic factors is "offence specific", it is submitted that a larger sample size and more sophisticated data analysis techniques would be an asset insofar as associative relationships between legal and extra-legal variables and type and length of disposition could be established. The present study makes no attempt at such inference and Lindsey-Peck's (1985) analysis, while alluding to association between specific "Northwest Territories factors" and the type and length of disposition imposed, remains speculative in the absence of supporting inferential statistics.

It also is submitted that future research on the criminal sentencing process in the Northwest Territories should include analysis of all four levels of courts in this jurisdiction. The present study, as previously noted, was restricted to Territorial and Supreme Court sentencing decisions. Determining the role of Justice of the Peace courts in relation to the accommodation of "geographic and

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[5]For elaboration of the limitations of the study, as well as the data that were used for the study, refer to Chapter III wherein such limitations are discussed.

demographic" factors at the level of sentencing would be a significant contribution to the existent literature given the figurative role of Justice of the Peace courts in this jurisdiction as well as their permanent location at the local level. Examining the role of the Court of Appeal in the Northwest Territories also should be a key research consideration in the future given the findings of the present study and arguments presented by Griffiths and Patenaude (1988) and Jackson (1989) suggesting that this level of court may play a figurative role in placing limits on the judicial accommodation of geographic and demographic factors by the courts of first instance.

As both a function of the type of data on which it was based and the judicial reasoning foci of the study, there remains a need for research which incorporates a variety of data gathering strategies and which provides a more comprehensive examination of the sentencing process in the Northwest Territories.

As discussed in Chapter III, the thesis is limited to what Hogarth (1971) refers to as the "formal justification for sentencing" in accordance with data extracted from transcribed sentencing decisions. As both Hogarth (1971) and Lindsey-Peck (1985) intimate, there are a number of attendant problems with sentencing studies that are based on the secondary analysis of the "stated reasons for sentence". With specific reference to the Northwest Territories, Lindsey-Peck (1985:60) asserts there are "numerous subtle factors" that may affect the sentencing process but which do not necessarily form part of the stated reasons for sentence. In particular, Lindsey-Peck (1985) points to the difficulty in ascertaining what effect the communal aspect of sentencing hearings in the Northwest Territories ultimately has on the judicial reasoning process. To the

extent that Lindsey-Peck (1985) is correct and there are "numerous subtle factors" affecting the judicial reasoning process in the Northwest Territories, the conclusions that can be drawn from the present study are circumscribed.

Given the need for additional research that more comprehensively examines the sentencing process in the Northwest Territories (with particular reference to the effect of clearance rates, charging practices, plea negotiation, and the role of crown and defence counsel, as well as the effects of cultural and linguistic diversity and the communal context for sentencing on the criminal sentencing process), it is submitted that future research on sentencing in this jurisdiction should incorporate a variety of data gathering strategies, including extensive observation of circuit court proceedings. Ideally, such research should include interviews with the "key players" in the sentencing hearing to determine what unstated factors, if any, potentially influence the judicial reasoning process in the Northwest Territories.

TABLE OF CASES

R. v. Ettagiak, [1986] N.W.T.R. 203 (N.W.T.S.C.)

R. v. Fatt, [1986] N.W.T.R. 388 (N.W.T.S.C.)

R. v. Fehr, [1985] N.W.T.R. 267 (N.W.T.S.C.)

R. v. Fireman (1971), 4 C.C.C. (2d) 82 (Ont.C.A.)

R. v. Goose, [1984] N.W.T.R. 56 (N.W.T.Terr.Ct.)

R. v. Hinch and Salanski (1968), 2 C.R.N.S. 350 (B.C.C.A.)

R. v. Ikalowjuak (1980), 27 A.R. 492 (N.W.T.S.C.)

R. v. Illingayuk, unreported, Rothman, S.C.J., May 11, 1983, (N.W.T.S.C.)

R. v. Issaluk, [1984] N.W.T.R. 192 (N.W.T.S.C.)

R. v. Ittigaitok, [1984] N.W.T.R. 21 (N.W.T.Terr.Ct.)

R. v. Krengnektak (1980), 27 A.R. 247 (N.W.T.S.C.)

Krey v. R., [1983] N.W.T.R. 379 (N.W.T.S.C.) R. v. Louyine, [1986] N.W.T.R. 256 (N.W.T.S.C.)

Masuzumi v. R., [1984] N.W.T.R. 285 (N.W.T.C.A.)

R. v. Malboeuf (1982), 68 C.C.C. (2d) 544 (Sask.C.A.)

R. v. McPherson, [1984] N.W.T.R. 225 ((N.W.T.S.C.)

R. v. Morrissette and two others (1970), 1 C.C.C. (2d) 307 (Sask.C.A.)

Myhren v. R., [1986] N.W.T.R. 15 (N.W.T.S.C.)

R. v. Nan-E-Quis-A K'a (1899), 2(1) N.W.T. Supreme Court Reports 21 (N.W.T.S.C.)

R. v. J.N., [1986] N.W.T.R. 128 (N.W.T.C.A)

R. v. S.N., [1986] N.W.T.R. 282 (N.W.T.C.A.)

R. v. Naukatsik (1977), 20 C.L.Q. 290 (N.W.T.S.C.)

R. v. Nilaulak, [1987] N.W.T.R. 201 (N.W.T.S.C.)

R. v. Nungaq, [1984] N.W.T.R. 229 (N.W.T.S.C.)

R. v. J.S.O., [1985] N.W.T.R. 255 (N.W.T.Terr.Ct.)

R. v. Omingmak (1980), 25 A.R. 181 (N.W.T.S.C.)

R. v. Onalik (1980), 27 A.R. 497 (N.W.T.S.C.)

R. v. Ootoova, unreported, de Weerdt, S.C.J., May 11, 1983, unreported.

R. v. Oquataq, [1985] N.W.T.R. 240 (N.W.T.S.C.)

R. v. Oscar, [1987] N.W.T.R. 135 (N.W.T.Terr.Ct.)

R. v. Petaulassie, [1986] N.W.T.R. 294 (N.W.T.C.A.)

R. v. Peter, Shaqu and Ashoona, [1985] N.W.T.R. 12 (N.W.T.Terr.Ct.)

R. v. Qitsualik, [1984] N.W.T.R. 233 (N.W.T.S.C.)

R. v. Punch, [1985] N.W.T.R. 373 (N.W.T.S.C.)

R. v. Ramos, [1985] N.W.T.R. 68 (N.W.T.Terr.Ct.)

R. v. Reddick (1976), 17 N.S.R. (2d) 369 (N.S.C.A.)

Saila v. R., [1984] N.W.T.R. 176 (N.W.T.C.A.)

R. v. Sandercock (1985), 40 Alta. L.R. (2d), 48 C.R. (3d) 154 (Alta.C.A.)

R. v. Selamio (1979), 23 A.R. 403 (N.W.T.S.C.)

Shimout v. R., [1985] N.W.T.R. 118 (N.W.T.S.C.)

R. v. Sikyea (1964), 2 C.C.C. 325 (N.W.T.C.A.)

R. v. Simms, [1983] N.W.T.R. 66 (N.W.T.S.C.)

R. v. Simon, [1983] N.W.T.R. 311 (N.W.T.S.C.), [1983] N.W.T.R. 318 (N.W.T.C.A.)

R. v. Smith (1972), 7 C.C.C. (2d) 468 (N.W.T.Terr.Ct.)

R. v. Smith, [1983] N.W.T.R. 82 (N.W.T.S.C.)

R. v. T. (R.P.); R. v. S. (T.), [1983] 5 W.W.R. 558, 7 C.C.C. (3D) 109, 46 A.R. 87 (Alta.C.A.)

R. v. Tobac (1985), 20 C.C.C. (3d) 49, [1985] N.W.T.R. 201 (N.W.T.C.A.).

R. v. W.U., [1984] N.W.T.R. 135 (N.W.T.Terr.Ct.)

R. v. Villeneuve, [1983] N.W.T.R. 274 (N.W.T.S.C.)

R. v. R.R.W., [1986] N.W.T.R. 69 (N.W.T.S.C.)

R. v. Weyallon, [1983] N.W.T.R. 394 (N.W.T.S.C.), [1985] N.W.T.R. 264 (N.W.T.C.A.)

Re Adoption of Katie, E7-1807 (1962), 38 W.W.R. 100 (N.W.T.Terr.Ct.)

Re Noah Estate (1961-62), 36 W.W.R. 577 (N.W.T.Terr.Ct.)

Royal Bank of Canada v. Scott and Commissioner of Northwest Territories, [1971] 4 W.W.R. 491 (N.W.T.Terr.Ct.).

BIBLIOGRAPHY

Allen, R.E., (ed.) (1986). The Oxford Dictionary of Current English. New York: Oxford University Press.

Atcheson, J.D. (1978). "Research Notes and Comments: Canadian Native Peoples and Psychiatric Justice". 1 International Journal of Law and Psychiatry. 93-104.

Batten, Jack. (1980). "Counsel to the Last Frontier", in Jack Batten, (ed.) Lawyers. Toronto: McMillan of Canada. 6-33.

Bayly, John U. (1983). "Entering Canadian Confederation...the Dene Experiment", in Harold W. Finkler, (ed.) Proceedings of the XIth International Congress of Anthropological and Ethnological Sciences, Commission on Folk Law and Legal Pluralism. Ottawa: Indian and Northern Affairs. 474-490.

Bayly, John U. (1985). "Toward the Development of a Northwest Territories Law Reform Capability to Enable the Development of Proposals for New Legislation to Meet the Special Needs and Circumstances of Northern Peoples", in Antony Allott and Gordon R. Woodman, (eds.) People's Law And State Law. The Bellagio Papers. Dordrecht, The Netherlands: Foris Publications. 285-297.

