

**THE YOUNG OFFENDERS ACT AND ABORIGINAL MODELS OF YOUTH
JUSTICE: Challenging the Crime Control Trend Through Bifurcation and
Restorative Justice**

by

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The Young Offenders Act and Aboriginal Models of Youth

Justice: Challenging the Crime Control Trend Through

Bifurcation and Restorative Justice

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ABSTRACT

Aboriginal youth are over-represented in Canada's youth justice system. Many aboriginal communities have become overwhelmed with substance abuse, violence and crime and these problems are likely to intensify as the already disproportionate population of aboriginal youth continues to grow. Dissatisfaction with the Canadian criminal justice system and the belief that the system fails to address the conditions that lead to youth crime have driven aboriginal groups to begin developing their own community-based justice initiatives both at the adult and youth levels.

Criminologists argue that the present trend in youth justice is towards crime control oriented policy. In contrast, aboriginal views of justice are more restorative in nature. This thesis explores the hypothesis that the principles of the *Young Offenders Act* are incompatible with aboriginal views of youth justice.

The research suggests that the present direction in youth justice is towards twin trends--bifurcation, where minor offenders receive diversion and unintrusive sentences and major punitive sentences are reserved for violent offenders. While recent amendments to the YOA have concentrated on crime control objectives there is also evidence of increasing support for restorative justice. An examination of the principles of the *Young Offenders Act* further reveals that the underlying Modified Justice Model has the capacity to facilitate restorative justice practices.

Most aboriginal communities that are assuming control over justice are proceeding incrementally. Often lacking the basic infrastructure and resources necessary to develop and maintain autonomous justice programs, communities have opted to take responsibility gradually. Contrary to YOA critics, the bifurcated YOA appears capable of meeting present First Nations aspirations. However, incremental objectives lie within the broader goal of self-government, which could pose complex political challenges for aboriginal youth justice in the future.

Despite the encouraging initiatives, the current political and media emphasis on *crime control reforms* in youth justice policy is inappropriate for aboriginal youth. It is argued that a *bifurcated approach* in youth justice policy should be intensified and promote *community-based justice programs* that are more restorative in nature. As well, aboriginal communities need to develop the necessary *community justice infrastructure*. Finally, *aboriginal youth justice* will require far greater policy coordination with provincial and federal governments.

DEDICATION

This thesis is dedicated to my family. Without your never-ending love, support and encouragement this work would not have been possible.

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CHAPTER I

INTRODUCTION

THE YOUNG OFFENDERS ACT AND ABORIGINAL YOUTH

Following an extensive period of reform lasting more than twenty years, the *Young Offenders Act* replaced the *Juvenile Delinquents Act* in 1982. The YOA was introduced within a broader framework of international reform where youth justice can be described as having moved away from the traditional Welfare Model based systems, which were informal and focused on rehabilitation, and towards systems reflecting a Justice Model founded in due process (see Corrado, 1992). It is currently argued by several authors that a further shift in youth justice is taking place in Canada--a movement towards the Crime Control Model (see Carrington and Moyer, 1995; Bala, 1994; Corrado and Markwart, 1994; Hylton, 1994; Lilles, 1994; Jaffe et al., 1991; Schwartz, 1991). The suggestion that youth justice is becoming more crime control oriented poses a significant threat to the justice needs of many youth in conflict with the law--including aboriginal youth.

It is clear that many aboriginal people are less than satisfied with the practices of the Canadian criminal justice system. Many First Nations individuals are frustrated and angry with a system which they feel does not reflect nor respect their values and traditions. In addition, aboriginal people feel that the justice system fails to address the context of crime which is critical to the development of appropriate responses to criminal behavior and delinquency.

It has been argued that the Canadian criminal justice system is failing aboriginal people in general; however, the specific concern of this research lies with the impact of the *Young Offenders Act* on aboriginal youth. It has been suggested that the principles of the YOA have had a more severe impact on aboriginal youth, due in part to the common factors of geographic isolation and extensive socio-economic deprivation (see LaPrairie, 1988). The over-representation of aboriginal youth in the youth justice system lends some support to this argument.

While there is dramatic variation among communities, evidence of the chronic marginalization of aboriginal youth in Canadian society is abundant. Many aboriginal youth experience high rates of alcohol and drug abuse, familial and communal violence, inflated rates of accidents and violent deaths, physical and sexual abuse, increased rates of suicide, disease and other health problems. In addition, aboriginal youth often face eminent unemployment, a lack of skills and lower levels of education. The disproportionate numbers of aboriginal youth in Canadian aboriginal communities and their growing population only exacerbates their already discouraging socio-economic circumstances (see Griffiths and Verdun-Jones, 1994; LaPrairie, 1994; Jackson, 1992; Cooper et al., 1991). It is important to recognize however, that not all aboriginal youth are in a state of conflict and that many non-aboriginal youth also suffer from the circumstances discussed above; indeed, the primary issue is one of socio-economic deprivation rather than culture or race. Nevertheless, this thesis will concentrate on the justice needs of aboriginal youth in conflict.

It can be argued that to be effective, responses to youth in conflict with the law must consider the context of the offending behavior. Justice issues, therefore, cannot be separated from the conditions and problems faced by contemporary society. Issues such as parenting, unemployment, education, economics and substance abuse are critical to the evolution of appropriate justice programs. In terms of the process of youth justice reform and its impact on aboriginal youth, these issues need to be considered.

THE YOA AND THE CRIME CONTROL TREND

The YOA has been characterized as a Modified Justice Model which embraces elements of the Welfare, Justice and Crime Control Models of youth justice (see Corrado, 1992). Nevertheless, the current debate in the literature suggests that a crime control trend is becoming more pronounced in Canadian youth justice. While the *Young Offenders Act* has already been described as being more punitive than the previous

welfare-based *Juvenile Delinquents Act*, recent amendments to the legislation point to an elevated interest in crime control objectives.

In view of the deprived socio-economic conditions of many aboriginal youth, the impact of the *Young Offenders Act* and the current process of legislative reform requires some attention. It is proposed that the crime control principles of the YOA will not only fail to address the needs of multi-troubled youth, but may in fact be counterproductive to those needs. The marginal position of many aboriginal youth, and the perceived failure of crime control principles to address that position, is compounded by the argument that traditional aboriginal societies have historically held views of justice that are sometimes inconsistent with those of the dominant society (see Mills, 1994; Griffiths, 1992; LaPrairie, 1992b; Ross, 1992; Cawsey, 1991; Hamilton and Sinclair, 1991; Royal Commission On Aboriginal Peoples, 1996).

THE YOA AND ABORIGINAL VIEWS OF JUSTICE

It has frequently been argued that the principles of Euro-Canadian justice are in contrast to those of traditional aboriginal societies. A variety of task forces and inquiries have maintained that traditional aboriginal justice is restorative in nature and is fundamentally incompatible with the more retributive western system (see Hamilton and Sinclair, 1991; Cawsey, 1991; Royal Commission On Aboriginal Peoples, 1996). Consequently, at first glance it appears as though the YOA is moving in one direction--towards a more crime control oriented model of youth justice--while aboriginal justice is traveling in the opposite direction, reflecting a more restorative approach.

INDIGENIZATION

The suggestion that there is an inherent incompatibility between principles of traditional aboriginal justice and the Euro-Canadian system poses a significant challenge for aboriginal justice aspirations. In recent history, attempts have been made to forge a relationship between the two systems through the process of indigenization (see Havemann, 1992). It was felt that by encouraging aboriginal people to work within the

criminal justice system many of the conflicts between aboriginal people and the system would be eradicated. Unfortunately, the continued over-representation of aboriginal people in the justice system--both young people and adults--has shattered this optimistic view.

ABORIGINAL JUSTICE INITIATIVES

In the wake of indigenization, both the formal system and aboriginal communities are aiming towards the development of projects that will better accommodate community justice needs. Aboriginal people have diverse justice goals, and in terms of strategy, the pace of acquisition varies extensively. First, there are some communities for which becoming involved in justice is not a priority at this time. Second, there are communities which feel that they do not yet have the necessary infrastructure, resources and community strength to develop and maintain justice initiatives. Third, as this thesis will demonstrate, the majority of aboriginal communities who are becoming involved in justice have adopted an incremental approach to justice, whereby they will gradually accept an increasing level of responsibility with the eventual goal of absolute self-government. Finally, there are some aboriginal groups who feel that they are ready to begin developing their own systems of justice under the authority of self-government; however, these proposals clearly reflect a partnership with the existing system (see LaPrairie, 1992b; Hamilton and Sinclair, 1991; Royal Commission On Aboriginal Peoples, 1996).

The driving force behind aboriginal justice reform is the perceived failure of the dominant system to meet community justice needs (see LaPrairie, 1995b; Sinclair, 1994; Royal Commission On Aboriginal Peoples, 1996). The inadequacies of the existing justice system have motivated aboriginal people to work towards their own models of justice--including youth justice. While for some aboriginal people justice initiatives currently take a secondary role next to issues such as self-government negotiations and the general healing of communities, various models of community justice have emerged throughout Canada (see LaPrairie, 1992b).

THE YOA AND ABORIGINAL YOUTH JUSTICE

Notwithstanding the contradictions between justice in traditional aboriginal societies and contemporary Canadian society, and the perceived limitations of the YOA in terms of aboriginal youth justice, models are being developed and implemented at the community level. Progress in the area of aboriginal youth justice raises questions regarding the true limitations of the *Young Offenders Act* in addressing the more *immediate* needs of aboriginal youth. A more in-depth analysis of the YOA reveals that while there is potential for future conflict if and when aboriginal communities aspire to develop autonomous systems of justice, it is apparent that many of the present aboriginal justice goals can be accommodated through the *Young Offenders Act* if the principles of the YOA are adhered to and implemented in the way that was originally intended by the legislation--as a Modified Justice Model.

BIFURCATION

The Modified Justice Model underlying youth justice policy in Canada, facilitates a bifurcated approach to youth justice where the application of crime control measures is limited to chronic, serious, dangerous and violent young offenders, while the majority of youth crime--which is less serious--is dealt with through the use of more restorative justice practices. Indeed, growing evidence of the emergence of a restorative justice paradigm challenges the current perception of a more limited crime control trend in youth justice. It will be argued in this thesis that the present trend in youth justice is towards bifurcation. Moreover, it will be maintained that the bifurcated approach fostered by the principles of the YOA first, allows aboriginal peoples to pursue their more immediate youth justice goals, and second, to use them as a stepping stone towards greater control in the future.

METHODOLOGICAL OVERVIEW

This thesis explores whether or not the principles of the *Young Offenders Act* and the current direction of youth justice reform have the potential to accommodate current aboriginal youth justice initiatives. This research is descriptive and exploratory in nature.

To fully investigate the diversity of aboriginal peoples justice concerns in Canada, would require a large scale research study. It would be necessary to conduct a considerable number of interviews at both the government and community levels. Such a venture is beyond the capacity of the resources available for this study. Therefore, the primary sources of information used for this study--government documents, reports and literary materials--reflect the presently available resources, along with their inherent limitations.

Information Gathering

YOA Trends

In order to explore the principles of the YOA and trends of reform to the legislation, an extensive literature search was conducted. The *Young Offenders Act* and academic literature regarding youth crime and justice were the primary sources of information. The work of authors such as Bala (1992), Bala and Kirvan (1991), Carrington and Moyer (1995), Corrado (1992), Corrado and Markwart (1988, 1989, 1992, 1995), Doob (1994), Hackler (1987, 1991), Markwart (1992), Milne et al. (1992), and Pearson (1991) are discussed.

Impact of the YOA On Aboriginal Youth

Following the investigation of historical and contemporary trends in youth justice, the second step was to learn how these trends have impacted aboriginal youth. Information regarding the impact of the YOA on aboriginal youth was gathered from various government documents and reports including: the *Report of the Aboriginal Justice Inquiry of Manitoba* (Hamilton and Sinclair, 1991), the *Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta*, (Cawsey, 1991), *Aboriginal Peoples and the Justice System*, (Royal Commission on Aboriginal Peoples, 1993) and *Bridging the Cultural Divide: A Report On Aboriginal People and Criminal Justice In Canada* (Royal Commission on Aboriginal Peoples, 1996). In addition, works by the following academics further contributed to this study:

Clark et al., (1995); Kueneman et al. (1986); and, LaPrairie (1988, 1992a, 1992b, 1994a, 1994b, 1995a, 1995b, 1995c).

Aboriginal Principles of Justice

Additional literature was examined in order to gather information regarding the concept of justice in traditional aboriginal societies. This was necessary in order to explore the argument that there are inherent distinctions between the values underlying aboriginal justice versus the values of Euro-Canadian justice. An understanding of the values of justice in traditional aboriginal societies further assists in contextualizing the present justice goals of aboriginal communities. Again, the primary sources of information included publications from the Royal Commission on Aboriginal Peoples (1993, 1996), *The Report of the Aboriginal Justice Inquiry of Manitoba* (Hamilton and Sinclair, 1991), *the Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta*, (Cawsey, 1991), as well as historical academic sources such as those from Brody (1991) and Tennant (1991).

Current Aboriginal Justice Initiatives

The final focus of the empirical research involved an analysis of reports, documents, evaluation research and other literature related to aboriginal models of youth justice. Documents regarding aboriginal youth justice initiatives in Canada were acquired from the provinces and territories by contacting more than twenty-five people working in the areas of youth justice policy and corrections, and in the field of aboriginal justice.

The contacts in the various provincial and territorial ministries constituted a "snowball sample." Eight contacts were initially provided by a senior policy analyst in the Ministry of the Attorney General for British Columbia. The sample then expanded as each contact provided several other relevant sources of information.

While not rigidly structured, discussions were held with each of the twenty-five correspondents within the context of making contact to acquire documentation. Discussions covered a variety of issues including: the nature and context of aboriginal

youth crime; perceived crime control trend in youth justice policy; the present direction and future strategy of aboriginal youth justice; the bifurcated approach to youth justice; the potential for aboriginal youth justice aspirations to be accommodated through a bifurcated approach; and, the need for intensified coordination and integration of government policy.

Limitations of the Methodology

It is critical to note that to date, there are few empirical studies that have explored the relationship between aboriginal people and the justice system. The various task forces and inquiries have occurred primarily at the provincial level (with the exception of The Royal Commission on Aboriginal Peoples), and the results typically reflect the general perceptions of aboriginal people in the communities that were studied. The extensive diversity of aboriginal peoples in Canada makes research challenging and complex, nevertheless, these inquiries have identified some of the major areas of concern for aboriginal people. Moreover, the perceptions that people have of the justice system are often as significant as personal experience.

It is also necessary to acknowledge the potential for selection bias in terms of the information that was provided during the discussions with policy specialists. The overwhelming majority of respondents represented non-aboriginal policy perspectives, which are therefore reflected in the findings of this study.

OVERVIEW OF THE CHAPTERS

Chapter two presents a review of the literature relative to the nature and context of aboriginal youth crime, current trends in youth justice policy and an analysis of the distinctions between the values of traditional aboriginal justice and contemporary Euro-Canadian justice objectives. In addition, the Restorative Model of justice is introduced and it is demonstrated how such practices can be subsumed into the confines of the YOA. Finally, a discussion of the direction and strategy of aboriginal justice aspirations is provided.

Chapter three presents a discussion and analysis of the various aboriginal youth justice projects in Canada and chapter four details the policy implications and general conclusions derived from this study.

CHAPTER II

LITERATURE REVIEW

The *Young Offender's Act* was enacted in 1982, and brought into force in 1984, replacing the previous *Juvenile Delinquents Act* of 1908. The JDA was based on a positivist philosophy which claimed that youthful offending could be linked to the poor socialization of children within the family and within the larger social system. The intent of the legislation then, was to treat or rehabilitate "misguided or inadequately socialized delinquents" (Corrado, 1992:1). In contrast, the YOA is embedded in a neo-classical philosophy with the primary premise that youth willfully commit crime and are therefore responsible and accountable for their behavior (Corrado, 1992).

The introduction of the YOA brought a significant shift in the philosophy of youth justice. In the wake of the *parens patriae* model, the *Young Offenders Act* embraces principles from several youth justice models and is consequently characterized by Corrado (1992) as a Modified Justice Model (see also Corrado and Markwart, 1995). On a continuum of justice models ranging from the Welfare Model on the left, to the Crime Control Model on the right, the Modified Justice Model is situated midway (see Corrado, 1992).

While the *Young Offenders Act* was initially passed without much controversy, the legislation has become the focus of justice reform in Canada, and it is clear that crime control principles are receiving a great deal of attention (see Corrado and Markwart, 1995). The current perception of a crime control trend in youth justice has particular implications for aboriginal youth. At a time when aboriginal communities are venturing into their own justice reforms, the question as to whether or not current youth justice policy initiatives are addressing the concerns of aboriginal youth must be considered.

ABORIGINAL CRIMINALITY

There is considerable variation in crime patterns amongst aboriginal peoples; however, it is well documented that many aboriginal communities suffer from

disproportionate levels of crime and violence as a result of complex historical and contemporary factors. Indeed, the Royal Commission On Aboriginal Peoples (1996) stated that "the available evidence confirms that crime rates are higher in aboriginal communities than non-aboriginal communities" (34). The majority of offences are alcohol related, are of an interpersonal nature and are committed by young males (see LaPrairie, 1992a, 1995b). Griffiths and Verdun-Jones (1994) note that in some places alcohol is related to more than 95% of the offences committed. Moreover, in some communities, violence towards women and children has tragically become normalized.

Aboriginal people also tend to experience conflict with the law at a younger age than non-aboriginal people (see LaPrairie, 1988). Indeed, aboriginal youth are over-represented in the youth justice system. In terms of the *Young Offenders Act*, it has been argued that the legislation has led to an increase in the rate of charging for aboriginal youth; that aboriginal youth have difficulty acquiring legal representation; that there is a lack of alternative measures available, necessitating a heavy reliance on custodial dispositions; and, that the implementation of the YOA is too law enforcement oriented resulting in too many charges being laid for incidents that could be dealt with by the community (Hamilton and Sinclair, 1991; LaPrairie, 1988, 1992b; Griffiths and Verdun-Jones, 1994). McCaskill (1970) describes the offence profile of the average aboriginal young offender as follows:

It would appear that a profile of the typical Native youth offender would include: a community of origin which is economically impoverished, an unstable family background, a high degree of contact with social service agencies (particularly white foster homes), limited knowledge and participation in Indian affairs, a low degree of Indian culture and a great sense of alienation from mainstream society (26).

In view of this profile, it does not appear that the current implementation of the YOA, with the heightened emphasis on crime control objectives, is addressing the circumstances of aboriginal youth crime.

In addition to their over-involvement in the youth justice system, aboriginal youth between the ages of 15 and 24 are considered to be the most vulnerable and the "most susceptible to violent and accidental death, suicide, and alcohol and substance abuse" (Griffiths and Verdun-Jones, 1994). Jackson (1992) adds that:

...the infant mortality rate among Indian children is 60% higher than the national rate; Indian children who have survived their first year of life can expect to live ten years less than a non-Indian Canadian; the rate of violent death among Indian people is more than three times the national average; the rate of suicide, most disturbingly among young people, is six times the national average; the likelihood of Indian children being taken out of their family and community and placed under the care of a child welfare agency is five times higher than for non-Indian children (151).

In view of these issues it is necessary to explore the conditions of contemporary aboriginal communities in order to gain a better understanding of aboriginal youth crime and disorder.

THE CONTEXT OF ABORIGINAL CRIME

In recognition of the higher rates of criminal activity and violent behavior in contemporary aboriginal communities, Turpel (1994) states that:

We have to accept that there are profound social and economic problems in aboriginal communities today that never existed pre-colonization...problems of alcohol and solvent abuse, family violence and sexual abuse, and youth crime--these are indications of a fundamental breakdown in the social order in aboriginal communities of the magnitude never known before (209).

LaPrairie (1992a) adds that:

Disproportionate levels of crime and violence, both on and off-reserve, suggest a serious rupture of traditional control mechanisms in contemporary aboriginal communities (285).

The source(s) of this breakdown and loss of control in aboriginal communities must be examined.

Macro Socio-Historical Factors

Several authors argue that the historical impact of colonization has served to marginalize aboriginal people politically, socially and economically (see LaPrairie, 1988, 1992b; Turpel, 1993; Royal Commission On Aboriginal Peoples, 1996; Griffiths and Verdun-Jones, 1994). Since the arrival of Europeans in North America there has been an assumption regarding the inferiority of aboriginal peoples and government policies have reflected this assumption (Royal Commission On Aboriginal Peoples, 1996). The most powerful instrument of colonization has always been the *Indian Act*, and the primary goal of this *Indian Act* has been to assimilate aboriginal people. However, in practice, the legislation has only marginalized aboriginal people, setting them apart from the rest of Canadian society.

Evidence of the marginalized position of aboriginal people in Canada is widespread. As stated by Griffiths and Verdun-Jones (1994):

This is reflected in pervasive poverty, high rates of unemployment, and reliance on public assistance, low levels of formal education, high death rates from accidents and violence, and increasing rates of family breakdown (635).

Social indicators of the marginal position of aboriginal youth in Canadian society are also painfully evident. According to Griffiths and Verdun-Jones (1994):

Aboriginal youth are extensively involved in the youth justice and child-care systems, evidence high rates of alcohol and solvent abuse and suicide, and experience considerable conflict in attempting to adapt to mainstream Canadian society while attempting to learn and retain their traditional culture (655).

One of the most serious reflections of the disorder that characterizes the lives of many aboriginal youth is their high rate of suicide. In a study conducted by Cooper et al. (1991) which looked at aboriginal suicide in British Columbia, it was found that the suicide rate for aboriginal youth on reserves is about twice that of the general Canadian

population. In terms of gender, it was learned that aboriginal males commit about four times the number of suicides as their female counter-parts and that the group which is at the highest risk of suicide are males between the ages of 15 and 24 (Cooper et al., 1991).

The devastating rate of suicide among aboriginal youth has been linked to their high rate of alcohol consumption which is further tied to the dysfunctional environment that many aboriginal children experience. Together, these factors have the propensity to foster criminal and violent behavior. As discussed by LaPrairie (1994b):

Marginalization and alienation--resulting from unstable and violent childhood experiences, coupled with a lack of education, opportunities and options and a dependency on alcohol, are the real culprits in making people vulnerable to commission of crime and criminal justice processing (243).

Thus, the less than positive socio-economic circumstances of many aboriginal youth relative to the rest of society sets the stage for general disorder including vulnerability to victimization and criminal behavior. In fact, Kaiser (1992) argues that:

The terrible problems which aboriginal people experience with the criminal justice system are the product of a long process of colonization, whereby traditional aboriginal societies have been systematically disorganized, deprived and dispossessed by the dominant colonized peoples (66).

Kaiser (1992) adds that:

People cannot be subject to a disastrous socio-economic situation for generations and then be expected to behave in the same way that they would had they been treated fairly by the colonizing powers (67).

Consequently, the long history of colonization contextualizes the problems of contemporary society and this history must be acknowledged if conditions in aboriginal communities are to improve.

