

# ALTERNATIVE JUSTICE ISSUES FOR ABORIGINAL JUSTICE

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## Introduction

The inadequacy of the Canadian Justice System for native peoples has been attested in recent years by numerous commissions and inquiries, social protests, position papers by native organizations, and academic research (Clairmont 1992: Vol 1, bibliography). Until lately the social policy focus has been on improving the native justice system through means such native collaboration in policing (e.g. Circular 55, Royal Canadian Mounted Police Program 3B), the appointment of native courtworkers, measures to increase accessibility (e.g. the provision of interpretation services, native legal aid), the introduction of fine options and intermediate sanctions in sentencing, and the provision of cultural sensitivity 'training' for justice system officials. Increasingly there has been a shift to examination of aboriginal-based justice philosophies and principles and to consideration of the possible use of the native community as a nexus for new justice initiatives. Especially now that official government policy has given its stamp of approval to a greater degree of self-government by aboriginal peoples and greater autonomy for them across a wide swathe of institutional areas, alternative justice issues for aboriginal people have become priority issues.<sup>1</sup>

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<sup>1</sup> For example a draft report on sentencing issued by the Department of Justice in 1992 noted:

Bill C-90 says that a principle of sentencing is that all available alternatives to imprisonment that are reasonable in the circumstances should be considered, particularly in relation to aboriginal offenders;

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Undoubtedly their significance for public social policy will be further underlined by the forthcoming report of the Royal Commission on Aboriginal Peoples.

To some extent this development represents an acknowledgement or recognition of extant multiple legal and moral orders in society (Macdonald 1993), since within the aboriginal communities some justice matters have always been dealt with apart from the official justice system.<sup>2</sup> But it also reflects a conscious constructionism whereby, through the reinvention of traditions (such as those relating to circles, healing ceremonies, and the roles of elders) and the mobilization of community and governmental resources, specific alternative justice practices and structures are promoted. The development draws on specific aboriginal-based interests, rights and claims and acknowledges the racism of the justice system and its insensitivity to native realities. It also receives succour from general social movements such as the restorative justice and popular justice movements (LaPrairie 1993), and from new directions in social policy such as the thrust for intermediate sanctions in sentencing (Sentencing Team 1992).

Governmental and quasi-governmental bodies have increasingly emphasized fine options, community service orders, diversion and other measures as antidotes to the high rates of incarceration, the large costs of dealing with offenders (e.g., police and incarceration costs) and the lack of rehabilitative success in corrections. These alternative justice initiatives are often deemed to have special potential for aboriginal peoples in view of their over-representation among offenders and incarcerates, their pattern of offences (i.e., high levels of interpersonal violence and public order offences), their alienation from the existing justice system (shown by, for example, high rates of 'failure to appear' and 'failure to comply' offences), and of course their claims for greater self-government and autonomy. Another consideration has been the presumption that native groups, especially on reserves, have currently or could have sufficient homogeneity, identity and subcultural distinctiveness to render such alternative aboriginal initiatives most likely to succeed in their communities. As Nielsen observes,

[Native communities] will have the opportunity of taking the

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It added: "It is important to bring criminal justice closer to Aboriginal communities" (Sentencing Team 1992: 4).

<sup>2</sup> Nevertheless it should also be noted that empirical research has found a great dependence on and utilization of the conventional justice system, including the police, to deal with community social problems and both minor and major offences, and on the other hand little indication as reported by residents that such problems were being dealt with alternatively or 'informally' in the community (Auger et al. 1991; LaPrairie 1992; Clairmont 1992).

best of the old ['traditional' culture], the best of the new [current Canadian] and learning from others' mistakes so that they can design a system that may well turn into a flagship of social change. (Nielsen 1992: 255)

This 'flagship' theme is noteworthy given the current era of restraint and restructuring brought about by governmental fiscal pressures. Funding for native justice initiatives still commands comparatively strong governmental priority.