Bell, Diane. (1983a). "Aboriginal Women and the Recognition of Customary Law in Australia", in Harold W. Finkler, (ed.) Proceedings of the XIth International Congress of Anthropological and Ethnological Sciences, Commission on Folk Law and Legal Pluralism. Ottawa: Indian and Northern Affairs. 491-513.

Bell, Diane. (1983b). "Exercising Discretion: Sentencing and Customary Law in the Northern Territory", in Harold W. Finkler, (ed.) Proceedings of the XIth International Congress of Anthropological and Ethnological Sciences, Commission on Folk Law and Legal Pluralism. Ottawa: Indian and Northern Affairs. 1110-1142.

Berger, Mr. Justice Thomas R. (1977). Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry, Volume 1. Toronto: James Lorimer and Co.

Boag, Tom. (1966). "Mental Health in the North", in Maja Van Steensel, (ed.) People of the Light and Dark. Ottawa: Information Canada. 137-140.

Bouchard, Serge and Clotilde Pelletier. (1986). Justice in Question: Evaluation of Projects to Create a Local Judiciary in Povungnituk (Northern Quebec). Quebec City, Quebec: Department of Justice.

Boyle, Christine L.M. (1984). Sexual Assault. Toronto: The Carswell Company Ltd.

Brody, Hugh. (1975). The Peoples' Land: Eskimos and Whites in the Eastern Arctic. Toronto: Penguin Books Canada Ltd.

Bucknall, Brian O. (1967). "John Howard Sissons and the Development of Law in Northern Canada". 5 Osgoode Hall Law School Journal. 159-171.

Canadian Criminal Code, (1989) R.S.C. , Chapter C-34.

Canadian Sentencing Commission. (1987). Sentencing Reform. A Canadian Approach: Report of the Canadian Sentencing Commission. Ottawa: Supply and Services.

Carrothers, A.W.R. (1966). Report of the Advisory Commission on the Development of Government in the Northwest Territories. Ottawa: Ministry of Indian Affairs and Northern Development.

Carswell, Margaret. (1984). "Social Controls Among the Native Peoples of the Northwest Territories in the Pre-Contact Period". 22(2) Alberta Law Review. 303-308.

Cowie, Ian B., Gordon E. Williams, Donald W. Trent, and Murray Smith. (1977) Legal Aid in the Northwest Territories: Recommendations for the Future. Report of the Federal-Territorial Committee constituted to examine and report on the adequacy and effectiveness of the legal aid programs presently operating in the Northwest Territories, and to make recommendations relating to the future development of such programs. Yellowknife, Northwest Territories. June 22, 1977. Ottawa: Minister of Justice and Attorney General for Canada. Yellowknife, Northwest Territories: Commissioner of the Northwest Territories.

Crawford, Anne. (1985). Outside Law and Traditional Communities in the Northwest Territories. Paper presented to the February, 1985 meeting of the Western Regional Science Association. San Diego, California, 1985.

Crawford, James. (1983). "The Australian Law Reform Commission's Reference on the Recognition of Aboriginal Customary Law", in Harold W. Finkler, (ed.) Proceedings of the XIth International Congress of Anthropological and Ethnological Sciences. Commission on Folk Law and Legal Pluralism. Ottawa: Indian and Northern Affairs. 1017-1082.

Cressey, Donald R. (1980). "Sentencing: Legislative Rule versus Judicial Discretion", in Brian A. Grosman, (ed.) New Directions in Sentencing. Toronto: Butterworths. 51-69.

Culliton, E.M. (1980). "Sentencing Guidelines: A Judicial Viewpoint", in Brian A. Grosman, (ed.) New Directions in Sentencing. Toronto: Butterworths. 295-301.

Dacks, Gurston. (1981). A Choice of Futures, Politics in the Canadian North. Toronto: Methuen Publications.

Decore, J.V. (1964). "Criminal Sentencing: The Role of the Canadian Courts of Appeal and the Concept of Uniformity". 6 Criminal Law Quarterly. 324-380.

Delisle, Del. (1983). Analysis of Case Management Practices in the Northwest Territories. Victoria, British Columbia: H.J. Bradley and Associates.

Devine, Marina, (ed.) (1982). N.W.T. Data Book 1982-1983. Yellowknife: Outcrop Ltd.

De Weerdt, Mark M. (1966). "The Law Through Our Eyes", in Maja van Steensel, (ed.) People of the Light and Dark. Ottawa: Information Canada. 95-99.

Dickson-Gilmore, Elizabeth Jane. (1987). Indian Law for Indian Lands: The Struggle for Self-Determination by Canadian Native People. Unpublished M.A. Thesis. Burnaby, British Columbia: School of Criminology, Simon Fraser University.

Drury, C.M. (1980). Constitutional Development in the Northwest Territories, Report of the Special Representative. Ottawa: Minister of Supply and Services.

Elberg, Nathan. (1983). "Comprehensive Claims, Culture and Customary Law: The Case of the Labrador Inuit", in Harold W. Finkler, (ed.) Proceedings of the XIth International Congress of Anthropological and Ethnological Sciences, Commission on Folk Law and Legal Pluralism. Ottawa: Indian and Northern Affairs. 547-566.

Ellis, Megan. (1984). "The Sexual Assault Provisions of the Criminal Code". 8(4) Legal Services Society Schools Program Newsletter. 3-6.

Emerson, Robert M. (1969). Judging Delinquents. Context and Process in Juvenile Court. New York: Aldine Publishing Company.

Finkler, Harold W. (1976). Inuit and the Administration of Justice in the Northwest Territories: The Case of Frobisher Bay. Ottawa: Minister of Indian and Northern Affairs.

Finkler, Harold W. (1981). The Baffin Correctional Centre, Frobisher Bay, N.W.T.: A Review of Current Programs and Alternatives. Report Prepared for the Department of Health and Social Services, Government of the Northwest Territories in conjunction with the Department of Indian and Northern Affairs.

Finkler, Harold W. (1982a). "Corrections in the Northwest Territories, 1967-1981, With a Focus on the Incaceration of Inuit Offenders". 5(1) Canadian Legal Aid Bulletin, Native People and Justice in Canada, Special Issue, Part 1. 27-38.

Finkler, Harold W. (1982b). Violence and the Administration of Criminal Justice in Northern Canada. Paper prepared for presentation to the Conference on Violence, sponsored by the Justice Centre, University of Alaska, Anchorage, October 11-13, 1982.

Finkler, Harold W. (1982c). Policy Issues in the Delivery of Correctional Services in the Northwest Territories. Paper prepared for presentation to the American Society of Criminology's 34th Annual Meeting in Toronto, November 4-6, 1982.

Finkler, Harold W. (1983). "Legal Anthropology in the Formulation of Correctional Policy in the Northwest Territories, Canada", in Harold W. Finkler, (ed.) Proceedings of the XIth International Congress of Anthropological and Ethnological Sciences. Commission on Folk Law and Legal Pluralism. Ottawa: Indian and Northern Affairs. 889-902.

Finkler, Harold W. (1985). "The Role of Traditional Inuit Measures for Social Control in Correctional Policy and Administration", in Antony Allott and Gordon R. Woodman, (eds.) People's Law and State Law. The Bellagio Papers. Dordrecht, The Netherlands: Foris Publications. 321-326.

Forst, Martin L. (1983). "Sentencing Disparity: An Overview of Research and Issues", in Martin L. Forst, (ed.) Sentencing Reform: Experiments in Reducing Disparity. Beverly Hills, California: Sage Publications. 9-34.

Gall, Gerald L. (1983). The Canadian Legal System. (2nd ed.). Toronto: Carswell Legal Publications.

Gigeroff, A.K. (1980). "Sex Offenders and the Sentencing Process", in Brian A. Grosman, (ed.) New Directions in Sentencing. Toronto: Butterworths. 235-241.

Government of the Northwest Territories, Department of Information. (1980). 1(1) Statistics Quarterly, December 1979. Yellowknife, Northwest Territories.

Government of the Northwest Territories, Department of Information. (1981). 2(1-4) Statistics Quarterly, March - December 1980. Yellowknife, Northwest Territories.

Government of the Northwest Territories, Department of Information. (1982). 3(1-4) Statistics Quarterly, March - December 1981. Yellowknife, Northwest Territories.

Government of the Northwest Territories, Department of Information. (1983). 4(1-4) Statistics Quarterly, March - December 1982. Yellowknife, Northwest Territories.

Government of the Northwest Territories, Department of Information. (1984). 5(1-4) Statistics Quarterly, March - December 1983. Yellowknife, Northwest Territories.

Government of the Northwest Territories, Department of Information. (1985). 6(1-4) Statistics Quarterly, March - December 1984. Yellowknife, Northwest Territories.

Government of the Northwest Territories, Department of Information. (1986). 7(1-3) Statistics Quarterly, March - September 1985. Yellowknife, Northwest Territories.

Government of the Northwest Territories, Department of Culture and Communications. (1986). 7(4) Statistics Quarterly, December 1985. Yellowknife, Northwest Territories.

Government of the Northwest Territories, Department of Culture and Communications. (1987). 8(1-4) Statistics Quarterly, March - December 1986. Yellowknife, Northwest Territories.

Government of the Northwest Territories, Department of Culture and Communications. (1988). 9(1-4) Statistics Quarterly, March - December 1987. Yellowknife, Northwest Territories.

Government of the Northwest Territories, Department Justice and Public Services. (1985a). Submission of the Government of the Northwest Territories to the Canadian Sentencing Commission. Yellowknife, Northwest Territories.

Government of the Northwest Territories, Department of Social Services, Corrections Division. (1985b). N.W.T. Plan in Corrections - Goals and Objectives, 1985-1987. Yellowknife, Northwest Territories.

Graburn, Nelson H.H. (1969). "Eskimo Law in Light of Self- and Group-interest". 4(1) Law and Society Review. 45-60.