Middle Level Conditions

The macro or society wide conditions of marginalization and alienation have caused aboriginal communities themselves to undergo dramatic changes since the time of colonization. At the middle or community level, aboriginal groups have not always emerged from the natural cohesion of individuals wishing to live close to one another.

Instead, various communities developed artificially either by way of the reserve system or because of the enforcement of laws requiring children to attend school (see LaPrairie, 1992b). Still other communities developed around the church, the Hudson's Bay Company and the availability of health and other services (Brody, 1991; Tennant, 1991). Consequently, families accustomed to living in isolation were drawn into a new social structure that required new social rules. Customs, including mechanisms of social control, which may have been appropriate for the nomadic lifestyle have not always sufficed in the community context. Aboriginal communities are no longer interdependent microcosms of families who rely on each other for survival; instead, most of the contemporary aboriginal community is politically, economically and socially stratified (LaPrairie, 1995a).

Aboriginal communities have experienced rapid social and economic change that has resulted in various alterations to their once traditional structure. Perhaps most critically, capitalism introduced wage labor which disrupted the subsistence economy and diminished traditional gender roles. In particular, the employment of women has led to increased tension between the sexes (LaPrairie, 1992a, 1995a).

Modernization and mass communication have further induced a transformation of traditional relationships as well as encouraged the emergence of what has been characterized as "liberal individualism" (Depew, 1994). LaPrairie (1992a) maintains that:

Many contemporary aboriginal communities have trappings of both communal and individualistic societies but are increasingly leaning in the direction of individualism (290).

Relationships between men and women, and youth and elders have become more complex. Also, the disproportionate numbers of youth in communities and the impact of youth culture have been cited as aggravating factors for communities in conflict (see LaPrairie, 1995a; 1992a; Royal Commission On Aboriginal Peoples, 1996).

The *new* value of individualism has created inequalities in all facets of community life. Furthermore, the natural corollary of communal inequality is relative deprivation--

perceived and often substantive. With relative deprivation comes general disorder and crime. As suggested by Depew (1994):

Property offences, less serious and minor offences, and "victimless" offences are frequently committed by marginalized individuals and families, and by youth who may be especially prone to alienative, disorderly responses to the rapidity of social change and modernization (25).

Similarly, a consistent theme that emerged from LaPrairie's (1992b) study of aboriginal justice in the Yukon, was the existence of both dominant and marginalized families within existing community power structures. It was learned that families of traditionally lower status are accorded responsibility for much of the crime and disruption, while at the same time, powerful families tend to maintain a trouble-free image. Consequently, increased inequality that has resulted from the growth of individualism likely impacts not only who commits crime, but also who is formally processed through the system for their crimes. Issues surrounding the power structure of communities and the potential for some groups--such as women, youth or people from lower status families--to be more vulnerable than others, must be considered when developing justice initiatives at the community level (see also Royal Commission On Aboriginal Peoples, 1996).

ADDRESSING THE ISSUES--OR NOT?

If crime and disorder in aboriginal communities is to be dealt with adequately, the inequalities and issues which contextualize the behavior must be addressed. Indeed, the Royal Commission On Aboriginal Peoples (1996) states that:

Misunderstanding the roots of the problem can lead only to solutions that provide, at best, temporary alleviation, and, at worst, aggravation of the pain reflected in the faces of aboriginal victims of crimes (39).

The stratification that exists in contemporary aboriginal communities has led to a breakdown, and in some cases a total loss, of informal social control mechanisms. In

addition, the lack of opportunities for large numbers of aboriginal youth has only exasperated the already intolerable conditions of some communities (see LaPrairie, 1994a, 1992b).

Whether aboriginal or non-aboriginal, when young people come into conflict with the law they should be dealt with in a manner that addresses the circumstances of their offending behavior. In other words, *justice* issues cannot be separated from other aspects of community life. Problems with parenting, lack of employment and education, poor economic circumstances, alcohol and drug abuse, cultural confusion and the general disorder that has resulted from rapid social, economic and political change must be considered when devising criminal justice alternatives. Communal and familial disruption, including alcoholism and violence, are primary antecedents to youth crime and conflict, and if issues such as these are not considered, responses to aboriginal youth criminality will continue to fail.

Turpel (1993) articulates the connection between conflict with the criminal justice system and conditions in contemporary communities:

Alcoholism in aboriginal communities is connected to unemployment. Unemployment is connected to the denial of hunting, trapping and gathering economic practices. The loss of hunting and trapping is connected to the dispossession of land and the impact of major development projects. Dispossession of land is in turn connected to loss of cultural and spiritual identity and is a manifestation of bureaucratic control over all aspects of life. This oppressive web can be seen as one of disempowerment of communities and individual aboriginal citizens (166).

Notwithstanding the relationship between socio-economic conditions and youth crime, the continual over-representation of aboriginal youth in correctional facilities is evidence that these issues have not been sufficiently addressed.

In terms of the option for alternative measures, results from a YOA workshop held by government officials, academics and youth justice professionals found that:

In many communities--in particular aboriginal communities--alternative measures programs, or other informal ways of dealing with young offenders, do not exist. In particular, some participants noted that there is strong pressure--where alternatives do not exist--to use the youth justice system to deal with problems involving youth when these problems could be better dealt with in the community (Doob, 1994; 9).

The Royal Commission On Aboriginal Peoples (1996) further states that:

The promise of innovative initiatives for young aboriginal offenders--which the young offenders legislation intended to encourage--like so many promises of our "just society," has not been fulfilled in the case of aboriginal people (117).

Consequently, while the YOA provides for the creation of alternatives to incarceration which could better address the needs of both aboriginal and non-aboriginal young offenders, to date, such alternatives are often not implemented.

THE NEED FOR COMMUNITY JUSTICE

There is no question that the Canadian criminal justice system is failing to satisfy aboriginal people--aboriginal youth included. In the *Report of the Aboriginal Justice Inquiry of Manitoba* it was stated that:

The youth justice system fails aboriginal youth in virtually every measurable way and there is no indication of plans to change the system. On the contrary, the plight of aboriginal youth and the frustration and bitterness of aboriginal communities are all but ignored (Hamilton and Sinclair, 1991; 589).

Statements such as these draw attention to the need for an investigation of the qualitative impact of the *Young Offenders Act* on aboriginal youth as well as an exploration of alternatives to current justice practices. Aboriginal people are voicing their frustrations with the formal justice system and there is overwhelming evidence to suggest that we can no longer shy away from innovative approaches to justice. Ovide Mercredi, in his Remarks to The Law Reform Commission of Canada Consultation (1991), sums up this point:

...a more representative system, where we have more Indian judges, more Indian lawyers, more Indian clerks of the court, more Indian correctional officers or more Indian managers of the correctional system is not the solution. So what we have to do, in my view, is take off that imperial hat, if that's possible, and find alternatives to the existing system...

Aboriginal people are aware of the disorder that has in many cases overwhelmed their communities, and justice practices that reflect the needs of aboriginal communities are long over-due. Hazlehurst (1995) points out that:

In Canada, there has been no incorporation of indigenous law or values in substantive law, the criminal process, nor in the establishment of truly indigenous courts (xv).

The historical imposition of Canadian law in aboriginal communities and the lack of effort to accommodate traditional approaches to social control, have lead to a dependency on external institutions, such as the RCMP, to solve communal problems. This dependency must be eradicated.

In suggesting the need for community justice the challenge of defining the concept of community must first be met. The definition of a community goes beyond geographic location, and instead must consider the complex social composition of the group. Aboriginal communities vary considerably, not only in terms of geography, but also with respect to such factors as demographics, common values, norms, customs, language and degree of cultural retention. Moreover, the existing power structure within a community will have a significant impact on the development of community justice programs in terms of who's needs the programs will address. Depending on the structure of the community, the special interests of certain segments of the population such as women, children, or elders may sometimes be neglected. It is critical that the protection of vulnerable groups be ensured throughout the community justice process. Consequently, in order to develop justice alternatives that are reflective of *community* needs, the complexity of what a community is must first be explored.

In the context of current youth justice reform, again, the needs of aboriginal youth need to be considered. A brief historical outline of the process of youth justice reform from the JDA to the YOA will show that while we are reluctant to let go of traditional Welfare Model principles, current amendments to the YOA reflect crime control objectives. In view of the above negative context associated with Native youth crime, it is evident that the crime control principles of the YOA fail to confront the needs of aboriginal youth and may even result in intensified community disruption.

THE PROCESS OF YOUTH JUSTICE REFORM

According to Hylton (1994) three primary factors contributed to the demise of the JDA. First, it is no coincidence that the enactment of the YOA coincides with the implementation of the *Canadian Charter of Rights and Freedoms* in 1982. Beginning in the 1960's, it became evident that concerns with due process and equality before the law were trends that highlighted the inadequacies of the JDA in terms of legal rights for young people. Second, the growing crime control mentality of both the public and politicians had an enormous impact on attitudes towards crime and criminals. An overt move towards "punishment, deterrence, youth accountability, and societal protection" was rapidly occurring (Hylton, 1994: 234). Finally, Hylton (1994) suggests that abuses in treatment facilities and the failure of due process called for a serious re-examination of the JDA in general.

Jaffe, Leschied, and Farthing (1987) state that the primary changes from the JDA to the YOA were: (1) the addition of the goals of responsibility and accountability of young persons for their actions; (2) the emphasis on legal rights for children; and (3) a movement away from treatment and rehabilitation of young people. Jaffe, Leschied and Willis (1991) further contend that the granting of legal rights for youth represents the most significant reform to the legislation and they predict that these rights will continue to be the foundation of future youth justice policies.

Concerns with legal rights and due process are often associated with policies based on the Justice Model; however, amendments made to the YOA in 1986 and 1992, as well as the proposed amendments brought to the table in 1994, all reflect an unmistakable move towards crime control objectives in youth justice (see Hylton, 1994; Bala, 1994; Corrado and Markwart, 1994). In light of this emerging trend it should be noted that the increased concern with legal rights flows naturally from the increasing threat of punishment under the YOA.

The first 'round' of amendments to the YOA occurred in 1986 and included the following:

- A new provision for pre-trial placements to be made with a responsible adult. This was introduced in order to deal with a perceived over-reliance on pre-trial detention;
- Failure to comply with a disposition of the youth court became a new and separately punishable offence. The three-year maximum sentence was extended in the case of youths who committed a subsequent offence while still under sentence for a previous offence;
- To deal with public concerns about being adequately protected, new provisions were included to allow for the publication of identifying information about dangerous young offenders who were at large; and,
- The *Criminal Code* was amended to strengthen provisions prohibiting adults from counseling young people to commit criminal acts (Hylton, 1994; 236-237).

While the roots of the crime control trend can be spotted in the 1986 amendments, changes made to the YOA in 1992 put the motion into full swing. The 1992 amendments included:

- Increasing the maximum disposition for first or second degree murder from three to five years;
- In order to encourage transfers to adult court in certain instances, new provisions were introduced to shorten the length of time to parole eligibility for young offenders convicted of murder in adult court; and,

- The standard used in assessing transfers to adult court was modified to make considerations relating to the protection of society paramount (Hylton, 1994; 237).

Finally, in 1994 several new proposals for changes to the YOA were tabled and include:

- Increasing the maximum sentence for first degree murder from five to ten years in custody;
- Increasing the maximum sentence for second degree murder from five to seven years;
- Increasing the minimum amount of time (from five to ten years) that young offenders convicted of murder in the adult court system must serve before becoming eligible for parole;
- Removing some restrictions on access to records of young offenders so that information about their backgrounds can be made more widely available; and,
- Requiring young offenders accused of serious crimes (murder, attempted murder, aggravated assault) to convince a youth court judge why they should not have their trials in adult court (Hylton, 1994; 238).

The amendments proposed in 1994 are reflected in Bill C-37 which was passed on December 1, 1995. It is clear from the amendments described above that Corrado and Markwart (1995) have drawn an accurate conclusion with respect to the existence of a crime control trend in Canadian youth justice. However, it is important to recognize that these crime control oriented amendments are primarily directed at dangerous and serious young offenders. While it appears that youth justice has slowly moved from welfare, to justice and now towards a crime control premised policy, in practice, Canadian youth justice contains elements from all three philosophies.

MODELS OF YOUTH JUSTICE

In order to acquire a better understanding of the process of policy formation and reformation it is helpful to examine legislation in terms of models. The use of models allows us to compare and contrast legislation both empirically and theoretically, as well as to examine the roles of key players within the realm of juvenile justice (see Corrado, 1992). The following models of youth justice can be envisioned in terms of a continuum ranging from the Welfare Model on the left, to the Crime Control Model on the far right. While the JDA was based on a Welfare Model of youth justice, it will be argued here that the YOA is best characterized as a Modified Justice Model (see Corrado, 1992).

The Welfare Model

The Welfare Model of justice is based on the positivist philosophy that criminal behavior is beyond the control of the individual (Reid-MacNevin, 1991). The sources of anti-social behavior are social, psychological and environmental factors directly related to the offender. Indicative of this philosophy then, is the lack of desire for determinate sentencing. Instead, the objective is to focus on the needs of the youth and to address problems through individualized treatment plans (Reid-MacNevin, 1991).

Treatment plans generally employ "therapeutic-community approaches" in order to encourage behavior modification and to assist youths in coping with the circumstances of their situation (Reid-MacNevin, 1991). The Welfare Model extends primacy of power and discretion to child care experts and social workers who are allotted the responsibility of rehabilitating *wayward* youth (see Corrado, 1992). The Welfare Model is set apart from all other models of youth justice in light of its failure to accommodate legal rights for young offenders, and as previously recognized, the lack of due process under the JDA was a leading contributor to the demise of the legislation (see Corrado et al., 1992).

The Justice Model

The Justice Model is based on the neo-classical philosophy that individuals possess free-will and are therefore responsible for their actions (Reid-MacNevin, 1991). In

recognition of the element of free-will, sentencing is not centered on the needs of the youth, but rather, reflects a *just desserts* philosophy whereby the punishment should be proportionate to the offence that has been committed (Reid-MacNevin, 1991).

One of the foremost tenets of the Justice Model is the principle of due process which in effect, has two components. As stated by Reid-MacNevin (1991), due process represents an:

...equal balance of the rights of society to protection from criminal behavior and the rights of the individual charged to fair treatment under the law (25).

Due process entails both the rights of society and the rights of the individual, however, the challenge rests in achieving an adequate balance between the two.

In light of the principle of due process and the notion of free-will, the Justice Model envisions treatment of offenders as an infringement on the rights of the offender (Reid-MacNevin, 1991). Proponents of the Justice Model argue that treatment ultimately represents an abuse of power by the state. This perspective is in direct contrast to the Welfare Model based JDA, which placed emphasis on rehabilitation and treatment of young offenders to the detriment of legal rights.

Within the Justice Model, lawyers and the law play key roles in the administration of justice through the protection of the rights of the individual and by meting out determinate sentences which simultaneously serve to punish the individual and protect society (Corrado, 1992).

The Crime Control Model

The primary objectives of the Crime Control Model are the protection of the public and the maintenance of law and order within society (Reid-MacNevin, 1991). Similar to contenders of the Justice Model, advocates of the Crime Control Model agree that there is an element of free-will in criminal behavior; however, the central interest lies in the "social utility of punishment rather than a 'just desserts' philosophy" (Reid-MacNevin, 1991: 26). The issues of retribution and deterrence over-ride the notion of proportionate sentencing.

The immediate concern of the protection of the public is achieved through the incapacitation of offenders and the principle of deterrence (Reid-MacNevin, 1991). Under the Crime Control Model the interests of society take precedence over the rights and needs of the individual. While due process is one of the characteristics of this model, the individual component is secondary to the societal component.

The Crime Control Model is adequately described by its title. The objective is to achieve an immediate solution and control the matter at hand, rather than to examine the underlying causes of the problem. In other words, crime control advocates deal with the present at the risk of failing to contextualize incidents of criminal behavior. At the surface, the goals of the Crime Control Model appear rational; however, in the long term, this model merely suppresses the *symptoms* while failing to confront the sources of crime.

Notwithstanding the current public perception of the YOA as *lenient*, the dramatic increase in youth custody rates since the implementation of the *Act* reveals that the YOA has the capacity to be much more punitive than its predecessor (see Markwart, 1992). Indeed, all of the amendments that have been made to the YOA since 1984 have been directed towards crime control principles (see Carrington and Moyer, 1995; Bala, 1994; Corrado and Markwart, 1994; Hylton, 1994; Lilles, 1994; Jaffe et al., 1991; Schwartz, 1991).

The Modified Justice Model

In order to accurately assess the multivariate principles and philosophies underlying the YOA, Corrado (1992) argues that it is necessary to introduce a fourth model which he calls the Modified Justice Model. Situated midway on the continuum between the Welfare Model and the Crime Control Model of justice, the Modified Justice Model embraces a combination of objectives borrowed from the Welfare, Justice and Crime Control Models.

Welfare Model tenets are reflected in several sections of the YOA including: section 3 (1) (c), special needs; section 3 (1) (a), diminished responsibility and

accountability; section 3 (1) (d), alternative measures; section 3 (1) (f), best interests of the youth's family; and, section 3 (1) (h), responsibility of parents (Reid-MacNevin, 1991). All of the above listed sections of the YOA represent remnants of the fading *parens patriae* model that dominated the JDA for more than seventy years (Reid-MacNevin, 1991; Schwartz, 1991).

The YOA is also heavily weighted with many principles of the traditional Justice Model. For example, the YOA guarantees that young people have virtually unlimited access to legal counsel, (section 11). Young offenders also have a right to appeal (section 27); the right to a review of their disposition (sections 28-34); a special guarantee of rights (section 3 (1) (e)); and the power of consent to treatment (section 22 (1)) (Reid-MacNevin, 1991). Moreover, all decisions regarding young persons are theoretically escorted by the umbrella philosophy of *least possible interference* (section (1) (f)) (Reid-MacNevin, 1991).

Finally, objectives borrowed from the Crime Control Model represent the most dramatic shift in youth justice policy. Most notable is section 3 (1) (b) of the YOA dealing with the protection of society (Reid-MacNevin, 1991). This goal is further emphasized in section 3 (1) (d) and section 3 (1) (f) in which the phrases "...where it is not inconsistent with the protection of society..." and "...that is consistent with the protection of society..." (respectively) qualify the otherwise stated objectives (Rodrigues, 1994; 707). Other sections of the *Act* such as those providing for the raising of young persons to adult court (section 16), and those dealing with detention (sections 7-8) and secure custody for children (section 24) further exemplify the growing conservative nature of youth justice policy in Canada (see Reid-MacNevin, 1991). Recent amendments to the YOA, specifically Bill C-106 in 1986, Bill C-12 in 1992 and Bill C-37 in 1995 (discussed above), are also consistent with the Crime Control Model (see Corrado and Markwart, 1994; Hylton, 1994).

Critics and Proponents of the Modified Justice Model

This discussion reveals that the YOA is unquestionably a mixed-model of justice, and in fact, it is this observation that has brought serious criticisms to the surface of the debate surrounding the YOA. Critics argue that the multivariate nature of the YOA is fundamentally flawed, because it fails to provide any consistent direction to criminal justice practitioners such as the police, lawyers, judges and corrections workers (see Hackler, 1991; Reid-MacNevin, 1991; Bala, 1994; Lilles, 1994). According to these authors, the YOA fails to prioritize the basic premises of the *Act* in a way that accommodates consistent application.

To illustrate the confusion that can arise, with regard to the American youth justice system Siegel and Senna (1994) state that:

The juvenile justice system is entrusted with a variety of often conflicting tasks: upholding the law, protecting the victim, meting out justice, evaluating the best interests of the child, rehabilitating wayward youths, acting as a conduit to social agencies and so on (454).

In recognition of the lack of clarity and direction provided in section 3 of the YOA, Lilles (1994) explains that the various objectives:

...reflect an ambivalence as to the role of children and youth in our society, our unwillingness to understand and face up to the causes of youthful offending and a lack of consensus as how we should respond (7).

In other words, the diverse principles of the Modified Justice Model reflect the diverse needs of young offenders, their families and their communities.

While some YOA advocates agree that the *Act* is somewhat weak in terms of guidelines for implementation, they argue that the capacity of the legislation itself to react to youth crime is only as strong as the administration of the *Act*. For example, Bala (1994) maintains that:

Much of the abuse being heaped on the YOA is simplistic, and fails to appreciate distinctions between statutory laws, judicial interpretations, and provincial implementation (247).

In particular, with regard to the 'get tough' critics of the YOA Bala (1994) states that:

The 'get tough' critics of the YOA are unrealistic about what any piece of juvenile justice legislation can do to cause or reduce youthful crime, and they tend to ignore complex social problems that have much more effect on youth crime (251).

Bala (1994) does not only challenge the 'get tough' critics, but also questions the validity of criticisms forwarded by rehabilitation advocates. Bala (1994) suggests that there is a general lack of understanding of the utility of treatment for young offenders and he again insists that changes to the legislation itself will not eradicate youth crime.

Notwithstanding the various criticisms, fundamental support for the YOA still exists. Proponents maintain that the *Act* facilitates discretion and flexibility in a manner that is consistent with enforcing such goals as the responsibility and accountability of youth and the protection of society, while at the same time maintaining the importance of the 'special needs' of some young offenders (Corrado, 1992). Corrado (1992) argues that the Modified Justice Model does in fact specify clear objectives and goals, notwithstanding the confusion surrounding the *implementation* of those goals. For example, the YOA calls for due process, determinate sentencing practices, responsibility and accountability of young persons, (albeit diminished), and a recognition of the legal rights of young people in terms of punishment and treatment objectives (Corrado, 1992).

Ultimately, the YOA is characterized by a legal process that reflects the contemporary adult system, while at the same time taking into account traditional juvenile justice goals at the sentencing stage. In addition, sections of the *Act* that provide for the formation of youth justice committees and the use of alternative measures suggest that the administration of youth justice has the capacity to be more flexible and less formal than the adult system where necessary. This analysis of the YOA is critical to the issue of

aboriginal youth justice because it suggests that the legislation has the capacity to be more responsive to the needs of aboriginal youth.

THE CRIME CONTROL TREND

It is argued that the YOA is best described as a Modified Justice Model; however, there is considerable evidence to suggest that the current trend in Canadian youth justice is in the direction of conservative crime control objectives. As previously discussed, the general public is both frustrated and angry because they perceive the YOA as being inadequate to deal with youth crime.

While there appears to be a lack of consensus among academics regarding the question of whether or not youth crime, and in particular youth violence, has increased substantively, even those authors who suggest that there has been a real increase agree that youth violence is not out of control in Canada (see Markwart and Corrado, 1995). Nevertheless, current reform initiatives have become political. In contrast to the process of legislative reform that took place during the twenty years prior to the implementation of the YOA, where academics and senior policy officials were the key players (see Corrado, 1992), the general public has become a dominant instigator in the reformation of the YOA.