The concept of aboriginal alternative justice could focus attention on either or both of two themes: (a) the extent to which native people have control over justice matters and hence have a parallel or separate justice system; (b) the degree of difference in philosophy, principles and practices between the 'alternative' native justice initiatives and their structural and functional equivalents in the larger Canadian society. Among the alternative justice initiatives that have attracted attention are tribal police forces, community justice committees, sentencing advisory committees, courts sittings on reserves, native justices of the peace, community organizations for channelling fine options and community service orders, and various diversion programs. Each initiative could be assessed in terms of the themes, 'control' and 'difference', and in terms of the extent to which it contributes to advancing overall native autonomy in justice matters and to dealing with native justice concerns in an equitable, efficient and effective manner.

### Issues in Aboriginal Criminal Justice Alternatives

Aboriginal criminal justice alternatives have typically highlighted reductions in incarceration and fairer sentences for aboriginal offenders. Clearly their advocates have adopted the view that native offenders often received harsher sentences than non-natives for similar offences (Mail Star: December 3, 1992; The Globe and Mail: July 27, 1991; Moyer and Axon 1993). Proponents of such alternatives also usually contend that such developments can have a significant impact on the volume of crime and in changing or redirecting offenders. The underlying mechanisms for such transformation presumably involve the bringing of greater and deeper understanding to crime and social problems, and the creation of a more profound accountability to the community, specifically the local native community, on the part of the offender. It is presumed that, while the native offender is alienated to a significant degree from the current criminal justice system, and is neither shamed nor reintegrated by involvement in its operation, the offender will identify with the aboriginal alternative, and so rehabilitation and reconciliation will be effected. The director of a native-based adult diversion program in metropolitan Toronto has contended:

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[W]e think it can break that revolving-door cycle ... break the repetition of petty crimes by requiring an offender to focus on the effect of his or her offence on the image of native society at large ... natives are going to be talking to and be judged by members of their community ... [council wants] to ensure that the person takes responsibility for what they've done and to get the person back on a better road - a healing path. (Globe and Mail: June 2, 1993).

The director of a similar, recent native justice initiative in Nova Scotia simply stated: "[W]ho better to understand a native community than someone who lives in it?" (Daily News: March 28, 1993).

It is often explicitly assumed too that the alternative native justice initiatives will reflect significantly different standards, values and principles. The Attorney-General of Nova Scotia, announcing a native diversion project, observed: "[T]he fact that a native community will be in a position to impose its standards based on heritage and tradition is perhaps the most significant benefit" (Daily News: October 2, 1992). He did not say what these standards would be and indeed throughout Canada there is much ambiguity regarding the specificity of this 'different cultural system'. However, there appears to be some consensus (see Nielsen 1992; Dumont 1993) that at a minimum it would entail more emphasis on the collectivity at the expense of individual rights, and a different prioritization of the principles and practices of justice (such as a preference for conciliatory over therapeutic or penal discourse).<sup>3</sup> One theme usually mentioned is the need for greater sensitivity to victims and more concern with reconciliation at the community level rather than preoccupation with the punishment of the offender. The director of one aboriginal justice diversion initiative noted that "the victim will be encouraged to attend and talk about what happened" (Globe and Mail: July 27, 1991). In another province a member of a recently formed Justice Committee, which is involved with the regular court system and on its own mediates some local disputes or offences, observed: "Our role is to help both the offender and the victim". She contended that the practice of making direct amends to a victim of crime was an ancient native tradition, adding that "now the victims know they'll be looked after too" (Globe and Mail March 14, 1994).

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<sup>3</sup> When specifics are discussed some ambivalence emerges within native circles concerning the priority to be accorded to collective rights, as evidenced in the constitutional debate on the Charlottetown Accord. It is also difficult to assess the priority accorded to conciliation as against therapeutic discourse; but usually harmony and reconciliation are seen as prerequisites for healing.