Grant, Peter R. (1982). "The Role of Traditional Law in Contemporary Cases". 5(2/3) Canadian Legal Aid Bulletin. Native People and Justice in Canada, Special Issue, Part 2. 107-110.

Greenspan, E.L. (1980). "The Role of the Defence Lawyer in Sentencing", in Brian A. Grosman, (ed.) New Directions in Sentencing. Toronto: Butterworths. 263-272.

Griffiths, Curt Taylor and J. Colin Yerbury (1983). "Conflict and Compromise: Canadian Indigenous Peoples and the Law", in Harold W. Finkler, (ed.) Proceedings of the XIth International Congress of Anthropological and Ethnological Sciences. Commission on Folk Law and Legal Pluralism. Ottawa: Indian and Northern Affairs. 975-1002.

Griffiths, Curt Taylor and J. Colin Yerbury. (1984). "Natives and Criminal Justice Policy: The Case of Native Policing". 26 Canadian Journal of Criminology. 147-159.

Griffiths, Curt Taylor, (ed.) (1985). Circuit and Rural Court Justice in the North. Burnaby, British Columbia: Northern Justice Society, Simon Fraser University.

Griffiths, Curt Taylor, J. Colin Yerbury, and Linda F. Weafer. (1987). "Canadian Natives: Victims of Socio-Structural Deprivation?" 46(3) Human Organization. 277-282.

Griffiths, Curt Taylor and Allan L. Patenaude. (1988). "Application of the Criminal Law to Native Indians and Inuit in the Northwest Territories, Canada". 22(1) Comparative Law Review. 1-35.

Griffiths, Curt T. and Verdun-Jones, Simon N. (1989). Canadian Criminal Justice. Toronto: Butterworths.

Grosman, Brian, (ed.) (1980). "Introduction", in Brian Grosman, (ed.), New Directions in Sentencing. Toronto: Butterworths.

Gross, Hyman and Andrew von Hirsch, (eds.) (1981). Sentencing. New York: Oxford University Press.

Hagan, John. (1974). "Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociolegal Viewpoint". 8(3) Law and Society Review. 357-383.

Hagan, John. (1975a). "Law, Order and Sentencing: A Study of Attitudes in Action". 38(2) Sociometry. 374-384.

Hagan, John. (1975b). "The Social and Legal Construction of Criminal Justice: A Study of the Pre-sentencing Process". 22(5) Social Problems. 620-637.

Hagan, John. (1976). "Locking Up Indians. A Case for Law Reform". 55(2) Canadian Forum. 16-18.

Hagan, John. (1977). "Criminal Justice in Rural and Urban Communities: A Study of the Bureaucratization of Justice". 55(3) Social Forces. 597-612.

Hall, E.M. "Sentencing the Individual", in Brian A. Grosman, (ed.) New Directions in Sentencing. Toronto: Butterworths. 302-304.

Havemann, Paul. (1983). "The Indigenization of Social Control in Canada", in Harold W. Finkler, (ed.) Proceedings of the XIth International Congress of Anthropological and Ethnological Sciences. Commission on Folk Law and Legal Pluralism. Ottawa: Indian and Northern Affairs. 350-380.

Havemann, Paul, Keith Couse, Lori Foster, and Rae Matonovich. (1984). Law and Order for Canada's Indigenous People. Ottawa: Solicitor General Canada.

Hayes, Derek C. (1960). Law and the Eskimo in Canada Today. Toronto: The Indian Eskimo Association of Canada.

Heather, Rod. (1983). Snow's Annotated Criminal Code. Toronto: The Carswell Company Limited.

Hellon, C.P. (1969). "Legal and Psychiatric Implications of Erosion of Canadian Aboriginal Culture". 19(1) University of Toronto Law Journal. 76-79.

Hennessy, Peter. (1984). "Aboriginal Customary Law and the Australian Criminal Law: An Unresolved Conflict", in Bruce Swanton, (ed.) Aborigines and Criminal Justice. Phillip, A.C.T.: Australian Institute of Criminology. 336-349.

Hill, Charles W. (1981). Proposal to Conduct a Comparative Analysis of Judicial Proceedings Concerning Native and Non-Native Persons Appearing Before Courts in Ontario. Toronto: Ontario Native Council on Justice.

Hobart, Charles W. (1978). "Economic Development, Liquor Consumption and Offence Rates in the Northwest Territories". 20(3) Canadian Journal of Criminology. 259-278.

Hogarth, John. (1971). Sentencing as a Human Process. Toronto: University of Toronto Press.

Hunt, Connie. (1976). "Creative Law in the North". 52(7) Canadian Welfare. 21-23.

Jackson, Margaret. (1985). Unequal Justice Before the Law: Traditional versus Customary Law. An Issues Paper. Paper presented at the Canadian Law and Society Annual Meeting, Montreal, June 2-3, 1985.

Jackson, Kirsty. (1988). "Keewatin Feels Legal Aid Long Overdue". Newsnorth. Monday, June 13, 1988, A14-15.

Jackson, Michael. (1989). "Locking Up Natives in Canada". 23(2) University of British Columbia Law Review. 215-300.

Jaffary, S.K. (1963). Sentencing of Adults in Canada. Toronto: University of Toronto Press.

James, J.T.L. (1979). "Toward a Cultural Understanding of the Native Offender". 20(4) Canadian Journal of Criminology. 453-462.

Jefferson, Christie. (1982). Conquest By Law: A Betrayal of Justice in Canada. Unpublished Paper. Available from the Northern Justice Society, Simon Fraser University, Burnaby, British Columbia.

Jobson, Kenneth. (1980). "Reforming Sentencing Laws: A Canadian Perspective", in Brian A. Grosman, (ed.) New Directions in Sentencing. Toronto: Butterworths. 73-96.

Kane, Doug. (1984). Customary Law: A Preliminary Assessment of the Arguments for Recognition and an Identification of the Possible Ways of Defining the Term. Working Paper for the Canada/Saskatchewan/ Federation of Saskatchewan Indian Nations Project. December 17, 1984.

Keon-Cohen, Brian S. (1982). "Native Justice in Australia, Canada and the U.S.A.: A Comparative Analysis". 5(1) Canadian Legal Aid Bulletin. 187-250.

Kimmerly, Roger S. (1980). "A Circuit Court Judge Looks at Old Crow". 6(11) Liaison. 13-17.

Kimmerly, Roger S. (1981). "Tangents: Territorial Judge Kimmerly's Life is Richer for the Old Crow Spirit". 5(1) Canadian Lawyer. 39-40.

Kittrie, Nicholas N. (1980). "The Dangers of the New Directions in American Sentencing", in Brian A. Grosman, (ed.) New Directions in Sentencing. Toronto: Butterworths. 32-50.

Kress, Jack M. (1980). "Reforming Sentencing Laws: An American Perspective", in Brian A. Grosman, (ed.) New Directions in Sentencing. Toronto: Butterworths. 97-116.

Kupsch, W.O. (1979). "The Case of Henry Innuksuk". 25 The Musk Ox. 82-84.

LaPrairie, Carol Pitcher. (1983). "Federal Initiatives in the Area of Customary Law", in Harold W. Finkler, (ed.) Proceedings of the XIth International Congress of Anthropological and Ethnological Sciences, Commission on Folk Law and Legal Pluralism. Ottawa: Indian and Northern Affairs. 903-910.

Laycraft, J.H. (1986). "Dean Weir Memorial Lecture January 14, 1986: Winds of Change in the Sentencing Process". 24(3) Alberta Law Review. 393-411.

Lilles, Heino. (1989). Some Problems in the Administration of Justice in Remote and Isolated Communities. Paper presented at the C.I.A.J. Conference, Kananaskis, Alberta, October 11-14, 1989.

Lindsey-Peck, Patricia L. (1985). Polarity in Sentencing: An Analysis of Sentencing Practices in the Northwest Territories. Windsor, Ontario: Faculty of Law, University of Windsor.

Lowe, Mick. (1984). "Northern Courts Battle the Clock". Globe and Mail. October 23, 1984, 1,11.

Lowe, Mick. (1985). "Wrist-Watch Justice". 9(4) Canadian Lawyer. 29-34.

Lyall, Ernie. (1979). An Arctic Man, Sixty-Five Years in Canada's North. Edmonton: Hurtig Publishers.

Manning, Morris. (1980). "Sentencing Laws: A Practitioner's View", in Brian A. Grosman, (ed.) New Directions in Sentencing. Toronto: Butterworths. 273-292.

Marshall, Jocelyn. (1982). "Northern Circuit - Or Doug and Rob in the Land of Oz". 8(8) Liaison. 2-11.

Morrow, William G. (1965). "Justice in the Canadian Arctic". 72 Queen's Quarterly. 144-149.

Morrow, William G. (1967). "Mr. Justice John Howard Sissons". 5(2) Alberta Law Review. 254-262.

Morrow, William G. (1970). "A Survey of Jury Verdicts in the Northwest Territories". 8 Alberta Law Review. 50-57.

Morrow, William G. (1971). "Law and the Thin Veneer of of Civilization". 10 Alberta Law Review. 38-44.

Morrow, William G. (1981). "Adapting Our Justice System to the Cultural Needs of Canada's North", in Louis A. Knafla, (ed.) Crime and Criminal Justice in Europe and Canada. Waterloo, Ontario: Wilfred Laurier University Press. 257-272.

Morse, Bradford W. (1980). Indian Tribal Courts in the United States: A Model for Canada? Saskatoon: Native Law Centre, University of Saskatchewan.

Morse, Bradford W. (1983). "Indigenous Law and State Legal Systems: Conflict and Compatability", in Harold W. Finkler, (ed.) Proceedings of the XIth International Congress of Anthropological and Ethnological Sciences. Commssion on Folk Law and Legal Pluralism. Ottawa: Indian and Northern Affairs. 381-402.