In response to the demands of the electorate, as several authors have suggested, the current focus in the area of youth justice is on crime control objectives (see Carrington and Moyer, 1995; Drowns and Hess, 1995; Bala, 1994; Corrado and Markwart, 1994; Hylton, 1994; Lilles, 1994; Doob and Meen, 1993; Jaffe et al., 1991; Hackler, 1987). For example, Leschied and Gendreau (1994) have argued that the heightened emphasis on accountability and responsibility of youth has led to an increase in the use of custodial dispositions under the YOA.

It is argued here that various crime control initiatives are too narrow in that they do not address the origins of youth crime in society. Crime control measures are primarily reactive, often serving to perpetuate the conditions that facilitate crime, and therefore,

maintain the status quo. Until there is radical change at the grass roots level, in the communities themselves, the current trends in youth crime will continue. Eventually, the responsibility for crime prevention must be returned to the community and initiatives for reform must strive towards socio-economic intervention and prevention.

The apparent contradiction between the reality of youth crime, public perceptions, and the political response to youth crime can find common ground in the necessity for a solution. The tradition of wavering amongst the various contemporary and traditional models of youth justice must end and a more holistic approach to justice must be adopted. The current pre-occupation with crime control objectives runs the risk of neglecting other valued justice goals of the YOA. The potential impact of an emphasis on crime control principles will be of even greater consequence for multi-troubled, aboriginal youth who's circumstances tend to be more complex and cannot be adequately addressed by crime control measures.

IMPACT OF THE YOA AND REFORMS ON ABORIGINAL YOUTH

There is evidence to suggest that the implementation of the *Young Offenders Act* has had a serious impact on aboriginal youth. The Royal Commission On Aboriginal Peoples (1996) states that:

...over the past several years government attention has focused increasingly on changing the *Young Offenders Act*, to shift the balance away from its rehabilitative purpose in the direction of punitive objectives. The apparent mood of the country, fueled by widely publicized crimes of random violence perpetrated by both adults and young offenders, has given rise to calls for the system to be 'toughened up'. These calls are not directed specifically to aboriginal young offenders, but because of the already great over-representation of aboriginal young offenders in the corrections system, measures designed to tighten the correctional screws have a disproportionate impact on aboriginal youth, placing the promise of alternatives to imprisonment even further out of reach (120).

It is argued that the legislation has resulted in an increase in charges of aboriginal youth; that too many charges are being laid for incidents that could be dealt with at the community level; that aboriginal youth are less likely to have legal representation; that they are less likely to receive alternative measures; and that in general, aboriginal youth spend more time in jail for the same offences as other youth (Hamilton and Sinclair, 1991; LaPrairie, 1988, 1992b; Royal Commission On Aboriginal Peoples, 1996; Griffiths and Verdun-Jones, 1994). In addition, there tends to be a heavy reliance on short term custodial sentences (see LaPrairie, 1992b). The apparently more severe impact of the YOA on aboriginal youth is said to be related in part to their geographic isolation and socio-economic marginality (see LaPrairie, 1988; Kueneman et al., 1986). Indeed, Jackson (1992) argues that in terms of aboriginal offenders there is the potential for systemic discrimination which he explains as follows:

System discrimination involves the concept that the application of uniform standards, common rules, and treatment of people who are not the same constitutes a form of discrimination (150).

In terms of the general over-representation of aboriginal peoples in the justice system--both youth and adults--the Royal Commission On Aboriginal Peoples (1996) reported:

...either that aboriginal peoples are committing disproportionately more crimes or that they are the victims of systemic discrimination. Recent justice studies and reports provide strong confirmatory evidence that both phenomena operate in combination (33).

The impact of the YOA and its on-going reforms on aboriginal youth requires some attention. Hamilton and Sinclair (1991) state in the *Report of the Aboriginal Justice*

Inquiry of Manitoba that:

Particular concern has been expressed about the impact of the *Young Offenders Act* upon aboriginal youth. In fact some observers argue that the deficiencies of the *Act* are so significant that even the guiding principles should be modified to take into account the special needs of aboriginal youth (549).

In light of the impoverished circumstances that tend to contextualize aboriginal youth crime, it is evident that some of the current objectives in youth justice may be counterproductive to the needs of aboriginal youth. By way of an example, Hamilton and Sinclair (1991) argue that:

Aboriginal young people have not been well served by the separation of the child welfare and the youth justice systems, a separation that has been accentuated by the *Young Offenders Act* (570).

Many aboriginal youth who come into contact with the youth justice system have already experienced the child welfare system and are simply being passed from one agency to another. It must be accepted that the criminal justice system is not designed to deal with multi-troubled youth and it is often the case that aboriginal youth who come into conflict with the law are also living with problems such as familial violence and alcoholism. These youth cannot be adequately served by a youth justice system that places an emphasis on crime control principles to the detriment of the welfare of children. For example, in terms of the use of custodial dispositions, Hamilton and Sinclair (1991) vehemently argue that pre-mature detention is detrimental to aboriginal youth and that wherever practical, these youth should be dealt with in their own community. Moreover, these authors contend that "the criminal justice system is ill-equipped to provide help for those young people with primarily social, cultural or family problems" (Hamilton and Sinclair, 1991: 570).

Notwithstanding the fundamental problems with some of the existing principles of the YOA, it is interesting to note that in the view of Hamilton and Sinclair (1991), not even the existing principles are being implemented as the legislation intends. These authors state that:

In both aboriginal and non-aboriginal communities, the intent and purpose of the *Young Offenders Act* are not being realized. This will continue as long as the system ignores the principles of the *Act*, and instead, blindly adopts the processes and procedures that have come to characterize the adult system (Hamilton and Sinclair, 1991: 589).

For example, the YOA policy of "least interference," is generally lost in practice and youth justice in aboriginal communities has in many cases become "more intrusive and punitive" (Hamilton and Sinclair, 1991: 558). The provisions in the legislation that provide for the development of alternative measures are also less frequently invoked. In fairness however, it is important to understand that the lack of alternative measures is not always tied to the failure of the formal justice system to facilitate such measures, but can also be attributed to extensive social disorganization at the community level where apathy may impede justice reform.

Overall, it is argued that in both aboriginal and non-aboriginal communities, more emphasis is being placed on the crime control principles embedded in the *Young Offenders Act*. Nevertheless, as demonstrated, there are principles in the YOA which could be used to better serve multi-troubled youth. In view of these observations, the potential for the YOA to provide *justice* to aboriginal youth must be further explored. Moreover, in doing so it is also necessary to consider the argument that there are fundamental differences between traditional aboriginal principles of justice and justice in contemporary Euro-Canadian society.

DEFINING JUSTICE: A COMPARISON OF ABORIGINAL AND NON-ABORIGINAL CONCEPTS OF JUSTICE

The term *justice* embodies a myriad of connotations which vary among people and cultures. Justice has been nominally defined as "the moral principle by which actions are determined as just or unjust, adherence to truth of fact, impartiality" and so forth (Funk and Wagnalls, 1992). Justice is sometimes explained in terms of retribution and revenge, while for others justice signifies fairness, equity and the restoration of wrongs and losses.

A "Legal" System Versus A "Justice" System

Within the Euro-Canadian context, people speak of the 'justice system' and the 'legal system' as though the two are conceptually interchangeable. It is submitted here that the two *systems* are fundamentally distinct entities in that a legal system, comprised of laws and procedures, is not innately 'just'.

All cultures have laws or rules for living and it is argued in the *Traditional Dene Justice Project* that "it would be impossible to imagine the survival of a human society without laws" (Ryan, 1993: 158). According to the *Report of the Aboriginal Justice Inquiry of Manitoba* "laws grow from the customs, traditions and rules of society;" however, in a heterogeneous society such as Canada, where a multitude of cultures exists, it is clear that the laws cannot and do not reflect the values of all those whom they are intended to serve (Hamilton and Sinclair, 1991: 22).

It is commonly argued that norms which are ultimately translated into laws are generally those which reflect the values of the majority and the dominant power interests of the state (see Cant, 1980). Thus, in recognition of the historical exclusion of aboriginal people from the process of law-making, the Canadian *justice system* is more accurately characterized as a legal system for aboriginal people. Indeed, the *Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta* found that "the imposition of the majority's justice system on the aboriginal minority results frequently in unfairness and inequity" (cited in Kaiser, 1992: 73).

It has been suggested in the literature that the laws and procedures of the Canadian legal system often do not reflect the values of traditional aboriginal societies, and therefore, cannot be viewed as a *justice system* for aboriginal people. In terms of the failure of the justice system to meet the needs of aboriginal people in Canada, MacPherson (1993) suggests that:

The Principal reason for this crushing failure is the fundamentally different world view between European Canadians and aboriginal Peoples with respect to such elemental issues as the substantive content of justice and the process for achieving justice (4).

The following sections will explore and contrast Euro-Canadian justice with justice in traditional aboriginal societies in order to examine the suggestion that the Canadian criminal justice system has historically served as little more than a legal system through which aboriginal people are processed in a manner that is often culturally inappropriate and ultimately ineffective. Indeed, the Honorable Judge Fafard (1994) states that "I believe we have an offender-processing system, but I am not sure we have a criminal justice system..." (403).

Justice In the Euro-Canadian Context

The Canadian legal system was born out of the cultural legacy of the earliest British and French immigrants to arrive in North America. Following the defeat of the French by the English in 1759, English law dominated (Department of Justice, 1993). Although civil law in Quebec is founded in the French Napoleonic Code, the Canadian concept of justice has evolved primarily from the influence of the British tradition (Department of Justice, 1993).

In terms of the goals of the Canadian legal system there are many; however, the emphasis falls in the protection of state interests, which is theoretically achieved through the deterrence, apprehension and punishment of offenders under the due process of the law. While the youth justice system is distinct from the adult system in Canada, many of the basic underlying values and objectives are similar.

The Goals of Euro-Canadian Justice

Protection of State Interests

The Euro-Canadian justice system is centered around the notion of the 'state', whereby the state is defined as the victim in all criminal offences. For example, the *Report of the Aboriginal Justice Inquiry of Manitoba* states that "in Europe murder was an

offence against the state; among Indians it was an offence against the family of the victim" (Hamilton and Sinclair, 1991: 27). Essentially, criminal behavior in Canada has been abstracted. Individuals who commit crimes and who are processed through the legal system are alienated from the substantive reality of their offences. Offenders are accountable to the state rather than to the true victim(s) of the crime. Rarely does an offender come face-to-face with the damage that his or her offence has caused, and it is the view of this author that as a result, feelings of responsibility and accountability are diminished. Contributing further to the abstraction of crime in society is the adversarial nature of the Canadian criminal justice system.

Adversarial System Founded In Due Process

The essence of the Canadian court system is found in its adversarial tradition where the conflict is between the state and the individual offender. Due to the relative vulnerability of individuals to the power of the state, sections 7 through 14 of the *Canadian Charter of Rights and Freedoms*, afford certain legal protections to offenders (Rodrigues, 1994: 580-81). For example, offenders have the right to legal counsel, (section 10), the right not to be unreasonably searched, (section 8) and the right not to be arbitrarily detained (section 9). The constitutional protection of legal rights is considered by some to be the true meaning of justice in Canada; however, it can also be argued that it is the adversarial structure and the inherent imbalance of power in the justice system that has created the *need* for due process.

Establishment of Guilt

The Canadian legal system is focused on the notion of legal guilt. The concept of guilt contributes further to the abstraction of justice due to the existence of the right to plead 'not guilty.' This right has resulted in the generation of a conceptual distinction between the notion of 'legal' guilt and 'moral' or 'factual' guilt and the issue has become one of legal responsibility as opposed to moral responsibility (see Corrado et al., 1992).

Responsibility and Accountability

Two intrinsic goals of the Canadian legal system are the responsibility and accountability of offenders. Punishment, often by way of incarceration or some other restriction of freedom, is commonly the means employed to achieve these objectives. Popular opinion suggests that the threat of an adequately severe punishment will deter offenders from committing further crime. Unfortunately, recidivism rates reveal that this is generally not the case. With regard to young offenders, Judge Heino Lillies (1994) notes that "Canadian research shows no correlation between severity of sentence and deterrence of youthful offending" (16). Still, responsibility and accountability are critical elements in Canadian criminal justice and it may be the case that the mechanisms for achieving these objectives need to be altered.

Punishment and Deterrence

Subsequent to the establishment of guilt, the goal of impressing responsibility and accountability on offenders is carried out through the process of punishment. The *Report of the Aboriginal Justice Inquiry of Manitoba* states that in the Euro-Canadian context "the emphasis is on punishment of the deviant as a means of making that person conform, or as a means of protecting other members of society" (Hamilton and Sinclair, 1991: 22).

In reference to Canadian youth courts, Judge Heino Lilles (1994) suggests that "our youth court judges are among the most punitive in the western world" (1). Not only do we attempt to alleviate the potential for future deviant behavior among individual offenders through the force of punishment, (specific deterrence) but we further capitalize on punishment as a mechanism of social control by visibly threatening the rest of society with the possible consequences of unacceptable behavior (general deterrence) (see Bartol, 1991). The inherent flaw in the punishment model is that punishment is purely a reactive mechanism of social control. In addition, the actual effects of deterrence are debatable and tend to vary among the various types of offences and offenders, particularly young

offenders (see Bartol, 1991). Nevertheless, punishment, if nothing else, facilitates individual and societal retribution.

Sanctions

The Canadian legal system employs a variety of sanctions such as fines, probation, imprisonment, prohibitions of various types and orders for compensation (Griffiths and Verdon-Jones, 1994). The paramount values of Euro-Canadian culture are expressed in these sanctions--primarily money and individual freedom. Sanctions enforced by the Canadian legal system generally aim to take something away from the offender, rather than to give something back to those who have been victimized.

Moreover, where an offender has been sanctioned, he or she will likely continue to be stigmatized as deviant long after they have fulfilled the conditions of their sentence. As a result, those who are followed by a criminal record tend to encounter various roadblocks as they attempt to reintegrate themselves into the community. When ex-offenders face too many barriers, (for example in the areas of employment, accommodation, and future relationships), they are much more likely to reoffend.

Rehabilitation

In addition to the goal of punishment, treatment or rehabilitation is also a consideration in the sentencing of offenders. Rehabilitation is defined as "restoring the person to a useful life, either through education, training, treatment...or a combination of these" (Bartol, 1991: 351). The rehabilitation of offenders is a valuable goal; however, attempts to rehabilitate individuals tend to take place within institutional environments such as prisons and hospitals, which are not likely to be as amenable to successful treatment as community-based facilities.

Justice Revisited

The very structure and nature of the Canadian criminal justice system fosters a definition of justice founded in procedures and rules where more energy is often directed at the process than at the outcome. Canadians are embedded in an abstract system of

justice where the victim is defined effectively in terms of the state, rather than in terms of the persons involved in the conflict. In addition, our preoccupation with constitutional rights and the conceptual distinction between legal and moral guilt has defined the majority conceptualization of justice. The Canadian legal system sets out to determine guilt and then further attempts to make offenders responsible and accountable for their crimes through reactionary punishment. While it cannot be said that the Canadian criminal justice system has lost control over criminal activity in Canada, it is argued that society has become distanced from the reality of crime, and that in the process, the objectives of justice have been blurred. The Canadian legal system has successfully removed the notion of justice from the context of daily life and it is this separation that constitutes the fundamental distinction between Euro-Canadian justice and justice in traditional aboriginal societies.

Justice In the Aboriginal Context

The concept of justice in traditional aboriginal societies differs from that of the Euro-Canadian system of justice. It is important to understand however, that traditional aboriginal systems of justice are quite diverse and that while there are many common elements, definitions of justice will vary among communities and cultures (see Mandamin et al. 1992; Royal Commission On Aboriginal Peoples, 1996). Moreover, it cannot be assumed that the various generic principles of justice are universally recognized or known among aboriginal people. Still, notwithstanding the diversity, a general discussion of aboriginal justice enables an understanding of the historical context of contemporary aboriginal justice initiatives.

Within traditional aboriginal societies there is "no separation of the emotional, physical, mental, and spiritual needs of people from the exercise of governing" (Griffiths, 1992: 41). Instead, there exists a holistic world view that entails the entirety of living. This point is clearly illustrated by Mills (1994) who argues that among the Wetsuwet'en, "all events in both day-to-day and formal life have social, political, spiritual and economic,

as well as legal aspects" (221). Consequently, justice cannot be separated from the everyday issues that challenge aboriginal communities (see also LaPrairie, 1992b; Royal Commission On Aboriginal Peoples, 1996).

Aboriginal peoples generally define justice in terms of *rules for living*. The *Report of the Aboriginal Justice Inquiry of Manitoba* states that the concept of law "to aboriginal people, means rules that they must live by and it reflects their traditional culture and values" (Hamilton and Sinclair, 1991: 45). The Wetsuwet'en Nation in British Columbia, defines law "as the principles which govern not only human relations, but relations of humans to the land, to animals, and to the spirit world which sustains them all" (Mills, 1994: 141). To clarify this point, there would for example, be no distinction between a civil offence and a criminal offence in a traditional system of justice. Even where a crime such as murder has occurred, the communal emphasis of action would be towards the compensation of the family of the victim *by* the family of the offender. Whatever the offence, the primary objective of traditional aboriginal justice systems, in accordance with the above interpretation of law is:

...to restore the peace and equilibrium within the community and to reconcile the accused with his or her own conscience and with the individual or family who has been wronged (Hamilton and Sinclair, 1991: 22).

In general, traditional aboriginal systems of justice emphasize the interests of the community, as well as individual and collective responsibility and accountability. Further, the resolution of conflict is non-adversarial and the primary goals include compensation for victims and the reintegration of offenders (see also Royal Commission On Aboriginal Peoples, 1996).

The Goals of Aboriginal Justice

Protection of Community Interests

Unlike the Euro-Canadian system of justice, where the victim is defined in terms of the state, traditional aboriginal societies define victimization in terms of the community, the family and the individual. According to a justice proposal presented on behalf of the Interlake Reserves Tribal Council (IRTC) of Manitoba (Sawatsky, 1990), "the 'state' is a foreign concept and justice is dependent upon the internal order and relations of a given society or community" (4). The ultimate goal of an aboriginal system of justice is to restore harmony to the entire community by way of compensation to the victim and his or her family, and by facilitating the reintegration of the offender into a productive role in the community. Overall, compensation and reintegration better serve the interests of the community as a whole; however, a common concern is the potential for communal interests to co-opt the interests of the individual, which is something that will likely be confronted by contemporary aboriginal justice initiatives.

Non-Adversarial System

Traditional aboriginal cultures are inherently non-confrontational, because it is said that confrontation violates the preservation of harmony within a group or community (Hamilton and Sinclair: 1991; Ross, 1992). In fact, it is argued that "the concepts of adversarialism, accusation, confrontation, guilt, argument, criticism and retribution are alien to the aboriginal value system" (Hamilton and Sinclair, 1991: 37). In light of the primary goal of restoring harmony to the community, an adversarial system appears

inappropriate in the smaller communal context. Undoubtedly, the goal of restoration is severely impeded by hostility which is often a residual of an adversarial system of justice.

Traditional aboriginal societies avoided antipathy by making decisions based on consensus. As stated by Patenaude (1989):

Inuit traditionally employed a consensus style of decision-making which, in turn, they applied to every aspect of social life, including conflict resolution and social regulation (34).

Consensual decisions are based on communal acknowledgment of the offence and the acceptance of responsibility on the part of the offender. Again, it is the interests of the community that are of the utmost importance, and these interests are thought to be best served by a non-adversarial process of decision-making.

Establishment and Acknowledgment of Responsibility

The *Traditional Dene Justice Project* revealed that the concept of guilt is defined differently among aboriginal cultures as opposed to how it is defined in the Euro-Canadian system (Ryan, 1993). The issue of importance is one of responsibility, and whether or not the act has actually been committed, rather than whether or not the person *intended* to commit the act. Thus, responsibility for an action (*actus reus*) is the focus and not whether the individual has a guilty mind (*mens rea*) (see Patenaude, 1989: 53-54). The result of this understanding of responsibility is that even in situations where an incident is accidental, the *actor* will still be considered responsible and must provide the necessary compensation or reparation.

It is however, important to challenge the erroneous image that the notion of responsibility is always less harsh than the established criminal justice system. Indeed, it is

often the case that more severe sanctions are required by first nation's decisions. The key difference, nevertheless, is that the community makes the decision in a manner that allows the individual to retain their dignity inspite of the harshness of what is imposed.

Collective Responsibility and Accountability

As in the Euro-Canadian system, traditional aboriginal societies recognize the inherent responsibility and accountability of an individual for their own actions; however, in terms of conflict resolution, the deviant behaviours of an individual become the responsibility of his or her entire, family, clan, or community (Mills, 1994). Thus, the emphasis is on collective responsibility and accountability. Collective responsibility is a powerful tool of social control and in fact, the *Report of the Aboriginal Justice Inquiry of Manitoba* suggests that:

By making criminal activity a collective responsibility of a tribe, village or clan, aboriginal people were able to impose law and order without resorting to capital punishment (Hamilton and Sinclair, 1991: 26).

Individuals who continue to cause trouble in their community ultimately receive less and less support from their clan, which in traditional times could determine one's chances of survival. Consequently, peer pressure is a strong mechanism of informal social control.

Resolution of Conflict

In dealing with deviant behavior, traditional aboriginal societies have not been consumed with the idea of punishment; instead, they are concerned with resolving the conflict at hand. Conflict resolution regularly involves some form of mediation, conciliation or restitution and disputes are generally dealt with by compensating the victim and his or her family rather than by directly punishing the offender (Griffiths, 1992). In fact, some forms of punishment are viewed as being more disruptive than beneficial to the community. Hamilton and Sinclair (1991) state that:

In the eyes of the community, sentencing the offender to incarceration or, worse still, placing him or her on probation, is tantamount to relieving the offender completely of any responsibility for a just restitution of the wrong (37).

It is apparent that the issue is one of establishing responsibility and accountability-- something that is not necessarily dealt with through overt forms of punishment such as incarceration. Nevertheless, punishment can and does manifest itself in a variety of ways within aboriginal communities. Notwithstanding the traditional aversion towards punishment as a primary objective in justice, aboriginal peoples still revert to sanctioning of offenders where individuals fail to cooperate with the demands of the group.

Sanctions

Founded in a preference for non-interference, reconciliation and restitution, sanctions in traditional aboriginal communities are directed less at punishing the offender and more towards *encouraging* the restoration of harmony within the community (see Royal Commission On Aboriginal Peoples, 1996; Ross, 1992). Among the Dene in the Northwest Territories, minor offences would generally be dealt with informally and might involve sanctions such as ridicule or shaming, while more serious offences "required a gathering and a public admission of guilt, restitution and a process of reconciliation" (Ryan, 1993: 98). Similar to the Dene, the Gitksan and Wetsuwet'en place a strong "reliance on social censure within the kinship network as a sanction" (Griffiths, 1992: 214). In Manitoba, Hamilton and Sinclair (1991) found that "the sanctions of ridicule, avoidance and shame were effective means to check those deviants who fell into behavioral lapses" (25). Finally, the Oglala Sioux system of justice involved many

unwritten customs such as "gossip, revenge, retaliation, public ostracism, reparation and punishment" (Watson, 1987: 4).