Apart from cultural differences, for many proponents of alternative aboriginal justice initiatives the crucial issue is direction and control, whether as an inherent right or as a strategy for effective change. "There's a feeling people want to do something about our problems and we want to do it ourselves" (Globe and Mail: March 14, 1994). Certainly there appears to be an implicit view that social and personal contextual knowledge and other considerations that should be incorporated into a justice response to crime and social problems are being ignored or undervalued. There would undoubtedly be agreement with the general comments of Sargent that "the courts recognize narrowly defined issues that may bear little resemblance to underlying social issues... the specificity of rights and the narrowness of the legal issues combine to preclude the introduction of broader though relevant social questions" (Sargent 1990: 575). Of course there is scant clear articulation of or consensus concerning the limits (if any) of an inherent right or the specification of the factors which should be given weight (and what weight they should be given) in an appropriate justice system response. Nevertheless the salience of this general issue of direction and control is underlined by MacDonald's comments that shortfalls at the levels of ideology and the administration of justice, more than shortfalls in access to adversarial adjudication, account for much of the disenchantment with and sense of disempowerment within the current system of justice (MacDonald 1993: 242).

In consequence of the relatively small core aboriginal population in Canada, and its dispersal in small communities over a large territory (in contrast to the concentration of 'Indian Land' in the USA), operating under a band system of governance, most initiatives in alternative aboriginal justice occur at the community level. A major issue concerns the extent to which the small community can be an appropriate vehicle for equitable, effective and efficient change. The concentration of social power and the dense social networks there argue for its effectiveness in this respect. So also does the fact of the loss of traditional bases, such as economic interdependence, for cooperation and for a conciliatory, restorative kind of justice system.

The significance of the local community and the need for community development have been emphasized by virtually all those writing about aboriginal alternative justice initiatives. Giokas, for example, cites approvingly the comments of leading native researchers calling for the development of internal community structures for aboriginal criminal justice, and contending that the area of the latter's greatest promise would be in diverting people from the courts to forums where the focus can be on community methods of restoring and healing (Giokas 1993: 203). Webber also stresses the importance, in the development of aboriginal justice systems which can pass some standard of effectiveness and uncorruptness, of institution-building at the community or band level. He writes:

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The challenge is to reinvent aboriginal institutions so that they draw upon indigenous traditions and insights in a manner appropriate to the new situation. This may mean inventing checks to prevent abuse that were unnecessary two hundred years ago or which existed in a very different form. (Webber 1993: 147).

MacDonald, positing some clash between aboriginal and nonaboriginal values, implicitly highlights the local community. He asks: "Should not mechanisms be developed for addressing conflict in the socio-cultural frame from which it arises, before it takes on the character of a lawsuit"? (MacDonald 1993: 251) From his 'legal pluralism' vantage point such aboriginal justice developments "do not undermine official law but rather can be seen as techniques for legitimating official law by legitimating in appropriate contexts its diverse unofficial complements" (MacDonald 1993: 252).

Researchers and other writers familiar with native communities have typically emphasized two points: that there is significant diversity among them in terms of legitimated local authority and readiness for exercising effective direction and control in justice matters; and that much 'community development' is required in order to effect the institution-building required for effective, equitable aboriginal justice alternatives (see for example Augur et al: 1991). Nielsen (1992), in Western Canada, observes that 'traditional aboriginal law' may not be considered in practice by natives as legitimate, that the basis of the traditional system such as 'shaming' may be ineffective in a mobile modern native community, and that community cohesion and deep value sharing are problematic.

LaPrairie (1992) noted in her study of the James Bay Cree that the traditional ways of dealing with justice-related social problems no longer worked since people were more sedentary, collaborated less directly economically and had the modern generation gaps. Thus if the communitarian style, so often presumed theoretically in proposed aboriginal justice alternatives, is to be harnessed there has to be much work at collaboration, community bonding, strengthening awareness and so forth. She also observes significant community variation among the Cree. Subsequently in a more general paper LaPrairie (1993) argues that the dominance of the aboriginal self-government theme has given rise to a more urgent need for critical appraisals of community needs and realities. In her view native communities may be in severe flux and harbour much value conflict, and aboriginal justice initiatives could entrench power inequalities, and merely reproduce 'state justice' rather than broadening the net of shame and accountability to work against power inequalities, to help victims of abuse, and suchlike.