Moyer, Sharon, Faigie Kopelman, Carol LaPrairie, and Brenda Billingsley. (1985). Native and Non-Native Admissions to Federal, Provincial and Territorial Correctional Institutions. Ottawa: Solicitor General of Canada.

Moyles, R.G. (1979). British Law and Arctic Men. Saskatoon: Western Producer Prairie Books.

Mueller, Gerhard .O.W., (ed.) (1970). The American Series of Foreign Penal Codes. Volume 16. The Greenland Criminal Code. (Trans. at the Centre for Studies in Criminal Justice, University of Chicago Law School with an Introduction by Dr. Verner Goldschmidt, Professor of Law, University of Copenhagen, Denmark). South Hackensack, New Jersey: Fred B. Rothman and Company.

Nadin-Davis, R. Paul. (1982). Sentencing in Canada. Toronto: The Carswell Company Ltd.

Nadin-Davis, R. Paul and Clarey B. Sproule, (eds.) (1985). Canadian Sentencing Digest [1980-1984]. Toronto: The Carswell Company Ltd.

Nadin-Davis, R. Paul and Clarey B. Sproule, (eds.) (1987). The Canadian Sentencing Digest [1985-1987]. Toronto: The Carswell Company Ltd.

Nelms-Matzke, Joyce. (1983). "The Delivery of Justice System Services to Isolated Northern Communities", in Harold W. Finkler, (ed.) Proceedings of the XIth International Congress of Anthropological and Ethnological Sciences, Commission on Folk Law and Legal Pluralism. Ottawa: Indian and Northern Affairs.

Northwest Territories Committee on Law Reform. (1987). An Act to Amend the Jury Act, Working Paper No. 1. Working Paper presented to the Minister of Justice, Government of the Northwest Territories, Yellowknife, Northwest Territories, June 16, 1987. Yellowknife, Northwest Territories: Department of Justice.

Northwest Territories Data Book 1984/85. (1984). Yellowknife: Outcrop Ltd., the Northern Publishers.

Northwest Territories Data Book 1986/87. (1986). Yellowknife: Outcrop Ltd., the Northern Publishers.

Parker, Graham. (1983). "The "New" Sexual Offences". 31 Criminal Reports (3d). 317-329.

Patenaude, Allan L. (n.d.). Maliganik Tukisiniakuik: Understanding the Circuit Court System in the Northwest Territories. Unpublished Paper. Available from the Northern Justice Society, Simon Fraser University, Burnaby, British Columbia.

Patenaude, Allan L. (1987). Kingait: Culture, Change and Criminal Justice in Cape Dorset, Northwest Territories. Unpublished Paper. Available from the Northern Justice Society, Simon Fraser University, Burnaby, B.C.

Price, Graham. (1986). Remote Justice: The Stipendiary Magistrates Court of the Northwest Territories (1905-1955). Unpublished Master of Laws Thesis. Winnipeg, Manitoba: The Faculty of Graduate Studies, University of Manitoba.

Rasing, Wim. (1984). On Conflict Management with Nomadic Inuit: An Ethnological Essay. Unpublished Doctoral Thesis. Nijemegen, Holland: Department of Cultural Anthropology, Catholic University of Nijemegen.

Richstone, Jeff. (1983). "The Inuit and Customary Law: Constitutional Perspectives", in Harold W. Finkler, (ed.) Proceedings of the XIth International Congress of Anthropological and Ethnological Sciences, Commission on Folk Law and Legal Pluralism. Ottawa: Indian and Northern Affairs. 567-597.

Riley, Rob. (1983). "Preface: Aboriginal Law and Its Importance for Aboriginal People", in Harold W. Finkler, (ed.) Proceedings of the XIth International Congress of Anthropological and Ethnological Sciences. Commission on Folk Law and Legal Pluralism. Ottawa: Indian and Northern Affairs. 1010-1016.

Robertson, Gordon. (1985). Northern Provinces: A Mistaken Goal. Montreal, Quebec: The Institute for Research on Public Policy.

Robertson, R.G. (1967). "The Coming Crisis in the North". 2(1) Journal of Canadian Studies. 8-11.

Ruby, Clayton C. (1976). Sentencing. Toronto: Butterworths.

Sanders, Douglas. (1977). Lawyers and Indians in the Canadian North. Unpublished Paper. Vancouver, British Columbia: Faculty of Law, University of British Columbia.

Savoie, Donat. (1983). "Conduct of Science in the North: Problems and Suggested Solutions", in Harold W. Finkler, (ed.) Proceedings of the XIth International Congress of Anthropological and Ethnological Sciences. Commission on Folk Law and Legal Pluralism. Ottawa: Indian and Northern Affairs. 960-974.

Schecter, Elaine. (1983). "The Greenland Criminal Code and the Limits to Legal Pluralism", in Harold W. Finkler, (ed.) XIth International Congress of Anthropological and Ethnological Sciences. Commission on Folk Law and Legal Pluralism. Ottawa: Indian and Northern Affairs. 800-829.

Schmeiser, Douglas A. 1968. "Indians, Eskimos and the Law". 33 Saskatchewan Law Review. 19-40.

Schuh, Cornelia. (1979). "Justice on the Northern Frontier: Early Murder Trials of Native Accused". 22(1) Criminal Law Quarterly. 74-111.

Singer, Charles. (1980). Constraint and Buffering in Communal Survival with Special Reference to the Dene. Unpublished Doctoral Thesis. Toronto, Ontario: School of Social Work, University of Toronto.

Sissons, Jack. 1968. Judge of the Far North. The Memoirs of Jack Sissons. Toronto: McClelland and Stewart Limited.

Statistics Canada, Candian Centre for Justice Statistics. (1984). Canadian Crime Statistics, 1983. Ottawa: Minister of Supply and Services.

Statistics Canada, Canadian Centre for Justice Statistics. (1985). Canadian Crime Statistics, 1984. Ottawa: Minister of Supply and Services.

Statistics Canada, Canadian Centre for Justice Statistics. (1986). Canadian Crime Statistics, 1985. Ottawa: Minister of Supply and Services.

Statistics Canada, Canadian Centre for Justice Statistics. (1987). Canadian Crime Statistics, 1986. Ottawa: Minister of Supply and Services.

Struzik, Ed. (1984a). "North's Culture Justifies Shorter Terms: Judge". The Vancouver Sun. Wednesday, October 5, 1984, A12.

Struzik, Ed. (1984b). "Northern Justice. Is there a Case for Different Standards?" The Edmonton Journal. Sunday, October 28, 1984.

Stuart, Don. (1982). Canadian Criminal Law. A Treatise. Toronto: The Carswell Company Limited.

Tallis, Mr. Justice Calvin F. (1980). "Sentencing in the North", in B.A. Grosman, (ed.) New Directions in Sentencing. Toronto: Butterworths. 305-308.

Tallis, Mr. Justice Calvin F. (1985). The Sentencing Process, The Native Offender. Unpublished Paper prepared for the Canadian Institute for the Administration of Justice, National Seminar on Sentencing, October, 1985. Edmonton, Alberta: Law Centre, University of Alberta.

Task Force on Spousal Assault. (1985). Report of the Task Force On Spousal Assault. Yellowknife: Government of the Northwest Territories.

Usprich, S.J. (1987a). "A New Crime in Old Battles: Definitional Problems with Sexual Assault". 29 Criminal Law Quarterly. 200-221.

Usprich, S.J. (1987b). "Two Problems in Sexual Assault: Attempts and the Intoxication Defence". 29 Criminal Law Quarterly. 296-314.

Van den Steenhoven, Geert. (1966). "The Law Through Eskimo Eyes", in Maja van Steensel, (ed.) People of the Light and Dark. Ottawa: Information Canada. 90-94.

Verdun-Jones, Simon N. and Gregory K. Muirhead. (1980). "Natives in the Canadian Criminal Justice System: An Overview". 7/8(1) Crime and/et Justice. 3-21.

Vining, Aidan R. (1979). "Reforming Canadian Sentencing Practices: Problems, Prospects and Lessons". 17 Osgoode Hall Law Journal. 355-412.

Vining, Aidan R. and Cory Dean. (1980). "Towards Sentencing Uniformity: Integrating the Normative aand Empirical Orientation", in Brian A. Grosman, (ed.) New Directions in Sentencing. Toronto: Butterworths. 117-153.

Weafer, Linda Mary Frances. (1986). The Development and Implementation of Community-Based Justice Programs for Native and Northern Communities: The Justice of the Peace Program in the Yukon. Unpublished M.A. Thesis. Burnaby, British Columbia: School of Criminology, Simon Fraser University.

Yabsley, Gary R. (1984). Nunavut and Inuit Customary Law, Report to the Constitutional Forum. Unpublished Paper. Available from the Northern Justice Society, Simon Fraser University, Burnaby, British Columbia.

Zaslow, Morris. (1984). The Northwest Territories 1905-1980. Ottawa: The Canadian Historical Association.

Zlotkin, Norman K. (1983). "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases", in Harold W. Finkler, (ed.) Proceedings of the XIth International Congress of Anthropological and Ethnological Sciences, Commission on Folk Law and Legal Pluralism. Ottawa: Indian and Northern Affairs. 866-887.

Appendix A: Letters Regarding Access to the Government of the Northwest Territories Corrections Information System

Northwest Territories Social Services

42 900 900

October 8, 1986.

Hayli A. Millar
Apartment 614, #4,
5004-54th street,
Yellowknife, N.W.T.
X1A 2R6.

Access to Corrections Data Base

Following our conversation the other day, I felt it productive to review some of the points raised.

As your letter of introduction anticipates, the major concern we have is not so much with the raw data (although an incomplete or fractional picture can and has caused us problems in the past) but with individual offenders being identified.