All societies encounter deviant factions at one time or another, and the sanctions employed to deal with offenders should reflect the values and the needs of the group. In light of the interdependent nature of traditional aboriginal societies sanctions were primarily driven towards the restoration of harmony within the community. Sanctions were imposed in order to give something back to the community as a whole, rather than to take something away from the offender as an individual.

Reintegration

The reintegration of offenders is a unique aspect of traditional aboriginal justice systems. Where the Euro-Canadian justice system tends to foster stigmatization and leave offenders with no means of becoming reaccepted into society, traditional aboriginal societies employ mechanisms of reintegration in order to *prevent* future criminal behavior. Indeed, Braithwaite (1989) argues that the determining factor in reoffending appears to be whether offenders are reintegrated or stigmatized following an episode of deviance. If an offender has the opportunity to participate fully as a productive member of the community, he or she is much less likely to commit further offences. Only in the most serious of cases, where the punishment might be death or banishment, would an offender not be reintegrated.

Justice Revisited

Justice in traditional aboriginal societies can be generically defined in terms of the restoration of harmony within the community, which is achieved through the acceptance

of responsibility and accountability on the part of the offender and the collective, and through respect and forgiveness from all parties. Justice is not an abstract entity, but rather, it is a holistic and pragmatic necessity. The traditional lack of distinction between civil and criminal offences is an illustration of this philosophy. Decisions regarding deviants are based on communal consensus and the forum for decision-making is non-adversarial in nature. A non-adversarial structure is appropriate in view of the fact that the objective is to determine who is *responsible* for an act, rather than to establish whether or not a person is *legally guilty*.

The primary goal of traditional aboriginal systems of justice is the resolution of conflict which may or may not involve a formal sanctioning of the offender. If punishing the offender will be disruptive for the group then such actions will be avoided. It is of the utmost importance that victims of deviant acts be compensated and that some form of reconciliation takes place among the offender, the victim and the community. Moreover, once the matter has been resolved it is officially closed.

It is critical to recognize that the above discussion of the conception and administration of justice in traditional aboriginal societies represents a somewhat idealistic notion of traditional justice. While history suggests that these principles characterized traditional aboriginal justice, the present reality is that through the process of colonization and modernization, *tradition* itself has become distorted. Some aboriginal communities are arguably more *acculturated* than others which complicates the definition of traditional justice. Nevertheless, there is still potential for traditional principles to play a role in contemporary aboriginal justice practices. Through aboriginal self-determination, the

concept of tradition will likely be redefined in order to discern the exact nature and role of traditional aboriginal customs and laws within contemporary aboriginal communities.

TWO WORLDS COLLIDE

This inventory reveals the apparent incompatibility of the values of the formal Euro-Canadian justice system with the values of traditional aboriginal societies. The *Report of the Aboriginal Justice Inquiry of Manitoba* reveals a perception that the differences:

...between European-Canadians and aboriginal people are broad enough to make most European-Canadian institutions incompatible with the moral and ethical value systems of aboriginal Canadians (Hamilton and Sinclair, 1991: 20).

Further, whether perceived or real, it has been argued that an appreciation of the differences between the two value systems helps to explain why the Canadian justice system continues to dissatisfy aboriginal people.

Nevertheless, traditional aboriginal societies have transformed into contemporary aboriginal communities. Consequently, mechanisms of social control that were successful historically, are not always fitting in the contemporary context. This is not to refute the inherent distinctions between various traditional aboriginal values and those of Euro-Canadian society, instead it is suggested that some common ground may be found in a compromise of social control needs--particularly in the area of youth justice. Traditionally however, the unfortunate trend has not been a compromise, but rather a complete denial of aboriginal justice in favor of the more dominant Euro-Canadian system.

FORGING JUSTICE

A Typology

Brad Morse (1983) introduces a typology of four approaches that can be taken in order to deal with a collision between two existing legal systems (cited in Patenaude, 1989: 8). The first approach is *total avoidance* where there is essentially no interaction

between the two systems. The second approach is *co-operation* where both systems continue to function with virtual independence, but they attempt to clarify issues of jurisdiction. The third possible response is the *incorporation* method where:

...one society can come to dominate the other to such a degree that the dominant society can choose to incorporate selected portions of the other's law or all aspects of it which do not fundamentally conflict with its own (cited in Patenaude, 1989: 9).

Finally there is the *rejection* model, which entails a complete rejection of, and failure to acknowledge the existence of indigenous systems of justice (cited in Patenaude, 1989: 9).

The Canadian Approach

From the time of initial contact between the Europeans and the indigenous peoples of Canada, there has been a tradition of outright rejection of all that is aboriginal, including laws and the administration of justice (see Cant, 1980; Patenaude, 1989; Ryan, 1993; Brody, 1991; Cassidy, 1992; Royal Commission On Aboriginal Peoples, 1996). Missionaries, traders, Hudson's Bay Company officers, and the Royal Canadian Mounted Police, (previously the Royal Northwest Mounted Police) all pursued the goals of civilization, christianization and ultimately the colonization and assimilation of Canada's *primitive* peoples (Brody, 1991).

In 1868, Canada introduced the *Indian Act* which was deemed as the "act for the gradual civilization of Indian peoples" (Griffiths, 1992: 51). Later, in 1927, the federal government further outlawed all Indian religious practices (Griffiths, 1992). The legislative goal was to promote the christianization of aboriginal peoples, which, at the time, was regarded as the pathway to civilization (Griffiths, 1992). Notwithstanding the fact that aboriginal peoples had complex systems of social control in place prior to the arrival of the Europeans, (see Cant, 1980; Patenaude, 1989; Ryan, 1993; Tennant, 1991) the indigenous peoples were barraged with foreign laws and procedures founded in an alien value system, which ultimately served to eradicate both formal and informal mechanisms of traditional social control.

Historically, as more and more aboriginal people came into contact with Canadian law, the belief that aboriginal people simply did not understand the law and the criminal justice system became more pronounced. Consequently, at a conference in Edmonton in 1975, it was decided that Canada should make efforts to bring more aboriginal people into the criminal justice system--as employees of the state (Finkler, 1992). There was no discussion of the lack of understanding of aboriginal systems of justice on the part of the general Euro-Canadian society, nor were there any initiatives directed towards the investigation and acknowledgment of those traditional systems. The movement towards indigenization was launched.

Indigenizing the System

The move towards indigenization has been characterized by many agents of the Canadian criminal justice system as *progressive*; however, most aboriginal people consider this to be a futile exercise and continue to call for separate indigenous mechanisms and institutions of justice (Havemann, 1992). Indigenization involves the recruitment of aboriginal peoples as police officers, justices of the peace, court workers and lawyers and is meant to dissolve conflict between aboriginal people and the justice system (Havemann, 1992). While this approach to the over-representation of aboriginal people in the justice system may have appeared somewhat advanced in the 1970's, it is suggested here that indigenization is simply a creative tactic of the state to inadvertently coerce the further assimilation of aboriginal people into Canadian culture. With regard to indigenization, Finkler (1992) states that:

The fact remains that the application of indigenization, the predominant thrust in current initiatives dealing with Natives before the law, is restrictive in focus and merely constitutes a tinkering with the system (10).

The failure of indigenization is tragically evidenced by the continued over-representation of aboriginal people--including aboriginal youth--in the justice system (see Royal Commission On Aboriginal Peoples, 1996). In recognition of the failed attempt to

sensitize the Canadian legal system to the needs of aboriginal people, many aboriginal communities, bands and nations are striving towards a future of indigenous justice projects and systems by proposing, creating and experimenting with lucrative justice initiatives.

CHALLENGING THE STATUS QUO

Whether communities intend to acquire control over singular elements of justice such as probation, or to aim for absolute control through self-government, it can be argued that the majority of these initiatives fall under an emerging paradigm of justice in Canada--restorative justice. The Royal Commission On Aboriginal Peoples (1996) states that:

Our review of aboriginal concepts of justice showed clearly that aboriginal justice systems are premised on principles of restorative justice, with reconciliation and healing assuming primary importance (214).

In terms of youth justice, it has already been said that significant evidence exists to suggest that crime control objectives are dominating the reform scene; however, there is also evidence to indicate the growing popularity of restorative justice practices (see LaPrairie, 1995b, 1992b; Saskatchewan Social Services, 1995; Alberta Commissioner of Services for Children, 1994; Jackson, 1992; Bazemore & Umbreit, 1995). Jackson (1992) states that:

A consensus is emerging on the need to develop community based sanctions and non-adversary processes which balance the interests of the victim, the offender, and the community. There is also a significant and growing body of opinion that restorative justice principles should play a far more important role in criminal justice policy and practice (187).

The restorative justice paradigm is gaining momentum from factors such as the recent, more amplified concern for victims and the increased use of alternative dispute resolution mechanisms within the justice system (see Bazemore & Umbreit, 1995).

Obviously, at this point it becomes necessary to challenge the observation that youth justice in Canada has become completely preoccupied with crime control objectives and recognize the increasing popularity of restorative justice practices as well. It is suggested here that the current trend in Canadian youth justice policy is actually towards bifurcation. Furthermore, notwithstanding the distinctions between traditional aboriginal justice values and the values of the Euro-Canadian system, it is argued that the restorative justice arm of the bifurcated approach to youth justice has the potential to accommodate the *immediate* needs of most young offenders, including those of aboriginal descent.

BIFURCATION

It is proposed here that there is an emerging trend of bifurcation in Canadian youth justice. This trend will result in the majority of youth crime being dealt with under a new paradigm of restorative justice through various alternative measures and community-based initiatives, while crime control measures will be reserved for only the most serious of youth crime. This approach facilitates the continued denunciation and punishment of violent and repetitive criminal acts while at the same time avoiding the costs (both human and monetary) of over-processing and over-incarceration of minor and non-violent offenders. This trend may in part reflect the growing fiscal crisis in Canada. A re-examination of the Modified Justice Model and the principles of the YOA reveals the potential for a bifurcation trend in youth justice policy.

REVISITING THE YOA: THE DECLARATION OF PRINCIPLE

Section 3 of the YOA outlines the guiding principles of the legislation which Corrado (1992) argues reflects a Modified Justice Model. Corrado's (1992) discussion reveals the bifurcation approach that is a natural corollary of the Modified Justice Model. The multivariate principles of the YOA simultaneously facilitate the punishment of chronic and violent offenders and the diversion of less serious offenders.

In dealing with chronic and violent offenders the YOA promotes the principles of accountability and responsibility, the protection of individual rights under due process and the guaranteed right to legal representation. In addition, these offenders are punished and receive determinate sentences for their crimes (see Corrado, 1992).

In the case of less serious offenders, the legislation has the capacity to be more informal and focuses on child care, diagnosis and treatment, the special needs of the young person and diminished individual responsibility.

The inherent bifurcated approach of the principles of the YOA invites restorative justice practices into youth justice policy. Restorative justice is not a new concept and it does not apply strictly to aboriginal people and cultures; however, it is a trend that may pave the way for aboriginal justice aspirations and redirect youth justice policy in Canada.

RESTORATIVE JUSTICE: A NEW PARADIGM

The concept of restorative justice or 'popular justice' (see Hazlehurst, 1995) is new to contemporary policy makers, however, it is a process that has been in practice among traditional aboriginal societies since time immemorial (see Braithwaite & Mugford, 1993). Restorative justice is akin to the notions of reconciliation and peacemaking and it

emphasizes the restitution of wrongs and losses (Braithwaite & Mugford, 1993; Walgrave, 1993; Bazemore & Umbreit, 1995).

Walgrave (1993) discusses restorative justice as a third model of justice relative to the Retributive Model and the Rehabilitative Model. The Retributive Model is described as one where the penal law is viewed:

...simply as the upholder of principles and values laid down by the state, intervening when those principles have been violated in order to redress the upset balance (Walgrave, 1993:1).

The Retributive Model is offence-oriented and assumes free-will on the part of the offender. The primary objective of the Retributive Model is to restore the 'moral balance' within society through the infliction of proportionate harm to the offender (Walgrave, 1993). Within this model the role of the victim is secondary, although it is assumed that the victim will gain some satisfaction from the sanction imposed on the offender (Walgrave, 1993).

The Rehabilitative Model is offender-oriented (Walgrave, 1993). Under this model, the objective is to enforce and maintain 'conformity' through the treatment of offenders. Walgrave (1993) states that in reality "the treatment is not proposed but imposed" (6). Like the Retributive model, the role of the victim is secondary, and in fact, it has been argued by some that the rehabilitative process can be damaging to victims because the victims view the offenders as receiving assistance rather than punishment.

Walgrave (1993) argues that "rehabilitative law is but a variant of retributive law" because both models uphold similar societal values in a coercive manner (4). Bazemore and Umbreit (1995) add that "neither treatment nor punishment is capable of uniting offender, community, family and victim" (301). Ultimately, both systems are exclusive of those individuals who fail to give in to the power of the state; this is the point of departure for the Restorative Justice Model.

The Restorative Model of justice is inclusive of all parties involved and the model is neither offence nor offender-oriented. Instead, the emphasis is on the 'loss caused' as well as communal accountability (Walgrave, 1993; Bazemore & Umbreit, 1995). The objective of this model is the reparation of losses by the offender and the role of the victim is central. Moreover, justice is defined in terms of the satisfaction of all parties. Restorative justice places emphasis on the goals of denunciation, responsibility and accountability of offenders, reparation, conflict resolution and the reintegration of offenders (Bazemore & Umbreit, 1995). Unlike the previous two models the Restorative Model is said to empower the community to maintain peace in a localized and effective manner.

Walgrave (1993) describes the Restorative Model as 'emancipatory' which is explained as follows:

An emancipatory society develops in accordance with two fundamental principles--autonomy and solidarity between individuals and the community (9).

The autonomy component affords both individual and societal responsibility and consequences for the incident at hand, while the solidarity of the community fosters the restoration of harmonic relations between the offender, the victim and the community at large.

In essence, restorative justice is centered around three primary principles. First, the criminal justice process must repair injuries to all parties including the victim, the offender and the community. Second, all parties should be actively involved in the process. And third, the role of the state should be to 'preserve order' while the local community maintains peace (Drowns and Hess, 1995). Both the Retributive Model and the Rehabilitative Model allow the state to co-opt the role of the local community in maintaining harmony, whereas it is hypothesized that the Restorative Model empowers communities to take responsibility for their own issues.

According to Bazemore and Umbreit (1995):

A restorative model would expand less punitive, less costly, and less stigmatizing sanctioning methods by involving the community and victims in sanctioning processes, thereby elevating the role of victims and victimized communities and giving priority to reparation, direct offender accountability to victims, and conflict resolution (298).

Moreover, restorative justice advocates still acknowledge the goals of protecting society and maintaining fairness and due process. First, they recognize that in order to protect society there will always be a percentage of serious and dangerous offenders that will need to be incapacitated. And second, restorative justice advocates contend that consequences for offending behavior should reflect in proportion the nature of the offense committed.

THE THEORY OF REINTEGRATIVE SHAMING

While restorative justice has thus far been discussed in terms of an empirical model, the model is not without a theoretical foundation. Braithwaite (1989) has articulated the concept of restorative justice in his theory of reintegrative shaming (see also Braithwaite & Mugford, 1993). Braithwaite (1989) argues that:

Crime is best controlled when members of the community are the primary controllers through active participation in shaming offenders, and, having shamed them, through concerted participation in ways of reintegrating the offender back into the community of law abiding citizens (8).

Reintegrative shaming allows for 'moralizing control' as opposed to repressive social control within society. In other words, peacekeepers are appealing to the moral responsibility of individuals and communities rather than to their legal responsibility.

Bazemore and Umbreit (1995) add that in terms of sanctions:

...expressive sanctioning aimed at communicating value-based messages to offenders and the community and affirming obligations and accountability should be more effective in regulating conduct and more likely to promote community solidarity and peaceful dispute resolution (300).

In order to avoid oppressive shaming Braithwaite (1989) contends first, that harmless behavior should not be shamed, and second, when behavior is harmful, offenders should be shamed with dignity rather than stigma. Indeed, Braithwaite (1989) warns that the process of shaming can be counterproductive if offenders are stigmatized. In order for the process of shaming to have the desired effect, it must be reintegrative and dignified as distinguished from disintegrative and stigmatizing.

Successful Reintegration

The process of reintegrative shaming is most fertile where two principal social conditions exist: communitarianism and interdependency (Braithwaite, 1989). Communitarianism is a characteristic of societies while interdependency is relevant to the individual level of analysis.

Communitarianism is essentially composed of three elements:

(1) densely enmeshed interdependency, where the interdependencies are characterized by (2) mutual obligation and trust, and (3) are interpreted as a matter of group loyalty rather than individual convenience (Braithwaite, 1989: 86).

Braithwaite (1989) describes communitarianism as the "antithesis of individualism." Where societies are characterized by high degrees of individualism there is a need for state intervention in conflict situations, in which case the state is responsible for the shaming of offenders. In contrast, communitarian societies have the power to deliver their own shame in a manner which is much more effective than that meted out by the state. Moreover, where the process of shaming occurs within the community, it is generally more reintegrative because there is less anonymity, and therefore, a less stereotypical view of offenders. Within a communitarian society, the offender is viewed as a whole person rather than merely as a *criminal*.

The second component, interdependency, relates to the individual level of analysis (Braithwaite, 1989). Interdependency is the basic "building block of communitarianism" and encompasses many variables. The degree of interdependency experienced by an individual is related to such factors as: the individuals' relationships with their parents or their peers; whether or not the person is attending school or is employed and if they are committed to their education or job; and, the person's age and marital status.

Braithwaite (1989) argues, that the latter two variables, age and marital status, are particularly important, because in the present day, individuals generally experience a *period of transition* between their involvement with their childhood family and their family of procreation. During this time individuals are less interdependent and are more prone to straying from the demands of the group. This point is particularly relevant to the contemporary context where many individuals are spending more time on their education and postponing marriage and children.

Braithwaite further (1989) suggests that levels of interdependency are different for males and females in light of the historical, patriarchal structure of most societies. Traditionally, women have moved from their parents' home into the home of their husband; consequently, women have been subjected to higher levels of informal social control than their male counterparts. In contrast, men tend to be exposed to more formal mechanisms of social control. Thus, it is argued that reintegrative shaming, particularly within the family unit, may be more effective with girls than boys.

Reintegrative Shaming As A General Theory of Crime

Braithwaite (1989) suggests that the theory of reintegrative shaming is plausibly a general theory of crime. In defence of his argument, Braithwaite (1989) maintains that:

A general theory is not required to explain all of the variance for all types of cases, but some of the variance for all types of cases (3).

The process of reintegrative shaming is intrinsically embedded in a multi-theoretical approach. Braithwaite (1989) argues that middle-range theories including labeling theory, subcultural theory, control theory, opportunity theory and the learning theories are all valid to an extent--Braithwaite's theory represents an attempt to integrate these middle-range theories into a general theory of crime.

Braithwaite's characterization of reintegrative shaming as a general theory of crime rests in the assumption that there is a high degree of consensus in terms of criminal law, and that individuals who commit crime do so with the knowledge that the act is deviant. Braithwaite (1989) concedes that where there is a lack of consensus, (for example, laws that prohibit the smoking of marijuana and other victimless crimes), the theory is less relevant. Reintegrative shaming is therefore most applicable in terms of predatory crime or in other situations where there is a large degree of societal consensus. In addition, as will be discussed later, the capacity of dysfunctional communities and communities that are becoming increasingly individualistic to engage in the shaming process must be questioned. In any event, there is the potential for the theory of reintegrative shaming to play a role in the future of aboriginal justice initiatives in Canada (see LaPrairie, 1992b).

Restorative Justice Revisited

The Restorative Justice Model has the capacity to accommodate diversity in youth justice because restorative practices are adaptable to a variety of local conditions and cultures. Restorative Models of justice are also victim-centered and are likely to be more cost effective than retributive or rehabilitative approaches. At the same time, young people are taught to be accountable and responsible for their behavior and any damage to individuals and/or the community is repaired. Bazemore and Umbreit (1995) add that restorative justice could actually serve to redirect offender accountability towards victims and communities and away from the state. Under the bifurcated approach, made possible by the structure of the YOA, the Restorative Justice Model not only accommodates diversity, but it clears a path for aboriginal justice aspirations within the existing youth justice system.

THE FUTURE OF ABORIGINAL JUSTICE

Since the time of initial contact with the Europeans, aboriginal peoples have been seeking acknowledgment of their customary laws and recognition of their rights as first nations. Section 35 of the *Constitution Act* (1982) states that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" (Asch, 1984: 1). It was not until the time of this *Act*, in 1982, that the existence of aboriginal peoples and aboriginal rights was officially recognized in law. Long before however, aboriginal peoples did exist within a successfully maintained, complex social system. For example, Ryan (1993) states that:

At the time of contact, the Dene had a well functioning social and political system which included an understanding of how their world worked and how intertwined the human world was with the spiritual and physical ones (71).

Unfortunately, the historic imposition of non-aboriginal norms and laws has resulted in a devastating obliteration of traditional social and political systems (Ryan, 1993). Presently, many aboriginal groups are attempting first, to rediscover their traditional customs, laws and social rules, and second, to determine the extent of their role in future justice initiatives.

The Driving Force Behind Aboriginal Justice Reform

In terms of the impetus for reform, LaPrairie (1995b) argues that:

The driving force behind new approaches is that the criminal justice system as it presently operates ignores the social context in which crime and disorder occur and, in doing so, de-contextualizes the offence and marginalizes various players (2).

In general, justice projects tend to emerge in communities where there is a deep dissatisfaction with the services provided by the formal Euro-Canadian system. As illustrated by Finkler (1992):

In part, community action has materialized as a consequence of increasing doubts about the effectiveness of the interventions and control strategies exercised by the formal control system (507).

In reclaiming control over justice practices, it is important to recognize that aboriginal people are not seeking to recreate the past. In the *Royal Commission On Aboriginal Peoples*, Webber (1993) states that:

Aboriginal justice is not simply a matter of returning to traditional institutions. The context of aboriginal life has changed, the communities themselves have changed. The challenge is to reinvent aboriginal institutions so that they draw upon indigenous traditions and insights in a manner appropriate to the new situation (147).

Aboriginal people are currently in the process of redefining and determining the role of tradition in the contemporary context. It is critical to recognize however, that traditional justice does not equal community justice and that traditional justice practices may not always have the capacity to deal with the complexity of contemporary youth crime. The challenge for aboriginal justice initiatives rests in discovering a balance between traditional values and contemporary goals (see Depew, 1994; Ross, 1994; Turpel, 1994).

A further challenge for the revitalization of tradition is that an assumption of consensus in terms of community values is no longer valid in the present-day context (see LaPrairie, 1995a; Clark et al., 1995). Contemporary aboriginal communities are stratified in terms of gender, age and social mobility. Consequently, the various strata may have different definitions of what tradition is and hold different perspectives as to what the role of tradition should be. Moreover, vulnerable members of the community will have concerns about the reintroduction of traditions that may serve to reinforce their marginal status (see Clark et al., 1995).