Ross (1993) draws upon his considerable experience both as crown prosecutor and provincial criminal court judge in Northern Ontario. He also notes problems such as the power inequalities in native communities, the need to 'heal' those who under some initiatives by proxy enjoy the role of 'healer', and the dangers of the misuse of elders as 'sentencers' rather than 'role models'. In his view it is important that aboriginal justice initiatives come to grips with serious community problems and emphasize the communitarian spirit and healing. But he holds that, to this end, the approach has to be explicitly different from that of the conventional justice system, and considerable effort has to be expended on developing that spirit and the legitimated authority (through, for example, trained professionals and paraprofessionals commanding strong community support) on which it rests, rather than simply reproducing the conventional system under the control of local political leaders and elders.

Review of the issues points to an hypothesized underlying symbiosis between the offender and the offence on the one hand and community organization on the other. Effectively dealing with the former by emphasising identity, accountability, shame and reintegration requires the reconstruction of community institutions so as to put into place a reinforcing cycle. In this cycle community development and legitimate, equitable programs will lead to more personal accountability which in turn will underline the appropriateness of community standards and sanctions, perhaps quite different from those of the larger society, and so on. The extent to which, and precisely how supra-community institutions such as provincial systems and tribal bodies will monitor, control and in general contextualize local community initiatives are questions which involve a host of issues. And the potential impact for the larger societal justice system itself is also interesting. MacDonald has argued that insofar as aboriginal justice initiatives entail a reorientation in approaches to access to justice toward issues of enfranchisement and empowerment, a legal pluralist perspective would suggest that they will significantly benefit Canadian society as a whole and especially disadvantaged segments with it (MacDonald 1993: 255).

### Diversions Programs in Four Select Areas

Aboriginal justice initiatives as noted are developing apace. It was recently reported that there were more than 125 proposals from aboriginal communities being considered by the Federal Government for projects such as diversion, sentencing circles, healing programs, community justice committees and the like (Times-Colonist, January 11, 1993). This paper focuses on four adult, general diversion programs not limited to first time offenders that have been in operation for more than two years, namely those in the communities of Indian Brook, Nova Scotia, Sandy Lake and Attawapiskat in Northern Ontario, and Metropolitan

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Toronto. These diversion initiatives, for which evaluation and other reports are available, are appropriate loci for consideration of all the issues referred to above: the feasibility of procedures instilling shame and accountability in offenders, the development of new community institutions, the incorporation of aboriginal culture, and the assertion of direction and control over community justice matters. Attention will be directed to assessing the initiatives overall on these issues and their equity, effectiveness and efficiency. What lessons have been learned thus far? What questions remain unanswered?

Of course diversion and related justice initiatives, such as neighbourhood justice centers and mediation, are not new to societies such as Canada and the United States. Indeed community-based mediation programs and adult diversion projects are considered by many writers to be passé and to have been based on faulty analyses of society and social relations, often fuelled by a community 'romanticism'. Merry (1990) suggests that court-directed mediation has been unpopular with victims and has meant some denial of legal entitlement to the typically socio-economically disadvantaged persons who seek state support in re-ordering their lives autonomously. More generally, as LaPrairie (1993) observes, many observers question the legitimacy and efficacy of 'popular justice'<sup>4</sup> and the extent to which it really is different from the State version and more than a tool for local power elites; clearly community justice projects may serve either progressive or reactionary politics.

Feeley (1983) contends that pre-trial diversion and neighbourhood justice mediation in the United States have been overblown, inefficient and ineffective. Even with few clients and 'skimming off the cream', there has been little discernible impact on recidivism or other measures of success. Such projects have been in sharp decline since the early 1980s. Typically these programs generated too few cases, partly because basic control remained with prosecutors but primarily because eligible arrestees - never mind victims - did not welcome the innovation enthusiastically and had no strong incentive to select it. Feeley argues that the courts, contrary to their image in diversion theory, have already adopted flexible and informal alternatives on their own, and so diversion is "no big deal in practice". The social circumstances in the case of aboriginal Canadians, especially those in remote communities, sharply differ from those of large city dwellers so it will be interesting to see the extent to which there are similar constraints with respect to similar justice initiatives.

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<sup>4</sup> Popular justice is defined in contradistinction to State justice as a justice response that is localized, formally requires no especial expertise, and utilizes broader prescriptions and sanctions (LaPrairie 1993).