In your letter, you make the following statements that we require of people requesting access to our data base:
-you are at this time not proposing to publish the information nor use it as a direct data source for your thesis.
-you guarantee that the names of offenders will not be used nor published without our express permission in writing.
-if the statistics are needed as a direct data source for your thesis, you will request our permission, in writing, prior to use.

Government of the Northwest Territories, Yellowknife, N.W.T. Canada X1A 2L9 / Telex 034-45531

Lastly, we would be very interested in having a look at the pre-publication work as well as the published work itself. It is the opinion of some here in the N.W.T. that given our high incarceration rate, in the end we don't have a crime problem but rather a sentencing problem. Your work will speak directly to this issue and it is of great interest to us in Corrections as I am sure it will be to the Department of Justice.

Thus I am granting permission to access our Corrections data base. If I can be of any assistance in your research, please don't hesitate to call, and stop in from time to time for coffee and a chat. Good luck.

Don Blaquiere
Program Research Officer,
Corrections Division.

Northwest Territories Social Services

42 900 900

October 3, 1986

Hayli A. Millar
Apartment 614, #4
5004 - 54th Street
Yellowknife, N.W.T.
X1A 2R6

Dear Ms. Millar:

Master's Thesis Research

Thank you for your letter dated the 30th of September concerning your desire to do research as part of your Master's Thesis for Simon Fraser University.

I have referred your letter to our Program Research Officer, Mr. Don Blaquiere, for his review.

Don is away on holidays until October 6th and will review this upon his return.

On the face of it, I think we can assist you, but the final decision will rest with Mr. Blaquiere.

Mr. Blaquiere can be contacted at telephone 920-8823.

If you have not heard from him in the next few days, please call him directly.

Yours sincerely,

S. C. Mounsey
Chief of Corrections

c.c. Don Blaquiere

Hayli A. Millar
Apt. 614, #4
5004-54 St.
Yellowknife, N.W.T.
X1A 2R6

09/30/86.

Mr. Stan Mounsey,
Chief of Corrections
Social Services,
Government of the N.W.T.
Yellowknife, N.W.T.
X1A 2L9

Dear Sir,

Please allow me to introduce myself. My name is Hayli Millar and I am a graduate student in the School of Criminology at Simon Fraser University. I am in Yellowknife to conduct research for my Master's Thesis in partial fulfillment of the degree requirements for the Criminology Graduate Studies Program.

In general, my thesis research interests concern judicial sentencing practices in the Northwest Territories. My research on judicial sentencing practices will entail the content analysis of transcribed and published sentencing decisions, and interviews with members of the criminal justice profession in the Northwest Territories.

I am writing to formally request access to statistical information on adult sentencing decisions, and I am also requesting that, if access is granted, Leslie Capstick write the computer reports for me. It is my understanding that information on sentencing dispositions involving probation and incarceration is available in the correctional information system. With regards to sentencing dispositions involving probation or incarceration I am interested in the following information: (1)the name of the offender; (2)the offender's ethnic origin; (3)the level of court at which the offender was sentenced; (4)the type of offence(s) for which the offender was sentenced; (5)the type of sentence that the offender received; (6)the length of sentence that the offender received, and; (7)the terms of the sentencing disposition.

At this time, I am not proposing to publish this information, or use this information as a direct data source for my thesis. Rather, I am proposing to use this information as a method of gaining familiarity with the type and length of sentencing dispositions that are imposed for specific offences in the Northwest Territories. Additionally, I am proposing to use this information as one method of identifying cases that are not transcribed or published for the purpose of interviewing members of the judiciary and the legal profession.

With the exception of those cases that are already transcribed or published, I can guarantee that the name of the offender will not be published without the express permission of yourself. Further, if the statistics are needed as a direct data source for my thesis your permission will be requested prior to their use, and a copy of the thesis will me made available to you for comment prior to publication.

For further information I can be contacted at 920-2777, ext. 614.

Thank you for your attention to this matter.

Yours truly,

Hayli A. Millar

C.C. Dr. Curt Griffiths, Thesis supervisor, School of Criminology, Simon Fraser University, Burnaby, B.C.

Appendix B: Letters Regarding Permission to Use Corrections Data as a Direct Data Source

Northwest Territories Social Services

July 5, 1990

Ms. Hayli Millar
Yukon College
P.O. Box 2799
Whitehorse, YT
Y1A 5K4

Dear Ms. Millar:

I received the draft copy of your Master's thesis with interest. The issue of sentencing for sexual assault has been of wide-spread concern in the Northwest Territories recently, and your thesis may prove to be a significant contribution in that discussion when it is completed.

I noted that the draft copy states "...the utility of the correction's data relevant to the present study was restricted to the superficial description of the offender sample." Offender names are not identified. I am satisfied that you have met the terms of the agreement that was reached to allow your use of Government of the Northwest Territories Correction's data.

Thank you for forwarding a copy of your draft thesis. Best of luck for your defence on August 27, 1990.

Yours truly,

Brian Mason
Director
Corrections Service Division

Yukon College

Box 2799
Whitehorse, Yukon
Y1A 5K4

Our File:
Your File:

June 19, 1990

Mr. Brian Mason
Director of Corrections
Department of Social Services, G.N.W.T.
P.O. Box 1320
Second Laing Building
Yellowknife, Northwest Territories
X1A 2L9

Dear Mr. Mason,

Re: Terms of Agreement for the Use of GNWT Corrections Data as a Master's Thesis Data Source

Further to my agreement with the Corrections Division, Department of Social Services I am providing you with the initial draft of my Master's thesis prior to its defence. In compliance with my agreement with GNWT Corrections, I have not identified any offenders by name in the context of the written thesis (please refer to attached correspondence). You will also note that my direct and exclusive reliance on Corrections data is restricted to the first portion of Chapter IV wherein I provide a sociodemographic profile of my offender sample. The remaining findings are premised almost exclusively on data generated from transcribed sentencing decisions.

I am defending my thesis on August 27, 1990. For this reason, I am providing you with the initial draft so as to ensure a reasonable amount of time for comment as per my agreement with Don Blaquiere (please refer to attached letter of October 21, 1987). Notably, this draft has not as yet been subject to any of the revisions recommended by my thesis committee. Given the controversy currently surrounding the issue of sentencing and sexual assault in the Northwest Territories, I am requesting that the contents of this initial draft be kept strictly confidential until after I have defended my thesis. Upon the succesful defence of my thesis, I will provide you with a copy of my thesis and would ask that this initial draft be returned to me or destroyed.

Yukon
Education

I hope that I have met with all of the conditions specified by the Corrections Division in exchange for the use of corrections data in my thesis. Should you require additional information, please do not hesitate to contact me at (403) 668-8775.

Sincerely,

Hayli Millar

c.c. Mrs. Aileen Samms
Dr. Margaret Jackson
Dr. Curt Griffiths
Dr. Colin Yerbury

encl. (1)

Northwest Territories Social Services

42 900 900

October 21, 1987

Hayli Anne Millar
5731 Bluebell Drive
West Vancouver, B.C.
V7W 1T2

Permission to Use Statistical Information

First let me apologise for the delay in responding to your letter, but as I mentioned on the phone, I have been travelling a good deal over the last while.

Secondly, as we also discussed on the phone, I doubt I will be able to free up the time required to produce runs on the offenders on your list. We are all still doing two jobs at the moment, as the Young Offender staff still have not been hired. Thus I am finding it a challenge to accomplish the major tasks associated with my position and have had to refuse all special requests for now. I do apologise for this, but there is little I can do under the constraints of the current workload.

Regarding the request in your letter, I do formally grant you permission to use the statistical information retrieved from the Corrections data base in October and November of last year for your Master's thesis. Again, as you mentioned in your letter, this permission is given with the proviso that the names of the offenders or any other form of identification are not incorporated nor published in the thesis without the Department of Social Services', G.N.W.T., express written permission. Furthermore, I would indeed appreciate a copy of the work prior to publication for comment, as well as after publication for reference.

Good luck with your work Hayli, and stay in touch. Take care.

Don Blaquiere
Program Research Officer

Hayli Anne Millar
5731 Bluebell Drive
West Vancouver, B.C.
V7W 1T2
(604) 921-7118
July 7, 1987.

Mr. Don Blaquiere
Program Research Officer
Corrections Division
Social Services
Government of the Northwest Territories
Yellowknife, Northwest Territories
X1A 2L9

Dear Don,

Further to our telephone conversation of June 15, 1987, I am writing to formally request your permission to use the statistical information retrieved from the Corrections data base in October and November of last year as a direct data source for my Master's thesis. As a prerequisite to using this information, I will guarantee that the names of the offenders will not be incorporated or published in the thesis without your express written permission and that a copy of the thesis will be made available to you for comment prior to its publication. Additionally, I would be pleased to provide you with a copy of the thesis after it has been published.

Since my initial letter to Mr. Stan Mounsey requesting access to the Corrections data base, I have narrowed the focus of my Master's thesis research to an examination of Territorial and Supreme Court sentencing decisions between January 1983 and December 1986 relative to adult male offenders convicted of a sexual assault offence in the Northwest Territories contrary to Section 246.1, Section 246.2, or Section 246.3 of the Canadian Criminal Code. Currently I have personal background data reports, incarceration data reports, and probation data reports available for 149 adult male sexual assault offenders recorded in the Corrections data base prior to November 12, 1986. It is anticipated in my thesis chapter outline, a copy of which is enclosed, that the statistical description of this data will generate enough information for one complete chapter in my thesis.

After thoroughly examining and cross-checking the personal background data reports, the incarceration data reports, and the probation data reports that I have available for these 149 offenders, I believe that I am missing data for some of these offenders. In the interest of providing a comprehensive description of these sexual assault offenders I would appreciate it if you could provide me with personal background data, incarceration data, and probation data for the list of offenders that I have enclosed. In addition to this list, I have also enclosed the names of all of the adult male sexual assault offenders generated from the Corrections data base corresponding with the type of information that I have available for each offender.