Still, there is a perception that the Canadian criminal justice system is generally failing to meet the needs of aboriginal people, and in recognition of this, attempts are being made to devolve various levels of control over justice practices to aboriginal communities that are interested, willing and able to take more responsibility for justice matters.

The Devolution of Justice

At this stage there is a lack of articulation as to how devolution of service delivery, particularly in the area of justice, will proceed. However, it is clear that there will be no

singular aboriginal model of justice that will be appropriate for all aboriginal people in Canada (see Quigley, 1994; Cawsey, 1991; Hamilton and Sinclair, 1991; MacPherson, 1993). Indeed, progressive justice initiatives will have to emerge from the communities themselves. Visions of justice range from completely autonomous, indigenous systems to localized control of particular aspects of justice such as probation.

Presently, aboriginal justice can be characterized as proceeding on two levels simultaneously. The first level reflects an incremental approach while the second represents a move towards autonomous systems of justice under the broader authority of self-government. Bellegarde (1994) has described this process as the "two-track strategy" (see also Royal Commission On Aboriginal Peoples, 1996). The first track is a "program-oriented track that fits within the current justice system" (Bellegarde, 1994: 317). Initiatives such as circle sentencing, family group conferencing, alternative measures and the creation of youth justice committees fall under this approach. In contrast, the second track deals with aboriginal justice in the long term. The primary goal is self-government which would include control over aboriginal justice matters through the creation of autonomous justice systems (see also Royal Commission On Aboriginal Peoples, 1996).

The Incremental Approach

For those communities that have a desire to increase their involvement in justice matters, the incremental approach to devolution recognizes that not all communities will be able to develop their own systems of justice immediately. In fact, LaPrairie (1992b; 1994a) warns against the development of justice systems that are too complex and may be difficult to manage. LaPrairie (1992b) further recommends the option of a transitional

stage for aboriginal communities interested in playing a role in justice (see also McNamara, 1992). It is evident that some communities simply lack the infrastructure and the resources to create and maintain their own justice systems; consequently, such communities will have no alternative but to assume control over justice at a more gradual pace.

In assisting to meet the needs of the incremental approach to justice devolution, the federal government created the Aboriginal Justice Directorate in April of 1992 (see *Royal Commission on Aboriginal Peoples*, 1993). The Aboriginal Justice Directorate provides funding for various aboriginal justice projects. However, such projects:

...must fall within the existing constitutional framework and the justice system as a whole and must support stated federal policy objectives in order to be considered (*Royal Commission on Aboriginal Peoples*, 1993: 34).

As a result of this framework provided for by the *Directorate*, there is the risk that community-based justice projects may not always respond directly to the demands of aboriginal communities and may instead reflect funding criteria. In a review of the Justice Development Workers Program (1995) it is argued that funding from the *Directorate* "is not governed by specific program parameters which predetermine within defined limits exactly which kinds of activities can be supported" (1). Nevertheless, the point has already been made that all projects must reflect federal policy objectives which may not always be consistent with the justice aspirations of aboriginal communities.

In view of the incremental approach, Ross (1994) suggests that the gradual acquisition of control by aboriginal communities may in fact induce a more rapid retreat of the Canadian system than would be experienced if immediate demands for full control

were made, thus representing a more realistic approach to reform. In addition, a collaboration with the Canadian criminal justice system would allow communities to direct their limited resources towards building stronger communities prior to engaging in more demanding community-based justice systems. Overall, communities who adopt an incremental approach to justice issues generally do so within the broader vision of increasing control over all areas of life under the authority of self-government (see Royal Commission On Aboriginal Peoples, 1996).

Autonomous Aboriginal Justice Systems

The *Aboriginal Justice Inquiry of Manitoba* recommends that aboriginal justice systems be established in aboriginal communities and be controlled by aboriginal people.

Hamilton and Sinclair (1991) argue that:

In the face of current realities confronting aboriginal people, we believe that it is important to recognize that the greatest potential for the resolution of significant aboriginal social problems lies in aboriginal people exercising greater control over their own lives (263).

Similarly, the Royal Commission On Aboriginal Peoples (1996) recommends that:

...federal, provincial and territorial governments recognize the right of aboriginal nations to establish and administer their own systems of justice pursuant to their inherent right of self-government, including the power to make laws, within the aboriginal nation's territory (224).

It is the opinion of these authors that autonomous justice systems provide one avenue for according more control to aboriginal people.

Structure

In terms of structure, Hamilton and Sinclair (1991) concede that it has yet to be determined how such systems would be legally established and how they would operate.

However, these authors emphatically oppose the proposal of a singular model that would be forced upon all aboriginal communities. Instead, Hamilton and Sinclair (1991) state that they "endorse the principle that each and every distinct aboriginal community be entitled to its own justice system" (315). In other words, each individual community would be granted the authority to develop a justice system that caters to the unique needs and circumstances of its constituents (see also Clark et al., 1995). The *Royal Commission on Aboriginal Peoples* agrees that an aboriginal justice system would "be an individuated and plural system devised and implemented at the local community level" (MacPherson, 1993: 9). Similarly, Mandamin (1993) suggests that "it would be unrealistic and indeed counterproductive to expect these community-based initiatives to give way to a single aboriginal justice system" (279). Models of community justice will be diverse and it may be the case that such models will not always be transferable to other communities. The success of justice initiatives may depend more on the extent of community involvement in the *process* of developing such projects, rather than the final outcome.

Constitutional Framework

With respect to the constitutional framework of these proposed systems, Hamilton and Sinclair (1991) argue that the necessary structures already exist and state that:

There are sufficient mechanisms and viable options available within Canadian law for the establishment of aboriginal justice systems to be accomplished (313).

It is further stated in the *Royal Commission On Aboriginal Peoples* that "the Canadian criminal justice system is very adaptable and could accommodate much of the aboriginal justice initiatives" (Mandamin, 1993: 303; see also Royal Commission On Aboriginal Peoples, 1996). In terms of aboriginal law, Hamilton and Sinclair (1991) further insist that:

Aboriginal communities be entitled to enact their own criminal, civil and family laws and to have those laws enforced by their own justice systems (323).

These authors argue that the expansion of an already inappropriate system is not the answer--hence the call for autonomous systems (Hamilton and Sinclair, 1991). Nevertheless, it may be the case that a collaboration with the existing system is the more progressive avenue for justice reform at this time.

Role of the Existing System

The mere suggestion of separate justice systems for aboriginal people brings about many concerns. First and foremost, the issue of how aboriginal systems would relate to the existing system must be confronted. In exploring this question, it has been suggested that aboriginal justice systems would likely contain elements of both traditional and contemporary mechanisms of justice. For example, the *Royal Commission On Aboriginal Peoples* maintains that "the challenge of aboriginal justice will almost certainly involve fashioning structures that draw upon both aboriginal and non-aboriginal forms" (Webber, 1993: 138). Goikas (1993) adds that "it cannot be expected that parallel or separate systems will have no linkage with the existing system" (195). Thus, it appears that at least for the present, the existing system will continue to play a significant role in aboriginal justice (see also Clark et al., 1995; Royal Commission On Aboriginal Peoples, 1996).

The Criminal Code and the Young Offenders Act

Significantly, it is quite possible that the Canadian *Criminal Code* as well as the *Young Offenders Act* will provide the link between the two systems. It is generally argued that the *Code* will apply to aboriginal people, but may in some cases be amended to accommodate the needs and local conditions of individual communities (see *The Royal Commission On Aboriginal Peoples*, 1993). Mandamin et al. (1992) point out that "many of the offences in the *Criminal Code* are offences among aboriginal people as well" (27). These authors add that:

In our view, it is necessary to amend the *Criminal Code* to expressly allow for accommodation of aboriginal values in the Canadian criminal justice system. The amendments required primarily relate to procedures and process rather than the substantive offence provisions of the *Code* (Mandamin et al., 1992: 32).

For example, a proposal for a Native Criminal Court in Nova Scotia stated that:

We wish to make it clear that the Native Criminal Court we propose will administer the same laws as applies to all other Canadians. We do not propose a separate system of Native Law, but rather a different process for administering on the reserve certain aspects of criminal law (Mandamin et al., 1992: 12).

Thus, while similar types of offences and offenders are the source of concern, how those offenders are processed may differ.

The Charter

Any discussion of the creation of autonomous justice systems for aboriginal people must consider the role of the *Canadian Charter of Rights and Freedoms*. Youth justice initiatives developed in aboriginal communities may be subject to the *Charter* in terms of issues involving the right to equality under the law. However, it has been argued that where alternative measures of justice actually cultivate equality, they are not likely be challenged under the *Charter*. As Kaiser (1992) reveals:

The twin rulings of *Andrews* and *Turpin* ensure that differential treatment for aboriginal peoples will not offend s. 15(1) if such measures foster equality (77).

Additional support for innovative aboriginal justice programs can be found in section 15(2) of the *Charter* whereby it is stated that:

Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that disadvantaged because of race, national or ethnic origin, colour, religion, sex age or mental or physical disability (Rodrigues, 1994: 582).

In addition to section 15, section 25 of the Charter states that:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada... (cited in Royal Commission On Aboriginal Peoples, 1996: 264).

It is the opinion of the Royal Commission (1996) that "section 25 should be capable of protecting culturally appropriate justice systems from Charter challenge" (265). In some situations then, it may be the case that aboriginal justice projects will find support in the *Charter*.

Of course, the potential for challenges to alternative mechanisms of justice still exist, particularly in the area of sentencing. The well known case of *R. v. Naqitarvik* provides a good example (see Jackson, 1992). In that case the accused was charged with--and pleaded guilty to--the offence of sexual assault. The Judge in the case held a sentencing hearing which involved input from the *Inumarit*--a Council of Elders. The Judge learned that the *Inumarit* wished to have the accused remain in the community because they believed that a sentence of incarceration would be harmful and disruptive to the offender, the victim and the community. The Judge imposed an intermittent sentence of ninety days to be served at the local RCMP detachment as well as two years probation and one-hundred hours of community service.

The sentence was appealed and subsequently overturned by the appeal court. However, the decision was not unanimous and the dissenting Judge made the following statement:

I am unable to detect any error in principle in the reasons of the sentencing judge. The preservation of cultural heritage is given new recognition by the Canadian Charter of Rights and Freedoms and it was proper to take it into account. The Trial Judge weighed this and all other factors and imposed a sentence which in my view was fit in the circumstances disclosed by the evidence before him (Jackson, 1992: 190).

In their reasons for substituting the original sentence with an eighteen month jail term, the Court of Appeal argued that they were required to follow the precedent setting case of *Sandercock* where it was determined that the offence of sexual assault required incarceration as a means of denouncing the seriousness of the crime and deterring others from committing the offence (see Jackson, 1992). This scenario reveals the potential for conflict where the values of the Euro-Canadian system of justice collide with the justice needs of aboriginal societies.

In any event, aboriginal communities are becoming more and more involved in their own justice aspirations and a variety of models have emerged despite any perceived limitations of the *Young Offenders Act* and the *Charter*. The *Charter* may become more of an issue in the future if aboriginal communities decide to step outside the boundaries of the YOA.

Partners In Justice

LaPrairie (1994a; 1992b) argues that aboriginal justice initiatives will involve a partnership with the existing criminal justice system. In some cases, at least initially, communities may not wish to assume the burden of dealing with serious offenders and may want to have them dealt with by the existing justice system (see for example Clark et al., 1995; Royal Commission On Aboriginal Peoples, 1996). Similarly, Turpel (1994) suggests that:

Public security and a gradual process of criminal justice reform is what people are looking for, not a sudden break and some completely isolated regime...and...there might be aspects of the current criminal justice system that will never be taken on by aboriginal justice systems (215).

At this stage, it is unclear what form aboriginal justice systems would take. It seems however, that flexibility is the key and that systems will emerge in a variety of unique ways. Ovide Mercredi (1991) articulates this vision of aboriginal justice aspirations:

The basic approach we want to take in the creation of our own systems of justice is flexibility, allowing for the evolution of systems of justice rather than a universal play. For example, if one community wants to proceed on the basis of a juvenile court system and that is all they want, then that is all they should have until they want more in the future...if a Native group wants to adopt parts of the white system and create other parts of an indigenous court system where the two work in tandem, that's their business (cited in Goikas, 1993: 195).

It is critical that individual aboriginal communities expand their control over justice issues at a pace that is manageable. It is also necessary to avoid idealizing the potential for various communities to absorb responsibility for justice. Any practical limitations to community-based justice programs, such as political divisiveness among community members, must be acknowledged, because what appears logical in policy may not always be feasible in practice. Initiatives that develop should also be specific to local conditions and may not always be transferable to other communities (see Royal Commission On Aboriginal Peoples, 1996). Moreover, justice must reflect the needs of all members of the community, thus necessitating an *a priori* definition of what 'community' is (see for example Clark et al., 1995). Depew (1994) argues that if this approach is not adhered to, there is the risk that dependency on the existing system will simply be translated into a dependency on the community-based system and those who administer it, rather than empowering the community to depend on its own strengths. Depew (1994) contends that in both scenarios the role of the community tends to be trivialized. In summary, the Royal Commission On Aboriginal Peoples (1996) states that:

As communities seek to develop their own justice systems, they will do so in an evolutionary way, beginning with the areas they believe need to be addressed (168).

CONSIDERING THE NEED FOR COORDINATION

It has already been argued that no matter what model of justice a particular aboriginal community proposes to adopt, it is not likely that concerns with youth justice will be separated from other community issues such as health services and child welfare. To date, the dominant approach to aboriginal justice development can be described as piecemeal, which has only lead to piecemeal solutions. However, in at least two provinces, Alberta and Saskatchewan, that approach is quickly being disposed of.

Alberta's new *Focus on Children* along with Saskatchewan's *Action Plan for Children* not only support the argument for the existence of a bifurcation trend, but they may also be setting the course for a new trend in policy which is aimed at a more holistic, more integrated, and more community-based delivery of services. These two provinces have incorporated aboriginal youth justice services into a broader framework that considers the overall needs of children, their families, and their communities. This further re-emphasizes the point that within the realm of justice, issues such as substance abuse, familial violence, unemployment, and poverty tend to outweigh the still important variables of race and culture.

Alberta's Focus on Children: A Plan For Effective, Integrated Community Services For Children and Their Families

In November 1993, the Alberta government appointed the Commissioner of Services for Children. The mandate of the Commissioner is "to design a new integrated, more effective and community-based system of support to children and families" (Alberta Commissioner of Services for Children, 1994: 3). Youth justice is just one component of the goal for integrated services. This mandate also pays particular attention to aboriginal services and the specific needs of aboriginal people in Alberta.

Following the creation of the Commissioners office, the first task involved an extensive consultation process with Albertans. During this time the government learned that many communities, both aboriginal and non-aboriginal, felt that they were capable of assuming more control over many of their own issues such as the management of children's services. Aboriginal communities further expressed their need for culturally appropriate services that would be sensitive to diverse local conditions. In addition, aboriginal people revealed that their desire for control over community-based services falls within their broader agenda of self-government. All communities felt that the role of the government should be restricted to roles surrounding policy, funding, devising and enforcing standards for programs, and the evaluation of programs operating in communities.

In terms of a new approach, Albertans have stated that emphasis must be placed on the overall needs of children and that the primary goals should be prevention and early intervention. With respect to aboriginal people, it has been pointed out that aboriginal children are highly over-represented in the child welfare system and that they suffer from more health problems and receive less education than other Albertan children. Consequently, the needs of aboriginal children require special attention.

The government's action plan consists of four major areas which are: integrated services; community delivery of services; aboriginal services; and a focus on early intervention. In terms of the integration of services it is argued that the coordination of services is inadequate and that what is required is one plan with one set of goals which all services will pursue. The second goal is to encourage the retreat of government from service delivery and to establish "Local Authorities" who will be responsible for the control of services in their communities.

Improved aboriginal services is the third goal incorporated into the action plan. It is the view of the Commissioner that aboriginal communities should have the authority to deliver and control culturally sensitive services to children and families; however, the

Commissioner adds that control over services should still involve a partnership with other aboriginal and non-aboriginal organizations. Finally, the action plan calls for proactive intervention. It is suggested that by building stronger communities the number of children in care and in corrections will be significantly reduced.

Under the government's plan for integrated services, "Local Authorities" will be responsible for a variety of services including: youth justice committees; alternative measures; early intervention; the development of Family Resource Centers; child welfare; aboriginal services; handicapped children's services; prevention of family violence; and day care programs (see Alberta Commissioner of Services for Children, 1994). It is evident that the Alberta government is attempting to address both youth justice and aboriginal justice issues within a broader context of complex social and economic factors.

Saskatchewan Social Services: Family and Youth Services Division

As in Alberta, youth justice in Saskatchewan is just one element of Saskatchewan's Action Plan for Children. The basis of this *Plan* revolves around "integrated, family-centered, and community-based prevention and early intervention strategies" (Saskatchewan Social Services, 1995: 2). The primary goal is to create a youth justice system that is flexible and responsive to the needs of the community, victims and offenders. Moreover, the *Action Plan* is designed to accommodate the needs of both aboriginal and non-aboriginal youth.

The *Plan* is based on a restorative justice strategy which aims to denounce *criminal behavior*, rather than the offenders themselves, and to reintegrate offenders, rather than stigmatize and marginalize them. On a broader level, restorative justice is concerned with general community development including psychological, social and economic factors.

Saskatchewan Social Services (1995) contends that the goal of creating an integrated system founded in the philosophy of restorative justice is necessitated by several factors. First, public intolerance of youth crime is intensifying and there is an urgent need

for a response; however, getting tough with youth is both costly and primarily ineffective. A more productive and fiscally responsible agenda is required.

Second, aboriginal people in Saskatchewan are pursuing community justice initiatives at a quickening pace and it is argued that "many of the traditional justice approaches taken by aboriginal people are compatible with restorative justice alternatives" (Saskatchewan Social Services, 1995). In addition, the population of aboriginal youth is growing faster than the general population which is contributing to their ever increasing over-representation in the youth justice system.

Finally, there is ample room for justice alternatives within the existing justice system. For example, in the city of Regina, a family group conferencing process has been established for aboriginal youth who reside in that community. According to Saskatchewan Social Services (1995):

Guiding principles currently contained within the *Young Offenders Act* provide the flexibility to protect the public and hold youth accountable by using alternative approaches for an expanded range of offences...they allow for a more restorative approach (4).

Consequently, it is suggested that the legislative framework needed to accommodate restorative justice initiatives is already in place in Saskatchewan and that what is required is a strategy.

The Strategy

The strategy for reforming youth justice in Saskatchewan is made up of a variety of components. First and foremost, there is a commitment to implementing the principles of the YOA which facilitate restorative justice practices. Second, in order to activate successful community-based justice projects, communities need to be strengthened. The strategy involves the redirection of resources towards the *root causes* of youth crime. Saskatchewan Social Services (1995) cites several of the risk factors for youth crime including:

...family dysfunction, poor mental health of parents, weak family attachments, parental conflict, lack of consistent discipline and supervision, domestic violence, child abuse, substance abuse, poor school performance, negative peer group influences, poverty and residence in high crime neighborhoods (4).

Significantly, the report goes on to state that "these programs are particularly important for aboriginal youth as they are disproportionately represented as offenders and victims" (Saskatchewan Social Services, 1995: 4). In view of these issues, it is evident that building stronger communities will require a partnership between the justice system and other social service agencies.

The third component in Saskatchewan's youth justice strategy involves the generation of public awareness about youth crime through public information programs. It is argued that restorative justice practices will be more eagerly supported by an informed public.

The fourth component aims to build partnerships within the communities themselves. Families, parents, schools, police, victims and youth must work together towards interventionist strategies. Communities need to become more involved in justice issues and in particular, victims must be encouraged to participate.

The fifth component in the strategy for youth justice reform encourages the increased use of community-based youth justice options. In support of this goal, Saskatchewan Social Services (1995) states that:

While youth crime is disturbing, it has its foundation in other problems, and certain youth misbehavior can be more effectively dealt with in community managed justice processes that come before the formal criminal justice system. A range of responses, some of which fall short of laying criminal complaints or charges, will be developed (6).

While it is agreed that serious offences require serious consequences, it is argued that traditional legal pathways are not always necessary nor effective, particularly when dealing with multi-troubled youth.

The sixth component recognizes the need to balance the right of society to be protected from crime and the right of the young person to be held accountable in a way that best meets his or her needs. In other words, restorative justice practices must promote the accountability of young offenders while at the same time taking in to consideration all of the circumstances of the offence by way of an individual assessment. These issues of collective and individual rights must further be balanced with the rights of the victim.

In terms of the government's role in restorative justice for young people, the seventh component of the youth justice strategy calls for a re-evaluation and re-organization of government policies, programs and organizations so that they may be more effectively delivered. Finally, the eighth component states that all existing and newly created youth justice projects will be subject to evaluation. The policy for an integrated strategy put into action by Saskatchewan Social Services has created a pathway for development not only for aboriginal communities, but for the general delivery of services in that province. It is not yet evident if other provinces and territories intend to adopt a similarly integrated and coordinated approach to social services; however, Hazelhurst (1995) has argued that "a multi-service, multi-intervention approach is urged by Canadian Native Organizations" (xvii).

The advancement of aboriginal youth justice is a complex issue and it has been argued that an understanding of the context of aboriginal youth crime is critical to the development of effective justice programs. This is not to suggest a more *lenient* approach, but rather a more realistic and pragmatic approach. Moreover, it has been proposed that crime control objectives alone cannot adequately address the complex state of multi-troubled youth.

While the literature would suggest a definite crime control trend in Canadian youth justice, this review has demonstrated that there is equal evidence of emerging support for restorative justice practices. Consequently, it has been found that rather than a crime

control trend, the actual thrust in youth justice is towards bifurcation. The Modified Justice Model underlying the *Young Offenders Act* fosters this bifurcated approach.

In consideration of current demands put forth by aboriginal communities regarding justice, it appears that an incremental approach towards the acquisition of control over justice matters is favored. This is not to overlook the eventual goal of self-government and greater control over justice issues, instead it is argued that the immediate goals of aboriginal justice are more pragmatic. Furthermore, notwithstanding the inherent distinctions between the values of traditional aboriginal justice and those of Euro-Canadian society, common ground is to be found in the need to respond to crime and disorder in contemporary communities. Indeed it can be argued that the disproportionate levels of crime and delinquency in aboriginal communities is the result of complex historical and contemporary social, economic and political conflicts and not the result of being aboriginal *per se* (see Depew, 1994).

Thus, it is proposed here that in terms of youth justice, the bifurcated set of principles of the YOA foster the development of restorative justice practices--in particular section 4 which provides for the use of alternative measures and section 69 which facilitates the creation of youth justice committees. Moreover, the current incremental approach to youth justice development that has been adopted by many aboriginal groups can be accommodated by the YOA through bifurcation.

Chapter three will provide an analysis of existing aboriginal youth justice programs in order to present some support for the arguments introduced here.

CHAPTER III

DISCUSSION AND ANALYSIS OF CURRENT ABORIGINAL YOUTH JUSTICE INITIATIVES IN CANADA

This chapter outlines some of the various models of aboriginal youth justice in Canada in order to demonstrate the advancements that are possible within the current legislative framework of the *Young Offenders Act*. It should be noted that the models discussed herein do not necessarily represent the boundaries of aboriginal youth justice aspirations; rather, they reflect the present stage of progress of the various initiatives.

MODELS OF ABORIGINAL YOUTH JUSTICE

As discussed in the literature, there is no one model of aboriginal youth justice in Canada. However, at this stage of development, and within the framework of the YOA, various communities are taking the initial plunge into justice through the use of some basic community-based models for young people. Many of these models are state-driven and reflect a partnership between aboriginal communities and the existing justice system. In addition, these programs are not limited to reserve communities and indeed, many of them are adaptable to isolated, rural and urban environments. The models implemented by the Youth Corrections Branch in Manitoba provide a good example. It is noteworthy that the youth justice models operating in Manitoba are utilized in both aboriginal and non-aboriginal communities.

MANITOBA COMMUNITY AND YOUTH CORRECTIONS

The Community and Youth Corrections Branch in Manitoba, operates four basic models of community-based corrections including: Community Participation Agreements; Honorary Probation Officers; Alternative Measures; and, Community Justice Committees. Each of these four models is designed to increase community awareness and participation in corrections services.

Community Participation Agreement

A Community Participation Agreement is described as:

A formal agreement entered into with community groups and organizations to facilitate the provision of community correctional services (Manitoba Corrections Handbook).

The Community Participation Agreement (C.P.A) is one mechanism that can be used to achieve a variety of objectives including: increased community involvement and awareness in corrections activities; providing culturally relevant services and monitoring human rights concerns; ensuring accessibility to corrections services for communities, victims and offenders; ensuring offender accountability to the community and to the justice system; the creation of alternative measures; and, maintaining a *partnership* between corrections services and the community.

Community Participation Agreements are designed to meet the unique needs of individual communities, both aboriginal and non-aboriginal. These agreements allow for a variety of diverse justice initiatives to occur at the community level and to be controlled by members of the community. The functions of agreements vary from community to community depending on need; however, areas of responsibility can include alternative measures, victim-offender mediation, supervision of bail and probation orders, diversion and various crime prevention activities.

Honorary Probation Officers: Volunteer Program

According to the Manitoba Corrections Handbook there are over 400 volunteers working for community corrections projects throughout the province. Volunteers are formally appointed and are required to perform specific tasks. Under section 3 of the *Manitoba Corrections Act* these volunteers are recognized as "honorary probation officers." Honorary probation officers are accountable to the Community Corrections Branch.

The primary objective of the volunteer program is:

...to develop a partnership between Corrections and local communities in planning, implementing, and evaluating correctional programs (Manitoba Corrections Handbook).

This objective is based on the underlying premise that citizens from the community can best provide services that require some knowledge of the community and its members.

Volunteers may perform a variety of tasks depending on the unique needs of the community but may include the following: recreation and social activities; supervision of court orders; victim services; life skills training; support for both youth and adults with alcohol and drug abuse problems; employment preparation; crime prevention and education; and, acting as a liaison with incarcerated offenders.

Alternative Measures

Section 4 of the *Young Offenders Act* provides for the development and operation of alternative measures programs for youth. The jurisdiction of these programs includes young people ranging from age 12 to 17 who have allegedly committed a less serious offence for which they have accepted responsibility. Eligibility is the decision of the Crown who determines whether there is enough evidence to proceed with prosecution. If the youth is eligible for alternative measures the young person must be informed of his or her right to counsel and must be given adequate time to consult with counsel prior to their consent to participation. The youth also has the option of continuing through the regular youth court process.

Alternative measures programs provide an option other than the youth court while maintaining the accountability and responsibility of the young person for their actions. This process further encourages the participation of victims and is more likely to benefit victims than proceeding through youth court.

A variety of alternative measures are presently employed in communities and may be administered by volunteers, youth justice committees or any other authorized group. The range of measures includes: compensation from the offender to the victim; mediation and conciliation; a formal reprimand; interviews with the youth and parents or guardian to determine the reasons for the offence; a curfew; crime prevention classes and projects;

referrals to other agencies such as health or social services; and/or any combination of the above options.

Community Justice Committees

Community Justice Committees are established under the authority of section 69 of the *Young Offenders Act*. A Community Justice Committee is described as:

...a group of citizen volunteers who have been formally established to assist in the administration of justice and in operation of a program or service to offenders (Manitoba Corrections Handbook).

Committees are to be comprised of citizens who represent and are sensitive to the interests of all community members. Operational costs of these committees are the responsibility of the communities and committee members are not paid for their participation.

Committees in various communities will have diverse priorities; however, the Manitoba Corrections Handbook states that these committees work under a set of shared principles. These principles or objectives include: the protection of society; maintaining the accountability of offenders; the protection of legal rights for offenders; victim compensation and restitution; and the right of citizens to participate in community justice issues that concern them.

Community Justice Committees have the authority to carry out a variety of functions and activities including the following: public education about crime; assistance in the creation and evaluation of corrections programs; development of crime prevention programs; development of alternative measures; involvement in sentencing of offenders; mediation; arrangements for community service orders and fine option programs; and support for offenders returning to the community.

Aboriginal Justice Services: Framework for Development.

In addition to the four models of community based justice operated by *Community and Youth Corrections* in Manitoba, *Aboriginal Justice Services* of Manitoba has created a document entitled a "Framework for Development" which provides direction to aboriginal communities wishing to develop justice projects. Aboriginal Justice Services

outlines four basic options that communities may wish to adopt. These four options are: community involvement in sentencing which may include sentencing circles, sentencing panels or the creation of a sentencing advisor; community justice committees for youth and adults; resident justices of the peace; and, alternative dispute resolution programs.

Aboriginal Justice Services in Manitoba also provides a category for "other program options;" however, such options are subject to specific guidelines set out by *Aboriginal Justice Services*. The guidelines require a formal proposal and all projects are subject to external evaluation. One project that has attracted a great deal of attention throughout Canada is the St. Theresa Point Youth Court.

St. Theresa Point Youth Court In Manitoba

The St. Theresa Point First Nation Youth Court is designed to address aboriginal youth crime and delinquency. The Youth Court serves youth who offend Band Bylaws, Provincial Statutes and various provisions of the Criminal Code. Serious offences such as murder and sexual assault are referred to the provincial court. Aboriginal youth who opt to participate in the St. Theresa Point Youth Court proceed through five stages:

- (1) an Intake Group investigates the offence, collects background material and recommends intervention plans;
- (2) a Case Conference Team consisting of community agencies and citizens reviews these reports, finalizes intervention plans and determines if the youth should appear in the Indian Government Youth Court;
- (3) if a court appearance is deemed necessary the Indian Youth Court will hear the case if the youth admits responsibility;
- (4) a locally appointed Indian Youth Court Judge will hear recommendations of the Case Conference Team and impose a disposition;
- (5) follow-up and monitoring is undertaken by the Co-ordinator and members of the Case Conference Team (Department of Justice, 1992: 10-9-3).

The St. Theresa Point youth court is one of the more progressive aboriginal justice initiatives that deals specifically with aboriginal youth and it is often looked upon as a

potential model for other aboriginal communities throughout the country. Moreover, Hamilton and Sinclair (1991) report that "there does not appear to have been any instance where a person in the community has questioned the authority of the community magistrate" (576-77).

SASKATCHEWAN SOCIAL SERVICES

Saskatchewan Social Services, through the Action Plan for Children, has committed itself to a restorative approach to youth justice. In line with this new philosophy, two projects are already underway in Regina, which are the Kweskohte Alternative Measures Program and the Atoskata Compensation Project. These two projects are good examples of "community justice" taking place in an urban environment.

Kweskohte Alternative Measures Program

The Kweskohte program was created by aboriginal people and is delivered by an all aboriginal staff. The program provides a pre-charge diversion option for aboriginal youth aged 12 to 17 who reside in Regina. While Kweskohte is directed at first-time offenders, all referrals--which come directly from Regina City Police Services--are considered. In order to be eligible for the program, the young person must admit and accept responsibility for the alleged offence.

The Kweskohte process involves a family group conference where aboriginal coordinators and elders facilitate reconciliation and reparation. The conference is centered around a community-based decision making process that empowers the community, victims and offenders to resolve the conflict. The conference results in an agreement with the young person to commit to one or more of the following options: a formal apology; service to the victim; community service; compensation; and/or restitution. The youth may also be subject to personal counseling, cultural activities or other projects related to home, school or employment opportunities.

Kweskohte is supported by a coordinated network of city police, a local youth court judge, the Crown, legal representatives and social services which contributes to the

program's success. However, it is the Kweskohte coordinators and aboriginal elders who take responsibility for all young people in the program from the time of their referral through to their conference. In addition, they provide support and follow-ups for the youth, victims, and their families until the problem or conflict has been adequately resolved.

Atoskata Victims Compensation Project

The Atoskata project deals with property offences, and in particular, auto theft. The program accepts both aboriginal and non-aboriginal youth. The Atoskata program was initiated because:

Community agencies and government departments felt there needed to be a new way of addressing property offences committed by youth that helped the youth understand how the offence affected their victim, helped support the youth in developing a non-offending, socially productive lifestyle and provided some compensation to the victim for his/her loss (Atoskata News Conference, 1995).

The program teaches youth to be responsible and accountable for their behavior while at the same time providing them with opportunities for a more productive role in the community. This is accomplished by providing youth with work placements which allow them to make restitution for their offence.

In the case where an offender commits a subsequent offence while involved in the program, or where the youth fails to participate in program activities, the youth is removed from the program. For youth who successfully complete the program, sentences typically involve a period of probation, community service hours, compensation or a combination of these options.

ALBERTA: COMMUNITY-BASED JUSTICE PROGRAMS FOR ABORIGINAL AND NON-ABORIGINAL YOUTH

Youth Justice Committees

As is the case in Manitoba, the province of Alberta provides for the development of youth justice committees within and by communities who wish to participate in the administration of youth justice under the authority of section 69 of the YOA.

Youth justice committees in Alberta are guided by four basic principles. The first principle is that all youth must be held accountable for their criminal behavior. Second, the rights and freedoms of both young offenders and victims must be protected. Third, a balance between the goal of protecting society and the goal of employing the least intrusive measures when dealing with a young person must be sought. Finally, the fourth principle that guides youth justice committees is that communities have the right and indeed a responsibility to participate in the administration of youth justice.

The functions and activities of youth justice committees vary among communities. Services and programs may include: the administration of alternative measures; assisting victims of crime; supporting young offenders through reintegration; providing sentencing recommendations; providing youth with placements to fulfill community service orders or fine option programs; arranging victim-offender reconciliation; facilitating mentor-ships for youth; referral of youth to services; and, educating the community about youth crime (see *Guidelines for Formation of Youth Justice Committees*, 1995).

As of October 1995, there are 28 youth justice committees operating in both aboriginal and non-aboriginal communities throughout Alberta. An example is the Stettler Town and Country Youth Justice Committee.

Alternative Measures

Again, as in Manitoba, Alberta employs section 4 of the *Young Offenders Act*, which provides for the development of alternative measures as a means for diverting youth from the formal youth court system. The objectives, eligibility criteria and various

conditions of alternative measures are the same as those discussed with respect to the province of Manitoba.

Youth Justice Circle of Ermineskin

An example of an alternative measures option in Alberta is the Youth Justice Circle of Ermineskin which provides judicial alternatives for aboriginal young offenders. The Circle is involved in a variety of activities such as: making recommendations during the sentencing of aboriginal youth; providing alternatives for youth to the formal court process; educating the community about youth crime; educating young people about crime and crime prevention in order to teach them about accountability and responsibility; and, assisting youth to become more productive members of the community.

Other Aboriginal Programs and Initiatives In Alberta

In addition to the formation of youth justice committees and the operation of alternative measures programs in both aboriginal and non-aboriginal communities in Alberta, there are also a variety of initiatives which address the specific needs of aboriginal people. These initiatives can be divided into two categories: community programs and custodial programs.

Community Programs

Community programs include contracts for assistant probation officers, community supervision, Native Courtworker programs, various correction's societies, Elder's programs and youth worker programs. The Assistant Probation Officer Program contracts with individuals in communities to deliver corrections services. About 60% of Assistant Probation Officers are aboriginal and they primarily serve an adult clientele. The Community Supervision Program also employs aboriginal probation officers to supervise probation orders and temporary absences. Native Courtworkers provide a variety of services including counseling, translation and explaining court procedures.

Corrections societies such as the Kainai Community Corrections Society and the Yellowhead Tribal Community Corrections Society manage community corrections

services including youth and adult probation, courtworker programs and crime prevention strategies. Elder's programs generally involve Elders supervising and mentoring with offenders--both youth and adult. Finally, the Tallcree Youth Worker Program employs a youth worker who is involved in cultural and recreational activities as well as self-help functions for young people in conflict.

Custodial Programs

Limited to the correctional setting, custody programs include an Elder's visitation program, addictions treatment, and Native Brotherhood and Sisterhood organizations. In addition, the Poundmaker's Adolescent Treatment Centre, staffed by aboriginals, provides a 90 day treatment program for aboriginal young offenders serving open custody dispositions. The program incorporates both cultural and spiritual components into treatment.

Alberta has also created both aboriginal youth custody homes and aboriginal group homes. Aboriginal custody homes are private residences which are contracted to house aboriginal youth in open custody with the intention of providing a family environment for aboriginal young offenders. The aboriginal group homes also service open custody youth and emphasize cultural and spiritual activities. It is evident that the need for the creation of aboriginal specific programs for youth has been identified in Alberta, and that the province is attempting to address that need.

BRITISH COLUMBIA

Unlocking Aboriginal Justice Project (UAJ)

The Unlocking Aboriginal Justice project has been operating in North Western British Columbia since 1990, and provides alternative dispute resolution to both adult and young offenders. Initially a joint program of the Gitksan and Wet'suwet'en Nations, as of April 1, 1995, the Nations now operate individual UAJ programs in their respective regions. The UAJ program was developed by the Gitksan and Wet'suwet'en Nations in an effort to take responsibility for their own communities and to govern themselves according

to their traditions, customs and laws. A key objective of the justice project is to promote harmony among the various clans and houses (telephone correspondence February, 1996).

The Unlocking Aboriginal Justice project works in partnership with the Canadian criminal justice system. Referrals to the UAJ program generally originate from the police and are then passed on to the Crown who determines if the candidate is suitable for the UAJ program. Referrals can also come from the community, the accused, defence counsel, legal services or the Ministry of Social Services. The UAJ program is not restricted to criminal matters, indeed, civil cases such as custody disputes may also be referred to the program (telephone correspondence February, 1996).

UAJ operates as a diversion mechanism as well as participating at the post-charge stage in sentencing. The program is based on consensus decision making and places emphasis on respect, reintegration of the offender, counseling, treatment and restitution (telephone correspondence, February, 1996).

Unlocking Aboriginal Justice is run by UAJ facilitators who initiate the process by obtaining the candidate's consent to participate in the program. Once the accused agrees to participate, if there is an identifiable victim, they too are asked for their agreement to have the accused processed through the UAJ program. The input of the victim is considered essential to the restoration of harmony. Finally, the facilitator speaks with the Chief of the participants House who decides whether or not to accept the case (telephone correspondence, February, 1996).

The UAJ program requires that all parties agree to an 'action plan' for the offender, which may include conditions such as treatment, counseling, community hours or restitution. In the case where the participants are acting in a post-charge capacity, the action plan becomes a part of the conditions for probation. Offenders who agree to participate in the UAJ program may be subject to monitoring for a period of up to two years (telephone correspondence, February, 1996).

The Unlocking Aboriginal Justice program is ongoing and is presently in the process of evaluation (telephone correspondence, February, 1996).

The South Vancouver Island Justice Education Project

The South Vancouver Island Justice Education Project was active from October 1991 through to March 1993. While this is not a current project it warrants some attention. The project was developed to address cultural barriers faced by Coast Salish people in the criminal justice system by incorporating Coast Salish traditions into the justice process; the project had both an education component and an operational component. The objective of the educational component was to provide cross-cultural education to government agencies and to communities, while the operational component was to create and implement diversion alternatives and sentencing intervention for aboriginal youth and adults (Clark et al., 1995).

The primary objectives of the project included the following:

- To utilize the processes of both the Canadian and First Nations justice system;
- To improve the justice system's response to First Nations' citizens;
- To involve all main parts of the justice system on the Education Committee and in the process of improving delivery of justice to First Nations' people on South Vancouver Island;
- To integrate the participation of the Elders Council and its appointees in each stage of the operation of justice delivery to aboriginal citizens in criminal, youth and family cases;
- To reduce the incarceration rate of First Nations' citizens;
- To apply First Nations' justice practices under: a. alternative measures
b. diversion c. dispute resolution d. family counseling;
- to produce cross-cultural education experiences for justice system professionals and Aboriginal people on South Vancouver Island; and,
- To support positive reform of justice delivery (Clark et al., 1995: 6).

The project was operated and administered primarily by a project coordinator, an Elders Council (S'ul Hwen Council) and representatives of the Crown. The selection of candidates for diversion involved an informal process of communication between the Elders Council and members of the community and was also dependent on the Council's knowledge of the individual offender's life circumstances. Once a candidate was accepted by project coordinators, then a formal diversion contract would be drawn up. Standard conditions of diversion might include community service, an apology to the victim, restitution, counseling or any other conditions deemed necessary by the Council such as abstinence from alcohol (Clark et al., 1995).

The project was terminated in 1993 for several reasons, many of which were related to problems with administration. A review of the project found that members of the community held negative views of the project in that they felt that it was implemented in a "top-down" manner (Clark et al., 1995). Respondents argued that the project failed to address the needs of the community because the process itself did not facilitate any significant involvement on the part of the community. It was said that decisions were made in concert by the Tribal Council and the government and did not involve adequate citizen representation. Moreover, respondents believed that the "political agendas" of both the government agencies and project administrators did not always coincide with the needs of the community and were sometimes counterproductive to those needs (Clark et al., 1995).

While not dealt with in the review, accusations revealed through the media in 1992 suggested that in terms of sentencing intervention, inappropriate actions may have been taken by the project administrators (Clark et al., 1995). There was no available documentation with respect to sentencing intervention, however, it was learned that some community members felt 'pressured' to participate in traditional justice as opposed to taking their case through the formal system. In addition, some victims were reluctant to take their case to the Council for fear that the offender would simply be 'counseled' and

return to the community which could place some victims in danger to re-victimization. Overall, victims felt that they did not have a say in the project and that their needs were not adequately addressed (Clark et al., 1995).

The final review of the South Island Project suggests that there is a need for extensive consultation with communities prior to devising and implementing justice programs. In order to address the diverse justice needs within individual communities those needs must first be determined. The review also stated the need to direct funds towards a non-political agency that would oversee project of operations. Other suggestions included the provision of more training for project administrators, limiting the jurisdiction of the project to less serious offences and greater involvement of the community in the selection of project staff (Clark et al., 1995).

In terms of the future of justice on South Island, respondents agreed that citizens should become more involved in problems surrounding crime, young people and families. With respect to models of justice, the review found that citizens felt that there should be a distinction between serious and minor offences and that serious offences should be dealt with by the existing justice system. Respondents also felt that citizens should have a choice between participating in traditional resolution or taking the case through the court system. Generally the review found that communities wished to move closer to self-governance in justice matters and that they were willing to develop approaches that would not conflict with the existing system.

Other Initiatives in BC

In addition to the Unlocking Aboriginal Justice project, there are a variety of other projects currently taking place in the province. First, the corrections branch often contracts community members to work as support workers for youth at risk. In some situations the corrections branch contracts directly with a band to carry out a specific program, while at other times the corrections branch will provide partial funding for

programs so that they have the option of sending young people to the program through a court order (telephone correspondence, October 1995).

Second, recreation programs in aboriginal communities, which include activities such as hockey and basketball, are popular as a means of preventing youth crime. The provincial government assists communities to set up First Nations Recreation Boards and teaches communities how to plan recreational events (telephone correspondence, October 1995).

Third, while there is very little documentation, cultural camps that deal with youth at risk are being operated in North Western British Columbia. These youth camps serve a variety of young people and are not limited to youth in conflict with law. These camps operate apart from the local corrections branch and are run by communities. Consequently, the corrections branch cannot order a young person to attend these camps, instead it is assumed that the community will be aware of which youths are considered to be at risk and send those youth to the camps accordingly (telephone correspondence, November 1995).

Fourth, it was learned that Hazelton now has a transition house that holds approximately four or five youth. The transition home houses youth who have just been released from custody and if they fail to comply with the conditions of their release they are returned to custody. The house is an aboriginal based program where the youths are taught skills in hunting, fishing, and trapping as well as other spiritual and cultural activities (telephone correspondence, November 1995).

Finally, a unique program known as *Project Rediscovery* has been operating in the Queen Charlotte Islands since 1978. This program is a residential attendance program for aboriginal and non-aboriginal young offenders and works under contract with the Corrections Branch. The program helps young people to build self-esteem by re-engaging them with their cultural heritage in a wilderness environment.

Conversations with corrections personnel revealed that there are some communities who are taking control over various aspects of the administration of justice; however, these projects are primarily still in the developmental stage and many of them deal with adult offenders (telephone correspondence October/November 1995).

YUKON TERRITORY

Youth Empowerment For Success

The Youth Empowerment for Success (YES) program is funded through federal health and is in its last of three years of funding. The program is designed to serve youth who are considered to be at risk and to act as a community development catalyst. Community groups work to develop activities and projects for youth at risk including recreational programs and youth conferences. Presently in the Yukon there is also a proposal for a Peacekeeper program which would provide young people with conflict resolution skills (telephone correspondence, February 1996).

Circle Sentencing

The Yukon is well known for its introduction of sentencing circles. While circles are used for both aboriginal and non-aboriginal youth and adults, circles are more popular in aboriginal communities and they deal with more young people than adults (see LaPrairie, 1995b). Sentencing circles are based on the tradition of aboriginal healing and talking circles, and local Judges contend that the circles empower communities through the generation of collective responsibility (see LaPrairie, 1995b). A sense of collective responsibility is said to strengthen communities, which in turn will assist in crime prevention. The circles also place an emphasis on the causes of crime rather than the symptoms in order to discover stronger, more long term solutions to offending behavior.

Other Youth Justice Initiatives In the Yukon

Initiatives for aboriginal youth justice in the Yukon are primarily in the planning and developmental stages. Most community projects that deal with youth are very informal, are community driven and community owned. In other communities where

models of justice are developing, the models have tended not to separate young people from adults and instead they have incorporated aboriginal youth into the basic community model. In one community it was said that the members of the community were simply not ready to deal with the issue of youth crime (telephone correspondence, December 1995).