.../2.

For further information I can be contacted at the above address and telephone number, or:

c/o School of Criminology
Simon Fraser University
Burnaby, B.C.
V5A 1S6
(604) 291-3213

Thank you for your assistance.

Yours truly,

Hayli Millar

Appendix C: Correspondence with the Territorial and Supreme Courts of the Northwest Territories

Northwest Territories

TERRITORIAL COURT
Judge's Chambers, Box 550, Courthouse, Yellowknife, X1A 2N4

August 12, 1987

Ms. Hayli Anne Millar
5731 Bluebell Drive
West Vancouver, B.C.
V7W 1T2

Dear Ms. Millar:

Thank you kindly for your letter of July 13th, 1987, and your enclosures.

The thesis chapter outline that you provided me is impressive, and I look forward to reading your completed thesis. It may be a welcome addition to the limited work in this area and shed some insights on our activities in the North.

I would note that you do not need permission to use and publish transcripts at sentencing hearings, or in fact, any Court hearing. These are matters of public record.

I am enclosing herewith a copy of a transcript in the Timothy Jar sexual assault case recently heard by me, and also the Phillip Perkins case, which are the only other recent sexual assault cases I am aware of. If you wish to provide me with a cut-off date, I will have all records searched and provide you with any transcripts that you may not have up until that cut-off date.

Please let me know if this would be of any assistance to you.

Best regards.

Yours truly,

J. R. M. Bourassa

Enclosures

NWT 1952-80/1080

Northwest Territories

TERRITORIAL COURT
Chief Judge's Chambers, Box 550, Courthouse, Yellowknife, X1A 2N4

July 24, 1987

Ms. Hayli Anne Millar
5731 Bluebell Drive
West Vancouver, B.C.
V7W 1T2

Dear Ms. Millar:

I have your letter of July 7th, and I do regret I did not have the opportunity to meet you last fall.

I doubt that you require any permission to publish the sentencing transcripts as you suggest. Certainly if permission is required, it would have to be obtained from each individual Judge. For my part, I give you permission to publish my remarks on sentencing in the case of **Paul Sonny Allen.**

In the case of **Allen**, this was the only sexual assault sentencing decision of mine that has been appealed in my 11 years on the Bench.

I happened to be talking to Judge Halifax on the telephone today about other matters, and your letter was in front of me and I discussed it with him. You will note that only two of his decisions are on your list, and he well recalls that in the case of **John Samuel Ogilvie**, his decision was appealed. It occurs to me, therefore, that what you might have are only cases that were appealed, and that you should also be looking at the dispositions made by the Court of Appeal. I think it likely that my remarks on sentencing on other sexual assault cases have been typed, even though not appealed. The Crown Attorney's office in Yellowknife might be a good source for you for other sentencing transcripts.

Yours truly,

J. R. Slaven
Chief Judge

Hayli Anne Millar
5731 Bluebell Drive
West Vancouver, B.C.
V7W 1T2
July 13, 1987.

Judge Michel Bourassa
Territorial Court of the Northwest Territories
Judge's Chambers, Court House
Box 550
Yellowknife, Northwest Territories

Dear Judge Bourassa,

Thank you for sending a copy of the Ettegiak transcript so promptly.

It was great to see you at the conference in Whitehorse. I was most interested in your discussion with David Gates following the Arctic Bay film regarding the Crown's motivation for appealing the sentence in Naqitarvik and the implications of the Appellate Court's decision in Naqitarvik.

Briefly, as I discussed with you in Whitehorse, I have narrowed the focus of my Master's thesis research to an examination of Territorial and Supreme Court sentencing decisions between January 1983 and December 1986 relative to adult male offenders convicted of a sexual assault offence in the Northwest Territories contrary to Section 246.1, Section 246.2, or Section 246.3 of the Canadian Criminal Code. The purpose of my Master's thesis research is to elicit information on the impact that local and regional circumstances have on judicial sentencing practices in the north in a methodologically consistent manner. Since I intend to incorporate the content analysis of Territorial and Supreme Court sentencing transcripts in my thesis, I have recently sent letters to Chief Judge Slaven and Mr. Justice de Weerdt formally requesting their permission to use and publish the information contained in these transcripts.

I have enclosed a copy of my thesis chapter outline and a copy of my content analysis format. I hope that my chapter outline and content analysis format will indicate both the type of information that I am interested in and the way in which I intend to use this information. Additionally, I have enclosed a list of the Territorial and Supreme Court sexual assault sentencing transcripts that I was able to locate in the Court House last Fall. Perhaps if you are aware of any sexual assault sentencing transcripts that I am missing you would be willing to let me know so that I might arrange for copies.

At this time I do not know whether I will be returning to Yellowknife in the Fall. After I have completed the data analysis sections of my thesis I will have a clearer idea of the information that I am missing and will decide at that time whether a return trip to Yellowknife is necessary.

Your support and assistance are very much appreciated.

Yours truly,

Hayli Anne Millar
5731 Bluebell Drive
West Vancouver, B.C.
V7W 1T2
(604) 921-7118
July 7, 1987.

Chief Judge James R. Slaven
Territorial Court of the Northwest Territories
Judge's Chambers, Court House
Box 550
Yellowknife, Northwest Territories

Dear Sir,

As you may recall, I wrote in September of last year informing you that I would be coming to Yellowknife to conduct research for my Master's thesis. I regret that the opportunity to meet you did not present itself during my brief stay in Yellowknife last Fall.

Since my return to Vancouver from Yellowknife in December, I have narrowed the focus of my Master's thesis research to an examination of Territorial and Supreme Court sentencing decisions between January 1983 and December 1986 relative to adult male offenders convicted of a sexual assault offence in the Northwest Territories contrary to Section 246.1, Section 246.2, or Section 246.3 of the Canadian Criminal Code. The purpose of my Master's thesis research is to elicit information on the impact that regional and local circumstances have on judicial sentencing practices in the north.

With reference to the research parameters that I have outlined above, I intend to incorporate the analysis of information contained in Territorial and Supreme Court sentencing transcripts as a central component of my Master's thesis. I anticipate that the qualitative analysis of the information contained in these transcripts will generate enough data for a complete chapter in my thesis.

I am writing to formally request your permission to incorporate and publish the information contained in Territorial Court sentencing transcripts in my Master's thesis. If there are any stipulations or restrictions to the use and/or publication of the information contained in Territorial Court sentencing transcripts relative to sexual assault offenders in the Northwest Territories, perhaps you could inform me of these stipulations or restrictions.

.../2.

I have enclosed a copy of my Master's thesis chapter outline and a copy of my content analysis format. I hope that these will indicate both the type of information that I am interested in and the way in which I intend to use this information. Additionally, I have enclosed a list of the Territorial Court sentencing transcripts that I was able to locate in the Court House last Fall. Perhaps if you or the other Territorial Court Judges are aware of any Territorial Court sexual assault sentencing transcripts that I am missing you would be willing to let me know so that I might arrange for copies.

For further information I can be contacted at the above address and telephone number, or:

c/o School of Criminology
Simon Fraser University
Burnaby, B.C.
V5A 1S6
(604) 291-3213

Thank you for your assistance.

Yours truly,

Hayli A. Millar

Hayli Anne Millar
5731 Bluebell Drive
West Vancouver, B.C.
V7W 1T2
(604) 921-7118
July 7, 1987.

Mr. Justice M.M. de Weerdt
Supreme Court of the Northwest Territories
Judge's Chambers, Court House
Box 550
Yellowknife, Northwest Territories

Dear Sir,

It was a pleasure to meet you during my brief stay in Yellowknife last Fall. I found our discussions to be most informative and I thoroughly enjoyed accompanying Mr. Justice Marshall on a day Circuit to Cambridge Bay.

Since I last had the opportunity to talk with you, I have narrowed the focus of my Master's thesis research to an examination of Territorial and Supreme Court sentencing decisions between January 1983 and December 1986 relative to adult male offenders convicted of a sexual assault offence in the Northwest Territories contrary to Section 246.1, Section 246.2, or Section 246.3 of the Canadian Criminal Code. The purpose of my Master's thesis research is to elicit information on the impact that local and regional circumstances have on judicial sentencing practices in the north.

With regard to the collection and analysis of data for my Master's thesis, I intend to incorporate the content analysis of both Territorial and Supreme Court sentencing transcripts as a central component of my thesis. Indeed, I anticipate that the qualitative analysis of information contained in Territorial and Supreme Court sentencing transcripts will generate enough information for one complete chapter in my thesis.

At this time I feel that it is appropriate to formally request your permission to incorporate and publish the information that is contained in Supreme Court sentencing transcripts in my Master's thesis. If there are any stipulations or restrictions to the use and/or publication of information contained in Supreme Court sentencing transcripts relative to sexual assault offenders in the Northwest Territories, perhaps you could inform me of these stipulations or restrictions.

.../2.

I have enclosed a copy of my Master's thesis chapter outline and a copy of my content analysis format. I hope that these will indicate both the type of information that I am interested in and the way in which I intend to use this information. Additionally, I have enclosed a list of the Supreme Court sentencing transcripts that I was able to locate in the Court House last Fall. Perhaps if you or Mr. Justice Marshall are aware of any Supreme Court sexual assault sentencing transcripts that I am missing you would be willing to let me know so that I might arrange for copies.

For further information I can be contacted at the above address and telephone number, or:

c/o School of Criminology
Simon Fraser University
Burnaby, B.C.
V5A 1S6
(604) 291-3213

Thank you for your assistance.