NORTHWEST TERRITORIES

Ndilo Chekoa Program

The Ndilo Chekoa Program is a youth crime prevention program that is operated by Yellowknives Dene Band. It was stated in a recent evaluation that the "program focuses on the basic needs of Dene children and youth to reduce the nature and extent of crime and delinquency within the community" (Patenaude et al., 1995: i). The program is government funded and community-based and has both after-school and weekend components. The objective of the program is to provide basic necessities such as nutrition and education to Dene youth, as well as to involve young people in cultural activities. A primary goal of the Ndilo Chekoa Program is to build self-esteem among Dene youth.

Youth Justice Committees and Alternative Measures Programs

Similar to other jurisdictions in Canada, youth justice committees are operating and continue to be developed throughout the Territories. Youth justice committees accept referrals from the police or the Territorial Court and function as an alternative to the formal court process. These committees oversee alternative measures programs in communities by determining the appropriateness of referrals as well as the types of measures that are invoked for a particular youth (Department of Justice, 1992). Youth justice committees in the Territories serve both aboriginal and non-aboriginal youth.

ONTARIO

With respect to Ontario, it was learned that while several justice projects exist in the province, there are very few projects which deal specifically with aboriginal youth (telephone correspondence with Ministry of the Attorney General, Ontario, November 1995). The Walpole Island First Nation has a program that provides counseling and

supervision to aboriginal youth aged 12 to 16 who are on probation. The program staff may also administer alternative measures where necessary. Other initiatives for aboriginal youth in Ontario include a limited number of wilderness projects such as the Cha-Ka-Besh Program in North Western Ontario (Department of Justice, 1992).

Some of the projects that are operating for adults include: the Anishinaabe Justice Program; the Whitefish Bay First Nation Tribal Court System; Nishnawbe-Aski Legal Services; and the Akwesasne Justice of the Peace Training Program (Department of Justice, 1992).

QUEBEC

Justice For The Cree

Carol LaPrairie's research in Quebec found that in terms of a vision, communities clearly desired a system based on informalism; however, most aboriginal people had not even thought about the possibilities for their own system of justice--including youth justice (see LaPrairie, 1991). Those aboriginal people who had considered justice matters were also concerned about the potential for community-based justice systems to become extensions of the existing power structures, which could subject vulnerable members to further marginalization within the community. It is noteworthy that a National Inventory of Aboriginal Justice Programs, Projects and Research published by the Department of Justice in 1992, did not report any aboriginal youth justice projects in Quebec.

NEWFOUNDLAND

Family Group Decision Making Project

The Family Group Decision Making Project was developed in three communities in Newfoundland. The first community is Nain, Labrador where the population is predominantly Inuit. The second community is Port au Port Peninsula which is a mixed community consisting of English, French and Micmac populations. Finally, the provincial capital of St. John's was chosen as the third community with a population that is primarily of British and Irish descent (Burford and Pennell, 1995).

The Family Group Decision Making Project is not being implemented in the context of youth justice; however, the model is based on the New Zealand model of youth justice which will be discussed later. This particular project was designed to bring families and friends together in the form of a family group conference with the objective of creating partnerships and empowering each community to deal with the problem of family violence (Burford and Pennell, 1995). The project received referrals from both the department of social services and the Child Welfare division until funding was terminated in the spring of 1995. A one year follow-up report on the results of this experiment will be available in the summer of 1996.

If this project demonstrates some success in the area of family violence, the model could be developed under the alternative measures provisions of the *Young Offenders Act* by aboriginal and non-aboriginal communities wishing to create community-based options for young offenders.

Other Initiatives In Newfoundland

In terms of young offenders, Newfoundland has also adopted the use of youth justice committees and alternative measures. Examples include the Happy Valley Youth Diversion Program and the Labrador West Alternative Measures Program. Youth justice committees and alternative measures programs in Newfoundland serve both aboriginal and non-aboriginal youth.

NEW BRUNSWICK, NOVA SCOTIA AND P.E.I.

The Department of the Solicitor General in New Brunswick operates a program that hires "Community Services Paraprofessionals" to perform probation and other services to aboriginal and non-aboriginal youth and adults as required. In addition, Native probation officers have been hired to provide correctional services to aboriginal youth and adults (Department of Justice, 1992).

Nova Scotia adds itself to the list of jurisdictions in Canada that uses the alternative measures provisions of the *Young Offenders Act* to deal with both aboriginal

and non-aboriginal offenders. This program accepts young people who are 16 and 17 years of age and encourages them to repair any damage or harm they may have caused to individuals and/or the community. Various alternative measures may include community service, restitution, an apology to the victim or a combination of these measures.

Finally, at the time of the National Inventory of Aboriginal Justice Programs in 1992, there were no reported justice programs for aboriginal youth or adults at Prince Edward Island.

NEW ZEALAND: PUTTING THEORY INTO PRACTICE, AN INTERNATIONAL EXAMPLE

The New Zealand Children, *Young Person's and Their Families Act* (1989) has dramatically reformed the youth justice system in that country (see Brown, 1995; Lilles, 1994). The legislation first "provided for the jurisdictional separation between children and young persons in need of care and protection and those who offend against the law" (Brown, 1995: 2). Moreover, what is unique about the legislation is that "there is a clear statutory intention to attempt to strengthen families and foster their own means of dealing with their offending young people" (Brown, 1995: 3).

With the implementation of the *Act* significant changes readily occurred. First, the police began to divert young offenders in much greater numbers, which in turn led to fewer young people appearing in court and fewer youths ending up in custodial facilities (see Brown, 1995; Lilles, 1994). The large scale diversion by police is "neither law and order or social welfare premised," (Lilles, 1994: 15) rather, the underlying assumption is that much of youth crime is essentially 'normal' behavior and as such, formal prosecution should be delayed where practicable. The second, and perhaps more notable legislative change, has resulted in the creation of the *family group conference procedure* (Brown, 1995). The family group conference is a pragmatic manifestation of the concept of restorative justice (see LaPrairie, 1995b, 1995c; Polk et al., 1995).

The Family Group Conference

The birth of the family group conference was preceded by a general public frustration with the formal justice system in New Zealand (Lilles, 1994). Concerns centered around the fact that too many young people were being charged and appearing in court for less serious offences and it was felt that the courts were not the place to deal with social and family problems. Moreover, victims were generally excluded from the justice process. With regard to the Maori population, the adversarial court process was considered to be particularly inappropriate.

A further instigator behind the evolution of the family group conference is the belief that "harsher penalties may in fact increase crime rates" (Lilles, 1994: 17). It is argued that the formal justice system in New Zealand is embedded in the theory of deterrence, which has not yet shown to have a significant impact on youth. In contrast, the family group conference presents an alternative, community-based approach to youth justice which empowers families to take responsibility for their own conflicts (see also LaPrairie, 1995b; 1995c; Polk et. al., 1995).

The Process

The New Zealand family group conference is designed to deal with both Maori and non-Maori young offenders (Lilles, 1994; Royal Commission On Aboriginal Peoples, 1996). When a young person commits an offence a Youth Justice Coordinator (YJC) contacts the family and other individuals who may have an interest in attending the conference--such as members of the extended family, friends, the victim, and police officers. According to Lilles (1994) the average number of conference participants is nine, however, one conference attracted thirty-nine concerned individuals. There are no lawyers or judges involved in the process and decisions are based on a group consensus which includes the participation of the victim.

The family group conference process encourages young people to accept responsibility and to be accountable for their actions. In addition, the participation of

families and the larger community fosters a communal sense of accountability. A critical distinction between the formal system and this process is that within the New Zealand model, it is believed that accountability and responsibility do not necessarily have to be achieved through overt punishment. Rather, the process is victim centered and reparation of damages is the primary objective (LaPrairie, 1995b, 1995c; Polk et. al., 1995; Lilles, 1994).

The family group conference further provides an arena for decision making. Decisions are based on a group consensus and the end result of the conference is the development of a formal, consensual 'plan' for the young person. The plan may include such things as a formal police cautioning, reparation to the victim, an apology, community service or restitution (Lilles, 1994). If no plan can be agreed upon, the case will be turned over to the formal justice system. When a plan is agreed upon but the consequences of the plan are not fulfilled by the youth, he or she can be brought back to the family group conference. It is important to note that the plan will always include input from the victim or someone representing the victim. In addition, the victim holds the power to veto any recommendation that is made by the family group conference.

Family group conferencing has the potential for success because it provides a forum for mutual comprehension and understanding of youthful criminal behavior. The offender is made to face the consequences of his or her behavior, and the victim, as well as the families involved, can learn why the offender committed the acts in question (LaPrairie, 1995b, 1995c; Polk et. al., 1995; Lilles, 1994).

The Family Group Conference as a Multi-purpose Initiative

It is important to note that the family group conference does not only provide a service to young people who have been diverted from the formal system, but serves other purposes as well. First, in the situation where a young person has been arrested, the family group conference will make recommendations regarding the youth's custody status (Lilles, 1994). Second, if the youth is arrested but does not deny the charge, the family

group conference can request that the proceedings be discontinued, or they can make recommendations for a suitable disposition. Finally, where a youth denies the charges brought against him or her and is brought to court and found guilty, the court can then turn to the family group conference for recommendations. In the majority of cases however, the young person admits responsibility for the offence and is not arrested. Thus, the majority of cases are handled by the family group conference.

An Overview of the Family Group Conference

The family group conference has the potential to be an expeditious, localized, effective and fiscally responsible way in which to deal with the majority of youth crime. However, it has been conceded that the New Zealand Model does not accommodate "deeply disturbed and dangerous" offenders (Lilles, 1994; see also Braithwaite and Mugford, 1993). More significantly, it is critical to understand that the process may be severely hindered in cases where the entire family is dysfunctional. Notwithstanding the limitations however, Lilles (1994) maintains that where the 'stakeholders' (the family, victims and the community) are involved in the process, people are likely to become empowered at the grass roots level. Moreover, it is suggested here that the empowerment of individuals and families is a potential catalyst for more general community healing. Ultimately, the conferencing process may lead to solutions which are "more specific to the social and economic causes of offending" within individual communities and help to strengthen communities in the process (Lilles, 1994: 20).

While still in its infancy, the New Zealand experience is important because it demonstrates that new strategies towards youth justice can be entertained, and with some success, (which is evidenced by the fact that youth crime has not increased in that country). With regard to the Maori population, in his concluding remarks, Lilles (1994) states that:

The family group conference accommodates aboriginal concepts of extended family, collective decision making, reparation and victim participation in the process (28).

Notwithstanding the fact that this revolutionary and elaborate diversion strategy has the capacity to be victim centered and cost effective, Lilles (1994) expects that much criticism will arise from those who continue to maintain that youth crime is out of control.

Other Criticisms

While there is enthusiasm for family group conferencing, some valid concerns have been raised (see Polk et al., 1995). For example, LaPrairie (1995b) questions whether the family group conference addresses conditions such as unemployment, poverty and family breakdown, which lead to delinquent behavior in the first place, or whether it is simply another mechanism for processing youth. LaPrairie (1995b) further challenges whether 'the family' is still the most important influence on contemporary youth--particularly those who come from a family that is dysfunctional.

Other concerns raised include issues surrounding due process and the rights of the offender, and the fact that thus far, victims tend to be the least satisfied with the process. Finally, in response to the notion of 'empowerment' Depew (1994) points out that due to a lack of research, it is unclear whether or not family group conferencing and other community-based justice alternatives are really acting as catalysts for building stronger communities.

Family group conferencing is just one approach that falls under the paradigm of restorative justice and its effectiveness is clearly still being evaluated.

Is Family Group Conferencing Plausible For Canada?

In asking whether or not the family group conference model would be practical in Canada, some observations can be made regarding the initial distinctions between New Zealand and Canada. First, in terms of legislation, Lilles (1994) argues that in New Zealand, "the principles and philosophy underlying the legislation are clear and consistent" (7). As has already been discussed, section 3 of the YOA (the Declaration of Principle)

has been criticized for its lack of clarity and its failure to provide consistent guidelines to justice practitioners.

The second distinction is that in New Zealand "diversion by the police is a significant factor in reducing the size of the intake to youth court (Police Cautioning)" (Lilles, 1994: 7). While some areas of Canada are becoming more involved with community-based policing schemes, it is not likely that Canadian police forces are diverting young people to the extent of police in New Zealand.

Finally, youth justice legislation in New Zealand has formally adopted the family group conference as a mechanism for maintaining the goal of strengthening families as set out in the legislation itself (Lilles, 1994). The Royal Commission On Aboriginal Peoples (1996) adds that:

Where the New Zealand legislation differs from the YOA is that alternative measures are built into the system as a pivotal, rather than discretionary, feature (121).

While attempts at policy integration and reform are being made in at least two provinces (namely Alberta and Saskatchewan), it is not yet evident if this trend will spread further throughout Canada. It has already been revealed that family group conferencing is being experimented with as a component of various aboriginal justice projects in Canada, and it is likely that such projects will grow in popularity as the philosophy of restorative justice becomes more prevalent here.

SUMMARY OF PROGRAMS

This inventory reveals that at this time, many aboriginal youth justice initiatives in Canada are state-driven and reflect an incremental approach to the acquisition of control over justice matters. While they maintain the capacity to accommodate diversity in local conditions, all of the present programs reflect a partnership with the existing criminal justice system. These partnerships represent a degree of political will in that they require the state to retreat somewhat from the justice process. In addition, such partnerships have

required aboriginal people to place some trust in a justice system that has not always treated them fairly.

With respect to the issue of political will, the complex political agendas of the federal, provincial and aboriginal governments pose a challenge for the implementation of aboriginal justice programs. Indeed, this issue was prominent in the South Island project where community members felt that the "political agendas" of both the government agencies and project administrators did not always address the needs of the community (Clark et al., 1995). Changes in both provincial and federal political dynamics in terms of leaders, parties, electoral platforms and policies have a significant influence on aboriginal justice matters and this is reflected in the nature and extent of programs that are implemented at the community level.

As well, the political agendas within the communities often differ and create considerable conflict. For example, key leaders can be associated with competing factions or even families; therefore, trying to define who represents "community interests" or what the community wants is potentially a complex political issue. In effect, there are separate political agendas at work at the federal, provincial and community levels. It is however, beyond the scope of this thesis to explore this crucial theme given the enormous number and diversity of groups involved in first nations issues in Canada.

In terms of initiatives, aboriginal youth justice projects developed thus far can generally be classified into one of the following categories: crime prevention programs for children and youth at risk; alternative measures programs; youth justice committees; various community contracts with corrections, such as those for probation services; and, alternative dispute resolution. In addition, while projects designed specifically for aboriginal youth do exist, the majority of programs such as alternative measures programs and youth justice committees generally serve both aboriginal and non-aboriginal youth depending on the demographics of local communities.

It is difficult to determine whether the projects discussed herein reflect aboriginal views of justice, or more simply, the options available to them. Nevertheless, these options do foster a significant degree of freedom and flexibility in justice for local communities. While there is a general lack of empirical research, there is a growing sense that community-based justice initiatives will facilitate the empowerment of communities, which in turn, will likely result in healthier communities with less crime and disorder (see Bazemore & Umbreit, 1995).

This discussion and analysis of existing aboriginal youth justice projects and initiatives in Canada, demonstrates that progress is possible within the legislative framework of the *Young Offenders Act*. Moreover, in view of the current strategy of aboriginal justice, it is apparent that the YOA has the capacity to accommodate many of the *immediate* needs of aboriginal youth. In terms of youth, the argument is made that section 4 of the YOA is sufficient at this time and that "political commitment rather than legislation is the key to getting these programs off the ground" (Jackson, 1992: 220). Jackson (1992) warns that we should not discount the value of enabling legislation but he supports the conclusion that section 4 will accommodate the immediate needs of aboriginal youth. It is important to note that the Royal Commission On Aboriginal Peoples, (1996) revealed that at the time of their report the Parliament of Canada was reviewing the *Young Offenders Act* and discussing potential future amendments. The Commission suggested that:

...this would have been an excellent opportunity to consider including provisions such as family group conferencing, which, in the transition to self-governing aboriginal justice systems, would have addressed the over-representation of aboriginal youth in correctional institutions and paved the way for aboriginal nations and their communities to address the problems facing their most precious gifts, their children and young people (Royal Commission On Aboriginal Peoples, 1996: 126).

CHAPTER IV

CONCLUSION

The *Young Offenders Act* quietly replaced the *Juvenile Delinquents Act* in 1982 (Corrado, 1992). Since that time however, the YOA has become the focus of justice reform in Canada. Heightened public frustration and a popular perception of the *Act* as lenient has put pressure on politicians to 'get tough' with young offenders, and recent amendments to the YOA suggest that the government is responding (see Hylton, 1994). However, the present preoccupation with crime control objectives in youth justice does not adequately address the complex issue of aboriginal youth crime.

While patterns of aboriginal criminality vary significantly, it cannot be denied that many aboriginal communities suffer from a disproportionate level of crime and violence resulting from complex historical and contemporary factors (see LaPrairie 1988, 1992a, 1995b; Royal Commission On Aboriginal Peoples, 1996). Offences are generally committed by young males under the influence of alcohol and are more often of an interpersonal nature. Aboriginal people also tend to become involved with the criminal justice system at a younger age than non-aboriginals which contributes to their over-representation in the youth justice system.

It has been argued that the *Young Offenders Act* has had a more serious impact on aboriginal youth than non-aboriginal youth (see Hamilton and Sinclair, 1991; LaPrairie, 1988). Aboriginal youth tend to have more charges laid against them and spend more time in jail than other youths. This trend is significant in light of the impoverished conditions of many contemporary aboriginal communities.

The present day conditions of aboriginal communities are the end result of a long history of colonization. Attempts to assimilate aboriginal people through such vices as the *Indian Act*, have generally served to marginalize aboriginal people, alienating them from the rest of society. This marginalized position is evidenced by poverty, unemployment,

lower levels of education, higher rates of alcohol and solvent abuse, heightened incidents of suicide, general disorder and crime (Jackson, 1992; Griffiths and Verdun-Jones, 1994). The macro influences of colonization have further lead to dramatic changes to the lifestyles of aboriginal people.

The process of colonization and the introduction of the reserve system brought once isolated individuals together into more structured communities. Aboriginal people are no longer dependent on each other for survival, rather, communities have become stratified through capitalism, modernization and the redistribution of power and control over resources (see Depew, 1994). The availability of wage labor has disrupted the subsistence-based economy and diminished traditional social and gender roles. Growing individualism has also made relationships between men and women and youth and elders more complex. Consequently, rules for living that were once appropriate in the more traditional lifestyle are less relevant in the community context. Rapid social and economic change has in many cases lead to a breakdown in traditional formal and informal social control mechanisms. This breakdown has further resulted in general disorder and crime (LaPrairie, 1995a).

In considering the development of effective community justice projects, it is evident that the concept of justice cannot be separated from the complex issues of daily life. In other words, the problem of youth crime cannot be severed from difficulties with parenting, unemployment, education, economics, and substance abuse. The socio-economic conditions of contemporary communities, whether aboriginal or non-aboriginal, contextualize and help us to understand youth crime. In view of the nature and context of aboriginal youth crime it is further apparent that an emphasis on crime control principles in youth justice is inappropriate.

While at first glance it appears that youth justice has gradually progressed from the Welfare Model, towards a Justice Model and now towards a Crime Control Model oriented approach, in actuality, the YOA is a mixed model of justice that contains

elements of all three philosophies. Critics maintain that the Modified Justice Model is fundamentally flawed in that it fails to provide guidelines to decision makers. On the other hand, advocates of the YOA argue that the mixed model does indeed have specific goals and that it fosters the flexibility that is necessary to address the diverse needs of youth justice in Canada (see Bala, 1994).

The concern at this stage of reform is that there is a preoccupation with crime control measures to the detriment of other valuable principles. This observation is significant in terms of multi-troubled youth who's needs cannot be met by narrowly focused crime control objectives. Moreover, the suggestion that there are inherent distinctions between the basic premises of traditional aboriginal justice and Euro-Canadian justice make a focus on crime control objectives even less attractive for aboriginal communities (see Mills, 1994; Griffiths, 1992; LaPrairie, 1992b; Ross, 1992; Cawsey, 1991; Hamilton and Sinclair, 1991).

The Euro-Canadian justice system has effectively severed the concept of justice from the conflicts of daily life by placing more emphasis on the *processes* of justice rather than on the outcome. In contrast, traditional aboriginal values do not separate justice from other aspects of community life. Instead, justice is a holistic concept that encompasses the overall welfare of the community. Thus, it is not likely that aboriginal perspectives on justice can be accommodated by a purely crime control model.

In recent history, the over-representation of aboriginal youth and adults in the criminal justice system resulted in a move towards indigenizing the system. Today, the failure of indigenization has encouraged both the state and aboriginal people to become more involved in justice through the development of initiatives at the community level. Currently, many aboriginal communities are dependent on external institutions for conflict resolution and it is argued that this dependency might be diminished through the development of more holistic and community-based approaches to justice.

Within the broader context of youth justice reform, and in light of the perceived crime control trend, this thesis has explored the potential for addressing the needs of aboriginal youth within the legislative framework of the YOA. The evidence presented in this thesis challenges the notion that the trend in youth justice is limited to crime control objectives and reveals the growing prevalence of restorative justice initiatives.

While it is evident that recent amendments to the YOA have concentrated on crime control principles, it is also evident that these amendments deal primarily with serious offences (see Hylton, 1994). Moreover, it is not the case that the welfare and justice based tenets of the YOA such as those promoting the 'special needs' of youth, the goal of 'least interference' the special guarantee of rights, or the provisions for alternative measures are being removed from the legislation. Hence, while crime control objectives are presently the center of political attention, it does not necessarily follow that the less punitive and more informal sections of the YOA are being dismissed in practice. Policy makers must remain committed to encouraging the implementation of all principles in the *Young Offenders Act*.

Notwithstanding the perceived crime control trend, evidence presented in this thesis reveals a significant advancement in the popularity of restorative justice practices in youth justice (see Jackson, 1992). It is further argued that while crime control objectives have been in the public eye, behind the scenes, restorative models of justice are receiving more and more attention (see Saskatchewan Social Services, 1995; Alberta Commissioner of Services For Children, 1994). Consequently, this thesis has proposed that the dominant trend in youth justice is bifurcation--and not strictly crime control.

As discussed, bifurcation results in the majority of youth crime being dealt with under the new paradigm of restorative justice through various alternative measures and community-based initiatives, while crime control measures are reserved for only the most serious young offenders. Bifurcation further represents the original legislative intent of the YOA founded in the Modified Justice Model. The Modified Justice Model embodies

diverse principles reflecting the diverse nature of youth crime in Canada. While it is necessary to denounce and deter serious youth crime, the majority of youth crime is less serious and can be dealt with effectively through means other than costly crime control measures.

In terms of aboriginal youth justice aspirations, it has been argued that the majority of these initiatives can be accommodated by the emerging paradigm of restorative justice. Restorative justice aims to repair wrongs and losses through a processes of restitution, reparation and reconciliation (Walgrave, 1995). Restitution can include various forms of mediation, conciliation and compensation depending on the individual situation. Significantly, restorative justice practices have the capacity to accommodate the diverse cultural, religious, geographic and communal values that characterize the Canadian context, while at the same time maintaining the overall goal of making young people responsible and accountable for their behavior. It is apparent then, that restorative justice, which accompanies bifurcation, provides a pathway for current aboriginal justice initiatives within the existing system of youth justice.

The driving force behind contemporary aboriginal justice initiatives is the failure of the dominant system to satisfy the diverse needs of aboriginal communities in Canada (LaPrairie, 1995b). It has been noted that aboriginal people are not attempting to recreate the past and employ mechanisms of control that are no longer relevant in the contemporary context, rather, aboriginal people feel that the current system of justice fails to address the root causes of youth crime and therefore wish to develop projects that will take these issues into consideration.

The dominant form of future aboriginal models of justice has yet to be determined; however, it has been made very clear that there will be no one model of aboriginal justice in Canada (see Hamilton and Sinclair, 1991; Cawsey, 1991). In addition, the point has been made that models which enjoy success in one community, may not necessarily be transferable to other communities. It appears that at this stage, of those communities who

are interested in becoming involved in justice, the majority wish to adopt an incremental approach to the acquisition of control. Many communities have not yet developed the infrastructure that is necessary to support a community-based justice system. In addition, many communities do not have the monetary or human resources required to maintain such a system.

As aboriginal systems of justice become more progressive, the research to date suggests that the current constitutional framework will facilitate the development of such programs. In addition, it has been argued that community-based aboriginal justice systems will likely be connected to the existing system through the *Criminal Code* and the *Charter*.

THE CURRENT STATE OF ABORIGINAL YOUTH JUSTICE IN CANADA

The majority of aboriginal justice programs in Canada are still in their infancy. This is not to suggest that progress is not being made, because indeed the opposite is true. Currently, there is a multitude of proposals for the gradual acquisition of control over various aspects of justice at the community level (telephone correspondence October 1995-February 1996). In addition, funding is being directed towards research, community consultation and conferences regarding aboriginal justice aspirations.

An examination of existing projects suggests that the YOA, through a bifurcated approach, may very well accommodate the more *immediate* needs of aboriginal youth and current aboriginal justice aspirations. While a mere tinkering with the system must be avoided, providing aboriginal people with an incremental approach to the acquisition of control over justice services may help to build stronger communities and contribute to the development of an infrastructure that could later support a larger, more integrated network of service delivery—including youth justice.

It is apparent that a great deal can be accomplished within the arena of aboriginal youth justice if the principles of the YOA are adhered to and implemented in the way that was originally intended. In other words, if the application of crime control measures is

limited to chronic, serious, dangerous and violent young offenders, more energy can be directed at dealing with the majority of youth crime--which is less serious--through the use of restorative justice practices. This conclusion is supported not only by the literature but also by many of those working in youth justice and aboriginal justice policy (telephone correspondence October 1995).

The progress of both youth justice and aboriginal justice concerns could further benefit from integration and coordination in the area of policy development by the provincial and federal governments. It would be worthwhile to explore the recent policy initiatives in Alberta and Saskatchewan in order to acquire ideas for policy reform in the remaining provinces and the territories.

POLICY IMPLICATIONS

The conclusions of this study have several implications for policy development in aboriginal youth justice and they include the following:

- **An Emphasis On Crime Control Objectives Is Inappropriate For Aboriginal Youth**

An understanding of the nature and context of aboriginal youth crime clarifies the inability of narrow crime control measures to address the needs of aboriginal youth. This is compounded by the desire of aboriginal communities to maintain a holistic system of justice whereby the problem of youth crime is not separated from other community issues such as poverty, unemployment, education, substance abuse and cultural disintegration.

- **There Is Potential for Community-Based Justice**

In order to eradicate the common dependency on external institutions of social control, aboriginal communities must be granted more authority to deal with their own conflicts. Community-based justice initiatives must also be developed in accordance with the diverse local conditions of individual communities, keeping in mind any practical limitations of the community to absorb responsibility for justice.

- **There Is A Need to Re-Commit to the Principles of the YOA**

There is a need to re-commit to the principles of the YOA and to implement those principles as the legislation intends--through a bifurcated approach. Bifurcation fosters the flexibility that is necessary to deal with the diverse nature of youth crime in Canada.

- **The Development of Restorative Justice Practices Should Be Encouraged**

Under the bifurcated philosophy of the YOA, the development of restorative justice practices should be encouraged. Restorative justice measures have the capacity to accommodate diversity in geography, demographics, culture and religion, all of which characterize the Canadian context

- **The Incremental Advancement of Aboriginal Justice Should Be Supported**

There is evidence to suggest that aboriginal communities will adopt a transitional and gradual approach to the acquisition of control over justice matters. While a mere tinkering with the system must be avoided, there is a need to encourage communities to mobilize and to begin to explore possibilities for community-based models of justice.

- **The Development of Community Infrastructure Should Be Encouraged**

In accordance with the incremental approach to aboriginal justice, funding should be directed towards projects and programs that assist in the development of community infrastructures which will further facilitate the building of a foundation for future justice endeavors. Funding should also be provided for community consultation and research in the area of community-based justice as well as for any other initiatives that serve to strengthen communities.

- **There Is A Need for Greater Coordination and Integration In Policy**

Recent policy advancements in Alberta and Saskatchewan should be explored and studied. The approach that has been adopted in these two provinces breaks away from the more traditional piecemeal approach of the past, and thus facilitates more holistic solutions that are concerned with the overall welfare of children, their families and their communities.

- **There Is A Need To Prioritize Community Goals**

There is extensive variation regarding the state of aboriginal communities in Canada, and for some, building healthier communities is of a top priority. The lack of development in the area of youth justice may in part reflect the preoccupation of some communities with other more salient issues such as unemployment, education, health services, child welfare, land claim settlements and self-government negotiations. Indeed Ross (1994) suggests that:

It may be appropriate to ask whether scarce training dollars are better spent on developing healing initiatives that may ultimately bring about a retreat of criminal justice interventions as criminal events diminish, or on learning about the intricacies of the western justice system (266-67).

Where communities are facing a general lack of resources it may be more sensible to direct those resources at the root causes of conflict and disorder, which will likely serve to lower the rate of youth crime and in turn, decrease the need for formal criminal justice intervention. In other words, some communities may want to focus their limited resources on early intervention and crime prevention, rather than on more reactionary justice programs.

REFERENCES

- Asch, M.
1993 Home and Native Land: Aboriginal Rights and the Canadian Constitution. Vancouver: University of British Columbia Press.
- Alberta Commissioner of Services For Children
1994 Focus On Children: A Plan For Effective, Integrated Services For Children and Their Families.
- Bala, N.
1994 "What's Wrong With YOA Bashing? What's Wrong With the YOA?-- Recognizing the Limits of the Law." *Canadian Journal of Criminology*. Special Edition. July 1994, 247-270.
- Bala, N.
1992 "The Young Offenders Act: The Legal Structure." In Corrado et al., (Eds). Juvenile Justice In Canada: A Theoretical and Analytical Assessment. Vancouver: Butterworths Publishing.
- Bala, N. & Kirvan, M. A.
1991 "The Statute: Its Principles and Provisions and their Interpretation by the Courts." In Leschied, A. et al. (Eds). The Young Offenders Act: A Revolution in Canadian Juvenile Justice. Toronto: University of Toronto Press.
- Bartol, C. R.
1991 Criminal Behavior: A Psychological Approach. Third Edition. New Jersey: Prentice Hall.
- Bazemore, G. & Umbreit, M.
1995 "Rethinking the Sanctioning Function In Juvenile Court: Retributive or Restorative Responses to Youth Crime." *Crime and Delinquency*. Vol. 41., 296-316.
- Bellegarde, D.
1994 "The Position of The FSIN Justice Commission." In Gosse et al. (Eds). Continuing Poundmaker & Riel's Quest: Presentations Made At a Conference On Aboriginal Peoples and Justice. Saskatoon: Purich Publishing.
- Braithwaite, J.
1989 Crime, Shame and Reintegration. Cambridge University Press.

- Braithwaite, J. & Mugford, S.
 1993 Conditions of Successful Reintegration Ceremonies: Dealing With Juvenile Offenders. Australian National University.
- Brody, H.
 1991 The People's Land: Inuit, Whites and the Eastern Arctic. Vancouver: Douglas & McIntyre.
- Brown, Judge M. J. A.
 1995 Background Paper on New Zealand Youth Justice Process. The International Center For Criminal Law Reform and Criminal Justice Policy.
- Burford, G. & Pennell, J.
 1995 Family Group Decision Making Project Implementation Report Summary. Memorial University of Newfoundland.
- Cant, C. S.
 1980 Crime and Deviance In Heterogeneous Societies: The Impact of the Imposition of Western Norms of the Aboriginal People of Canada and Zimbabwe. Edmonton: University of Alberta, Faculty of Law.
- Carrington, P. & Moyer, S.
 1995 "Factors Affecting Custodial Dispositions Under the Young Offenders Act." *Canadian Journal of Criminology*. April 1995, 127-162.
- Cassidy, F. (Ed).
 1992 Aboriginal Title in British Columbia: Delgamuukq v. The Queen. Vancouver: Oolichan Books Publishing.
- Cawsey, Mr. Justice R. A.
 1991 Task Force On The Criminal Justice System and Its Impact on the Indian and Metis People of Alberta. Edmonton: Attorney General of Alberta and Solicitor General of Alberta.
- Clark, S. & Associates; Lannon, V. & Associates; a.m. Research Services
 1995 Building the Bridge: A Review of the South Island Justice Education Project. Report on Behalf of the B.C. Ministry of Attorney General, the Department of Justice Canada and the Solicitor General of Canada.
- Cooper, M. et al.
 1991 Aboriginal Suicide in British Columbia. Burnaby: B.C. Institute on Family Violence.

- Corrado, R. R. et al. (Eds).
 1992 Juvenile Justice In Canada: A Theoretical and Analytical Assessment.
 Vancouver: Butterworths Publishing.
- Corrado, R. R.
 1992 "Introduction." In Corrado et al., (Eds). Juvenile Justice In Canada: A
 Theoretical and Analytical Assessment. Vancouver: Butterworths Publishing.
- Corrado, R. R. & Markwart, A. E.
 1995 Canada: A Modified Justice Model Approach to Juvenile Justice. Simon
 Fraser University and the Ministry of the Attorney General of British
 Columbia.
- Corrado, R. R. & Markwart, A.
 1994 "The Need to Reform the YOA In Response to Violent Young Offenders:
 Confusion, Reality or Myth." *Canadian Journal of Criminology.* Special
 Edition. July 1994, 343-378.
- Corrado, R. R. & Markwart, A. E.
 1989 "Is the Young Offenders Act More Punitive?" In Lucien, B. Young
 Offenders Dispositions. Toronto: Wall and Thompson, Inc.
- Corrado, R. R. & Markwart, A. E.
 1988 "The Prices of Rights and Responsibilities: An Examination of the Impact of
 the Young Offenders Act in British Columbia." *Canadian Journal of Family
 Law.* Vol. 7 (1), Fall.
- Department of Justice
 Campbell Research Associates
 1995 Justice Development Workers: Review and Recommendations. Prepared for
 Aboriginal Justice Directorate, Department of Justice Canada.
- Department of Justice
 1993 Canada's System of Justice. Ottawa: Minister of Supply and Services Canada.
- Department of Justice
 1992 National Inventory of Aboriginal Justice Programs, Projects and Research.
 Ottawa.
- Depew, R. C.
 1994 Popular Justice and Aboriginal Communities: Some Preliminary
 Considerations. A Report Prepared for the Aboriginal Justice Directorate,
 Department of Justice Canada.

- Doob, A. N.
 1994 Beyond the Red Book: Recommendations for Amendments to the Young Offenders Act. Toronto: Centre of Criminology, University of Toronto.
- Doob, A. N. & Meen, J. M.
 1993 "An Exploration of Changes In Dispositions For Young Offenders In Toronto." *Canadian Journal of Criminology*. January 1993, 19-29.
- Drawns, R. W. & Hess, K. M.
 1995 Juvenile Justice. Second Edition. West Publishing.
- Fafard, C.
 1994 "On Being a Northern Judge." In Gosse et al. (Eds). Continuing Poundmaker & Riel's Quest: Presentations Made At a Conference On Aboriginal Peoples and Justice. Saskatoon: Purich Publishing.
- Finkler, H.
 1992 "Community Participation in Socio-legal Control: The Northern Context." *Canadian Journal of Criminology*. Vol. 34., 503-12.
- Funk & Wagnalls
 1992 New Illustrated Webster's Dictionary of the English Language. New York: Pamco Publishing.
- Goikas, J.
 1993 "Accommodating the Concerns of Aboriginal People Within the Existing Justice System." In Royal Commission on Aboriginal Peoples. Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues. Minister of Supply and Services Canada.
- Gosse, R., Henderson, J. Y. & Carter, R.
 1994 Continuing Poundmaker & Riel's Quest: Presentations Made At A Conference On Aboriginal Peoples and Justice. Saskatoon: Purich Publishing.
- Griffiths, C. T.
 1992 Self-Sufficiency In Northern Justice Issues. Burnaby: Simon Fraser University, Northern Justice Society.
- Griffiths, C. T. & Verdun-Jones, S. N.
 1994 Canadian Criminal Justice. Second Edition. Toronto: Harcourt Brace & Company, Canada.

- Hackler, J.
1991 "Good People, Dirty System: the Young Offenders Act and Organizational Failure." In Leschied, A. W., et al. "The Young Offender's Act: A Revolution In Canadian Juvenile Justice". Toronto: University of Toronto Press.
- Hackler, J.
1987. "The Impact of the Young Offenders Act." *Canadian Journal of Criminology*. Vol. 29 (2), 205-209.
- Hamilton, A. C. & Sinclair, C. M.
1991 The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba. Winnipeg, Manitoba: Queen's Printer.
- Havemann, P.
1992 "The Indigenization of Social Control In Canada." In Silverman, R. A. & Nielsen, M. O. (Eds). Aboriginal Peoples and Canadian Criminal Justice. Vancouver: Butterworths Publishing.
- Hazlehurst, K. M. (Ed).
1995 Popular Justice and Community Regeneration: Pathways of Indigenous Reform. Westport: Praeger.
- Hylton, J. H.
1994 "Get Tough or Get Smart? Options for Canada's Youth Justice System in the Twenty-First Century." *Canadian Journal of Criminology*. Special Edition. July 1994, 229-246.
- Jackson, M.
1992 "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities." *UBC Law Review*. Special Edition: Aboriginal Justice.
- Jaffe, P. G., Leschied, A. W., & Farthing, J. L.
1987 "Youth's Knowledge and Attitudes About the Young Offenders Act: Does Anyone Care What They Think?" *Canadian Journal of Criminology*. Vol. 29., 309-315.
- Kaiser, H. A.
1992 "The *Criminal Code* of Canada: A Review Based on the Minister's Reference." *UBC Law Review*. Special Edition: Aboriginal Justice.
- Kueneman, R., Linden, R., & Kosmick, R.
1986 A Study of Manitoba's Northern and Rural Juvenile Courts. Final Report. Department of Sociology, University of Manitoba, October 1986.

- LaPrairie, C. P.
1995a "Community Justice or Just Communities? Aboriginal Communities in search of justice." *Canadian Journal of Criminology*. Vol. 37 (4), 521-545.
- LaPrairie, C. P.
1995b Altering Course: New Directions In Criminal Justice And Corrections. Ottawa: Solicitor General.
- LaPrairie, C. P.
1995c Conferencing In Aboriginal Communities In Canada: Finding Middle Ground In Criminal Justice? Ottawa: Solicitor General.
- LaPrairie, C. P.
1994a "Self-Government And Criminal Justice: Issues and Realities." In Hylton, J. H. (Ed). Aboriginal Self-Government In Canada: Current Trends and Issues. Saskatoon: Purich Publishing.
- LaPrairie, C. P.
1994b Seen But Not Heard: Native People in the Inner City. Ottawa: Department of Justice, Canada.
- LaPrairie, C. P.
1992a "Aboriginal Crime and Justice: Explaining the Present, Exploring the Future." *Canadian Journal of Criminology*. Vol. 34., 281-298.
- LaPrairie, C. P.
1992b Exploring the Boundaries of Justice: Aboriginal Justice In the Yukon. Yukon: Report to Department of Justice, Yukon Territorial Government First Nations.
- LaPrairie, C. P.
1991 Justice For the Cree: Communities, Crime and Order. Grand Council of the Crees. Ottawa: Department of Justice, Canada.
- LaPrairie, C. P.
1988 "The Young Offenders Act and Aboriginal Youth." In Hudson, J. & Hornick, J.P. (Eds). Justice and the Young Offender In Canada. Toronto: Wall and Thompson.
- Leschied, A.W. & Gendreau, P.
1994 "Doing Justice In Canada: YOA Policies That Can Promote Community Safety." *Canadian Journal of Criminology*. Special Edition. July 1994, 291-303.

- Leschied, A. W., Jaffe, P. J. & Willis, W.
1991 The Young Offender's Act: A Revolution In Canadian Juvenile Justice. Toronto: University of Toronto Press.
- Lilles, H.
1994 The Young Offenders Act: Some International Perspectives For Reform.
- MacPherson, J. C.
1993 "Report From the Round Table Rapporteur." In Royal Commission on Aboriginal Peoples. Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues. Minister of Supply and Services Canada.
- Mandamin, L.
1993 "Aboriginal Justice Systems: Relationships." In Royal Commission on Aboriginal Peoples. Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues. Minister of Supply and Services Canada.
- Mandamin, L., Callihoo, D., Angus, A., & Buller, M.
1992 "The *Criminal Code* and Aboriginal People." *UBC Law Review.* Special Edition: Aboriginal Justice.
- Manitoba Corrections
1995 Manitoba Corrections Handbook.
- Markwart, A.E.
1992 "Custodial Sanctions Under the Young Offenders Act." In Corrado, R. et al. (Eds). Juvenile Justice In Canada: A Theoretical and Analytical Assessment. Vancouver: Butterworths Publishing.
- McCaskill, D.
1970 Needs and Resources Related to Offenders of Native Origin in Manitoba. Correctional Planning Branch, Correctional Services Canada.
- McNamara, L.
1992 "The Aboriginal Justice Inquiry of Manitoba: A Fresh Approach to the "Problem" of Over-representation in the Criminal Justice System." *Manitoba Law Journal.* Vol. 23 (1), 47-79.
- Mercredi, O.
1991 Remarks to Law Reform Commission of Canada Consultation. Edmonton: March, 1991.

- Mills, A.
1994 Eagle Down Is Our Law. Vancouver: UBC Press.
- Milne, H. A., Linden, R., & Kueneman, R.
1992 "Advocate or Guardian: The Role of Defence Counsel In Youth Justice." In Corrado, R. et al. (Eds). Juvenile Justice In Canada: A Theoretical and Analytical Assessment. Vancouver: Butterworths Publishing.
- Patenaude, A. L. et al.
1995 Yellowknives Dene Band Youth Crime Prevention Program (Ndilo Chekoa Program): An Evaluation of Operations, Administration and Management During the First Fifteen Months of the Program. Yellowknife.
- Patenaude, A. L.
1989 Whose Law? Whose Justice. Two Conflicting Systems of Law and Justice In Canada's Northwest Territories. Burnaby: Simon Fraser University.
- Pearson, J.C.
1991 "Legal Representation Under the Young Offenders Act." In Leschied, A.W. et al. (Eds). The Young Offenders Act: A Revolution in Canadian Juvenile Justice. Toronto: University of Toronto Press.
- Polk, K. et al.
1995 Family Conferencing and Juvenile Justice.
- Quigley, T.
1994 "Some Issues In Sentencing of Aboriginal Offenders." In Gosse et al. (Eds). Continuing Poundmaker & Riel's Quest: Presentations Made At a Conference On Aboriginal Peoples and Justice. Saskatoon: Purich Publishing.
- Reid-MacNevin, S.
1991 "A Theoretical Understanding of Current Canadian Juvenile Justice Policy." In Leschied, A. W., et al. The Young Offender's Act: A Revolution In Canadian Juvenile Justice. Toronto: University of Toronto Press.
- Rodrigues, G. P. (Ed).
1994 Pocket Criminal Code. Toronto: Carswell Thomson Professional Publishing.
- Ross, R.
1994 "Duelling Paradigms? Western Criminal Justice Versus Aboriginal Community Healing." In Gosse et al. (Eds). Continuing Poundmaker & Riel's Quest: Presentations Made At a Conference On Aboriginal Peoples and Justice. Saskatoon: Purich Publishing.

- Ross, R.
1992 Dancing With A Ghost: Exploring Indian Reality. Ontario: Reed Books.
- Royal Commission on Aboriginal Peoples.
1996 Bridging the Cultural Divide: A Report On Aboriginal People and Criminal Justice In Canada. Minister of Supply and Services Canada.
- Royal Commission on Aboriginal Peoples.
1993 Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues. Minister of Supply and Services Canada.
- Ryan, J. et al.
1993 Traditional Dene Justice Project. Yellowknife.
- Saskatchewan Social Services
1995 Towards A Restorative Youth Justice Strategy.
- Sawatsky, L.
1990 Native Harmony and Restoration Center: Proposal for Pineimuta Place. Prepared for the Interlake Reserves Tribal Council, (IRTC).
- Schwartz, I. M.
1991 "The Death of the Parens Patriae Model." In Leschied, A. W., et al. The Young Offender's Act: A Revolution In Canadian Juvenile Justice. Toronto: University of Toronto Press.
- Siegel, L. J. & Joseph J. S.
1994 Juvenile Delinquency: Theory, Practice and Law. Fifth Edition. West Publishing.
- Sinclair, Chief Justice M.
1994 "Aboriginal Peoples, Justice and the Law." In Gosse, R. et al. (Eds). Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference On Aboriginal Peoples and Justice. Saskatoon: Purich Publishing.
- Tennant, P.
1991 Aboriginal People and Politics. Vancouver: UBC Press.
- Turpel, M. E.
1994 "Reflections On Thinking Concretely About Criminal Justice Reform." In Gosse, R. et al. (Eds). Continuing Poundmaker & Riel's Quest: Presentations Made at a Conference On Aboriginal Peoples and Justice. Saskatoon: Purich Publishing.

Turpel, M. E.

- 1993 "On the Question of Adapting the Canadian Criminal Justice System for Aboriginal Peoples: Don't Fence Me In." In Royal Commission on Aboriginal Peoples. Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues. Minister of Supply and Services Canada.

Walgrave, L.

- 1993 Beyond Retribution and Rehabilitation: Restoration As The Dominant Paradigm In Judicial Intervention Against Juvenile Crime. Paper presented at the International Congress on Criminology, Budapest, Hungary.

Watson, G. D.

- 1987 The Oglala Sioux Tribal Court. Nebraska: Chadron State College, Criminal Justice Department.

Webber, J.

- 1993 "Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice." In Royal Commission on Aboriginal Peoples. Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues. Minister of Supply and Services Canada.