Yours truly,

Hayli A. Millar

Appendix D: Sentencing Judge Relative to Offender Sample

Sentencing Judge N = 11	Status N = 2	Court N = 2	Number of Sentencing Decisions N = 57 N %
Marshall	Resident	Supreme	14 (24.56)
Davis	Resident	Territorial	14 (24.56)
de Weerdt	Resident	Supreme	12 (21.05)
Bourassa	Resident	Territorial	8 (14.03)
Paul	Deputy	Supreme	2 (3.50)
Halifax	Resident	Territorial	2 (3.50)
Rothman	Deputy	Supreme	1 (1.75)
Bracco	Deputy	Supreme	1 (1.75)
Boilard	Deputy	Supreme	1 (1.75)
Trudeau	Deputy	Supreme	1 (1.75)
Slaven	Resident	Territorial	1 (1.75)

Appendix E: Content Analysis Format

Content Analysis - Sentencing Transcripts

A. General Information

1. Offender Name: _____

2. Type of Court: _____

3. Sentencing Judge: _____

4. Crown Counsel: _____

5. Defence Counsel: _____

6. Offence Type: _____ #of Ch(s): _____ Date: _____ Location: _____

Offence Type: _____ #of Ch(s): _____ Date: _____ Location: _____

Offence Type: _____ #of Ch(s): _____ Date: _____ Location: _____

Offence Type: _____ #of Ch(s): _____ Date: _____ Location: _____

Offence Type: _____ #of Ch(s): _____ Date: _____ Location: _____

Offence Type: _____ #of Ch(s): _____ Date: _____ Location: _____

Offence Type: _____ #of Ch(s): _____ Date: _____ Location: _____

Offence Type: _____ #of Ch(s): _____ Date: _____ Location: _____

7. Plea (guilty, not guilty, unknown): _____

8. Fitness to Stand Trial (yes, no): ____ _____

_____

9. Preliminary Inquiry (yes, no) Date: __ _____

_____

_____

10. Trial (yes, no) Date: _____ _____ Location: _____

Type: _____

_____

_____

_____

11. Remand (yes, no) Date: __ _____ Length: _____

_____

12. Sentencing Hearing Date: _____ Location: _____

_____

13. Disposition Date: _____

14. Type of Sentence (If more than one offence/charge is involved, specify what offence/charge the disposition relates to, and whether the sentence is consecutive or concurrent).

i. Suspended Sentence (yes, no) Length & Terms: _____

_____

ii. Absolute Discharge (yes, no) Length & Terms: _____

_____

iii. Conditional Discharge (yes, no) Length & Terms: _____

_____

iv. Incarceration (yes, no) Length & Terms: _____

_____

v. Probation (yes, no) Length & Type: _____

Terms: _____

_____

_____

_____

_____

vi. Fine (yes, no) Amount & Terms: _____

_____

vii. Restitution (yes, no) Amount & Terms: _____

_____

viii. C.S.O. (yes, no) Length & Terms: _____

_____

ix. Other (yes, no) Specify: _____

_____

_____

15. Judicial Recommendations (yes, no) (Identify and Discuss):

i. _____

_____

ii. _____

_____

iii. _____

16. Case Citation (reported, unreported) Specify: _____

17. Comments/General Information: _____

B. Offence Information (4).

1. Offence Location (specific location, eg. dwelling house): _____

2. Nature of the Sexual Assault (type of sexual contact, nature of the assault): _____

3. Were alcohol, or drugs involved (yes, no) (alcohol, drugs) (who was consuming, amount consumed):

4. Was the offence premeditated (yes, no) (factors indicating premeditation): _____

5. Was more than one accused involved (yes, no) (#of offenders, role in the sexual assault): _____

6. Were weapons involved (yes, no) (type of weapon, and the nature of its use): _____

7. Was violence, or the threat of violence involved (yes, no) (type and degree of violence): _____

8. Was the complainant injured (yes, no) (physical, psychological) (type and extent of injury): _____

9. What was the victim-offender relationship (stranger, blood relative, position of trust): _____

10. Age of the complainant at the time of the sexual assault offence: _____

11. Comments/Offence Information (eg. more than one sexual assault offence, more than one complainant): _____

C. Offender Information

1. Demographic Information.

a. Age/Sexual Assault Offence: _____

b. Ethnicity/Language: _____

c. Usual Residence (community; permanent/temporary resident): _____

_____

2. Personal/Background Information.

a. Marital Status: _____

b. Number of Dependents: _____

c. Living Arrangements (alone, with parents/friends/relatives, with spouse and/or children): _____

_____

d. Family Background (eg. stability, family breakdown): _____

_____

_____

_____

_____

e. Occupation (traditional, wage economy): _____

_____

f. Employment History (employed, unemployed, record of employment): _____

_____

_____

_____

g. Education/Training (level of education, skills): _____

_____

_____

_____

h. Psychiatric/Personality Disorder (yes, no) Specify: _____

_____

_____

_____

_____

I. Personal History (eg. level of intelligence, physical/mental health, alcohol abuse): _____

j. Criminal History (yes, no) (type of offence, # of Ch(s), age of contact, patterns of contact, temporal relationship between offences, temporal placement of the sexual assault offence) (Identify and Discuss):

i. _____

ii. _____

iii. _____

iv. _____

v. _____

vi. _____

vii. _____

viii. _____

ix. _____

x. _____

3. Comments/Offender Information: _____

D. Sentencing Information

1. General Information.

a. Reports (Specify the type of report, report recommendations, judicial consideration of the report):

b. Arguments Made by Counsel:

i. Crown:

ii. Defence:

c. Cases Judicially Considered (Specify):

d. Judicial Consideration of Previous Dispositions for Similar Offences (Specify):

e. Range of Sentence Judicially Considered (Specify type & length of sentence):

2. Principles of Sentencing.

a. Protection of the Public (yes, no) Specify: _____

b. General Deterrence (yes, no) Specify: _____

c. Specific Deterrence (yes, no) Specify: _____

d. Rehabilitation/Reformation (yes, no) Specify: _____

e. Denunciation (yes, no) Specify: _____

f. Incapacitation (yes, no) Specify: _____

g. Punishment (yes, no) Specify: _____

h. Retribution (yes, no) Specify: _____

i. Other (yes, no) Specify: _____

3. Aggravating Factors (Identify and Discuss):

i. _____

_____

ii. _____

_____

iii. _____

_____

iv. _____

_____

v. _____

_____

vi. _____

_____

vii. _____

_____

4. Mitigating Factors (Identify and Discuss):

i. _____

_____

ii. _____

_____

iii. _____

_____

iv. _____

_____

v. _____

_____

vi. _____

_____

vii. _____

_____

5. Judicial Determination of the Sentencing Disposition.

a. What northern characteristics are judicially considered, and how do these characteristics impact on the sentencing disposition imposed by the judge (identify and Discuss):

i. _____

ii. _____

iii. _____

iv. _____

v. _____

vi. _____

b. What is the stated judicial rationale for imposing the particular sentencing disposition (focus on the interaction between legal and extra-legal factors) (Synopsis): _____

6. Comments/Sentencing information (eg. sentencing principles that apply to more than one accused, more than one criminal offence, first offenders): _____

Appendix F: **Sentence for Additional Offences**

	Incarceration Length by Instant and Additional Offence	
Offender	Sexual Assault Charge and Sentence	Additional Charges and Sentence
5	Sexual Assault (246.1) (9 months)	Breach of Probation (1 month concurrent) (same incident);
10	Sexual Assault (246.3) (3 years)	Break and Enter (3 years concurrent) (proximity), Breach/Undertaking (1 month consecutive) (same incident);
11	Sexual Assault (246.2) (4 years)	Breach/Undertaking (1 month concurrent), Escape/Custody (6 months consecutive) (all same incident);
13	Sexual Assault (246.1) (3 months)	Assault Causing Bodily Harm (3 months concurrent), Impaired Driving (3 months concurrent) (all separate incidents);
14	Sexual Assault (246.3) (8 years)	Abduction (2 years concurrent) (same incident);
17	Sexual Assault (246.1) (3 years)	Rape (2 years consecutive) (separate incidents);
26	Sexual Assault (246.1) (15 months)	Breach/Probation (1 month consecutive) (same incident);
28	Sexual Assault (246.1) (1 year)	Assault Causing Bodily Harm (3 months consecutive) (separate incidents);
29	Sexual Assault (246.2) (8 months)	Breach/Probation (2 months consecutive) (same incident);

Offender	Sexual Assault Charge and Sentence	Additional Charges and Sentence
34	Sexual Assault (246.1) (21 months)	Careless Use/Firearm (3 months less a day consecutive) (separate incidents);
36	Sexual Assault (246.1) (6 months)	Breach/Probation (2 weeks concurrent) (same incident), Break and Enter (1 month consecutive) (separate incidents), Breach/Undertaking (1 month concurrent) (related to B&E);
37	Sexual Assault (246.2) (4 years)	Break/Enter/Theft (6 months consecutive) (separate incidents);
38	Sexual Assault (246.1) (90 days)	Breach of Probation ($400.00 fine) (same incident);
46	Sexual Assault (246.1) (12 months)	Breach Undertaking (1 month consecutive) (same incident);
50	Sexual assault (246.1) (6 months)	Assault Causing Bodily Harm (6 months concurrent) (separate incidents), Assault Causing Bodily Harm (6 months concurrent);
52	Sexual assault (246.1) (2 years)	Unlawful Confinement (1 year concurrent), Attempted Murder (3 years concurrent) (All same incident)

Note: Restricted to sentences of incarceration and does not include offenders who committed additional "sexual assault offences.

Appendix G: **Community Variation in Offence Patterns**

Community	Usual Address N	%	Offence Location N	%	Frequency Offences N	%
Aklavik	1	(1.75)	2	(3.50)	2	(3.22)
Arctic Bay	2	(3.50)	2	(3.50)	2	(3.22)
Baker Lake	2	(3.50)	2	(3.50)	2	(3.22)
Cambridge Bay	1	(1.75)	1	(1.61)	1	(1.61)
Cape Dorset	6	(10.52)	2	(3.50)	3	(4.83)
Chesterfield Inlet	1	(1.75)	1	(1.75)	1	(1.61)
Clyde River	1	(1.75)	1	(1.75)	1	(1.61)
Coppermine	2	(3.50)	2	(3.50)	2	(3.22)
Coral Harbour	2	(3.50)	2	(3.50)	2	(3.22)
Detah	0	(0.00)	1	(1.75)	1	(1.61)
Eskimo Point	1	(1.75)	1	(1.75)	1	(1.61)
Fort Resolution	1	(1.75)	1	(1.75)	1	(1.61)
Fort Simpson	1	(1.75)	1	(1.75)	1	(1.61)
Fort Smith	4	(7.01)	3	(5.26)	5	(8.06)
Frobisher Bay	9	(15.78)	13	(22.80)	14	(22.58)
Hall Beach	1	(1.75)	2	(3.50)	2	(3.22)
Hay River	1	(1.75)	1	(1.75)	1	(1.61)
Inuvik	4	(7.01)	3	(5.26)	3	(4.83)
Norman Wells	1	(1.75)	1	(1.75)	1	(1.61)
Pangnirtung	1	(1.75)	1	(1.75)	1	(1.61)
Rae	4	(7.01)	3	(5.26)	3	(4.83)
Rankin Inlet	3	(5.26)	2	(3.50)	2	(3.22)
Resolute Bay	1	(1.75)	1	(1.75)	1	(1.61)
Tuktoyaktuk	3	(5.26)	3	(5.26)	3	(4.83)
Yellowknife	3	(5.26)	5	(8.77)	6	(9.67)
Total (25)	57	(99.86)	57	(99.86)	62	(99.88)

Appendix H: Type of Sexual Contact

Type of Sexual Activity	Frequency of Offenders N	%	Frequency of Offences N	%
Not Specified	10	(17.54%)	10	(16.12%)
Forcible Intercourse *	22	(38.59%)	23	(37.09%)
Attempted Intercourse	7	(12.28%)	7	(11.29%)
Fondling/Touching	13	(22.80%)	17	(27.41%)
Other	5	(8.77%)	5	(8.06%)
Total	57	(99.98%)	62	(99.97%)

Note: * Includes two separate assaults, the former in which an act of fellatio took place in addition to the forced sexual intercourse and the latter in which the victim was both "raped" and sodomized.

Appendix I: The Role of Violence in the Offence

Type of Violence	Number of Offences N = 62
Physical Force/Violence	12 (19.35%)
Threats (verbal or with a weapon)	8 (12.90%)
Threats and Physical Force	5 (8.06%)
Forcible Confinment and threats	4 (6.45%)
Forcible Confinement and Physical Force/Violence	2 (3.22%)
Inducement and Physical Force	1 (1.61%)
Forcible Confinement	1 (1.61%)
Total Number of Offences	33 (53.20%)

Appendix J: The Role of Injury in the Offence

Type of Injury Inflicted on the Complainant During the Course of, or As a Result of the Sexual Assault

Type of Injury	Number of Offences N = 62
Physical	14 (22.58%)
Psychological/Emotional	11 (17.74%)
Combination	5 (8.06%)
Total Number of Offences Involving Injury	30 (48.38%)

Appendix K: The Relationship Between the Complainant and Offender

Relationship Between the Accused and Complainant	Frequency Complainants	Percent Complainants
Friend/Acquaintance	12	(20.33%)
Daughter *	9	(15.25%)
Stranger	5	(8.47%)
Sister **	3	(5.08%)
Neice	2	(3.38%)
Loco Parentis/Breach of Trust	2	(3.38%)
Son	1	(1.69%)
Stepmother	1	(1.69%)
Wife	1	(1.69%)
Cousin	1	(1.69%)
Distant Relation	1	(1.69%)
Not Specified	21	(35.59%)
Total Number of Complainants	59	(99.93%)

Note: * Step-daughter and adopted daughter are included in this category. ** Sister-in-Law is included in this category.

Appendix L: A Comparison of Offence and Sentencing Location

Community	Offence Location Frequency Offenders/Frequency Offences		Court Location
	N %	N %	N %
Aklavik	2 (3.50)	2 (3.22)	1 (1.75)
Arctic Bay	2 (3.50)	2 (3.22)	2 (3.50)
Baker Lake	2 (3.50)	2 (3.22)	2 (3.50)
Cambridge Bay	1 (1.75)	1 (1.61)	
Cape Dorset	2 (3.50)	3 (4.83)	1 (1.75)
Chesterfield Inlet	1 (1.75)	1 (1.61)	
Clyde River	1 (1.75)	1 (1.61)	1 (1.75)
Coppermine	2 (3.50)	2 (3.22)	1 (1.75)
Coral Harbour	2 (3.50)	2 (3.22)	1 (1.75)
Detah	1 (1.75)	1 (1.61)	1 (1.75)
Eskimo Point	1 (1.75)	1 (1.61)	1 (1.75)
Fort Resolution	1 (1.75)	1 (1.61)	
Fort Simpson	1 (1.75)	1 (1.61)	1 (1.75)
Fort Smith	3 (5.26)	5 (8.06)	3 (5.26)
Frobisher Bay	13 (22.80)	14 (22.58)	12 (21.05)
Hall Beach	2 (3.50)	2 (3.22)	1 (1.75)
Hay River	1 (1.75)	1 (1.61)	1 (1.75)
Inuvik	3 (5.26)	3 (4.83)	2 (3.50)
Norman Wells	1 (1.75)	1 (1.61)	
Pangnirtung	1 (1.75)	1 (1.61)	1 (1.75)
Rae	3 (5.26)	3 (4.83)	2 (3.50)
Rankin Inlet	2 (3.50)	2 (3.22)	1 (1.75)
Resolute Bay	1 (1.75)	1 (1.61)	1 (1.75)
Tuktoyaktuk	3 (5.26)	3 (4.83)	3 (5.26)
Yellowknife	5 (8.77)	6 (9.67)	18 (31.57)
Total	57 (99.86)	62 (99.98)	57 (99.89)

Appendix M: Time Lapse Between Offence Commission and Sentence

Number of Months Elapsing Between Offence and Sentence	Frequency Offenders N	%	Cumulative Frequency N	%
1 - 4 months	14	(24.56)	14	(24.56)
5 - 8 months	11	(19.29)	25	(43.85)
9 - 12 months	9	(15.78)	34	(59.63)
13 - 16 months	4	(7.01)	38	(66.64)
Not Specified	19	(33.33)	57	(99.97)
Total	57	(99.97)		

Note: For those offenders who committed more than one charge/offence of sexual assault or who were involved in an "ongoing pattern of behavior", the latter offence date was chosen for the evaluation of the number of months elapsing between the commission of the offence and the disposition date.

Appendix N: Time Spent in Custody

Length of Time Remanded to Custody (Months)	Frequency of Offenders N	%	Cumulative N	%
< 1 month	1	(4.34)	1	(4.34)
1 month	3	(13.04)	4	(17.38)
2 months	5	(21.73)	9	(39.11)
3 months	4	(17.39)	13	(56.50)
4 months	2	(8.69)	15	(65.19)
5 months	2	(8.69)	17	(73.88)
6 months	1	(4.34)	18	(78.22)
7 months	2	(8.69)	20	(86.91)
8 months	0	(0.00)	20	(86.91)
9 months	1	(4.34)	21	(91.25)
N/S	2	(8.69)	23	(99.94)
Total	23	(99.94)		

Appendix O: Frequency of Sentence Type

Type of Disposition	Frequency of Offenders N %	Cumulative Frequency N %
Incarceration	21 (36.84)	21 (36.84)
Incarceration and Probation	17 (29.82)	38 (66.66)
Incarceration and Section 98	8 (14.03)	46 (80.70)
Incarceration, Probation and Section 98	4 (7.01)	50 (87.71)
Incarceration, Probation, and CSO	2 (3.50)	52 (91.21)
Incarceration and Fine	1 (1.75)	53 (92.96)
Incarceration, Probation, CSO, and Section 98	1 (1.75)	54 (94.71)
Probation and Fine	1 (1.75)	55 (96.46)
Suspended Sentence (Probation)	1 (1.75)	56 (98.21)
Conditional Discharge (Probation)	1 (1.75)	57 (99.96)
Total	57 (99.96)	

Note: The quantification of "sentence type" reflects the sentences imposed by the Territorial and Supreme Courts and have not been adjusted for those sentences that were varied and/or substituted on appeal.

Appendix P: Appeals from Sentence

Offender	Appellate Court Decision
1	Sentence of 10 months imprisonment and one year probation appealed by Crown and a sentence of 24 months imprisonment substituted on appeal.
2	Sentence of nine months incarceration and one year probation appealed by Crown and varied on appeal to two years less one day with original probation order allowed to stand.
11	Sentence of four years incarceration for sexual assault causing bodily harm appealed by Crown and varied to eight years imprisonment on appeal.
16	Suspended sentence with two years probation appealed by Crown and a sentence of 60 days imprisonment substituted on appeal with the probation order allowed to stand. Court of Appeal recommending that the accused be entered into a sex offender treatment program "at the earliest opportunity".
38	Sentence of 90 days intermittent and two years probation appealed by Crown and a sentence of 18 months imprisonment substituted on appeal.
44	Sentence of 25 days intermittent appealed by Crown and increased to six months imprisonment on appeal.
51	Sentence of two-and-a-half months imprisonment and two years probation appealed by Crown and sentence increased to one year imprisonment on appeal

Note: The researcher was unable to obtain a comprehensive listing of all appeals for the offender sample. Accordingly, the above is only a partial listing of all sentencing decisions that were appealed relative to the offender sample.