The diversion programs examined here are being nurtured in quite different environments or social contexts. Aboriginal Legal Services (hereafter ALS) in Metropolitan Toronto provides a range of legal services (a legal aid clinic, court workers, and training, as well as diversion) for the area's sizable but unconcentrated offreserve native population.<sup>5</sup> Its diversion program is primarily used by status Indians, migrants (some of them longterm) to Toronto who typically have quite weak ties to the area's native organizations. The Indian Brook diversion program is found on the reserve of the same name which is located about six kilometers from the town of Shubenacadie and sixty kilometers from Metropolitan Halifax. The reserve population of some 1500 persons is, on the whole, well-travelled, well-educated and deeply acculturated.<sup>6</sup> Community institutional boundaries are quite permeable. Its diversion program is used mainly by reserve residents but can be accessed by band members residing elsewhere in the province. Sandy Lake and Attawapiskat are reserves in Northern Ontario which are quite isolated, 'fly-in' communities, served by a secondary airport. They are among the largest communities in the Nishnawbe-Aski First Nation, Attawapiskat having a population of 1300 and Sandy Lake about 1700. The use of the traditional Cree language is commonplace in both communities.

Clearly the aboriginal initiatives present an interesting research case since their social contexts differ profoundly with respect to the central theoretical and policy factor in the diversion alternative, communitarianism. As Depew has argued with respect to policing,

a transient and potentially mobile aboriginal population where community boundaries are not easily identified is less likely to provide an enduring basis for informal collective sanctions as a substitute for or functional equivalent of a formal police response.  
(Depew 1986)

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<sup>5</sup> The aboriginal population in Metropolitan Toronto is quite modest compared to the area's total population, especially if it is defined, as in the aboriginal peoples survey carried out by Statistics Canada, to include only band members and those considering themselves as having native identity or culture; on the latter criteria the aboriginal population would account for less than 1% of the metro population.

<sup>6</sup> Over 80% of Indian Brook adults have lived outside the reserve for more than five years in total and many persons have commuted to the metropolitan area for work and education. A large number of eligible adults have attended post-secondary schools, roughly 100 per year in recent years. Indian Brook residents fully participate with Shubenacadie area residents across a wide range of institutional areas such as education, justice, business and leisure activities. Few residents can speak the Mi'kmaq language.

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Here, with respect to diversion, there is ostensibly representation across the communitarian continuum, from the 'anonymous' metropolis through the small community well-integrated in its region, to the isolated fly-in community. To what extent do the diversion programs in these communities differ in objectives, strategies, processes and impact?

The four areas, compared to nearby native communities of similar types, could probably be characterized as progressive in terms of community institutional development and community resources such as educational levels, leadership and community resources. Metropolitan Toronto for example has had a greater concentration of aboriginal organizations than other urban centers in Ontario and probably elsewhere in Canada.<sup>7</sup> Indian Brook is the largest and most developed Mi'kmaq community on the Nova Scotian mainland. Its political activity is attested to by the fact that in recent election contests at least 70 candidates have vied for the twelve council positions and a handful for the chief's position. The Attawapiskat initiative was part of a ten-year master plan for that community's development, and the community has been described as "a very good progressive and active community" (Howley 1992: 36). Sandy Lake has been regarded by justice system officials as "a relatively crime-free community", and among the most capable Nishnawbe-Aski communities of controlling and directing their affairs (Obonsawin-Irwin, 1992a: 11, 42). It is not surprising that these communities took the lead in developing the diversion initiative, in the sense that all aggressively advanced proposals for funding, since some groundwork had been laid for these projects by both local activity in the justice area and by the experience of exercising control in other specific institutional areas such as family services (Obonsawin-Irwin 1992a: 8; Clairmont 1993: 8-12).

At the same time all the areas faced considerable problems with respect to justice matters. Indian Brook residents experienced, and reported, high levels of substance abuse, factionalism, social order problems and alienation from the

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<sup>7</sup> The ALS which developed from recommendations contained in a 1989 Native Justice Report is itself an example of this concentration of resources. There is a critical mass of native infrastructure and resources in Toronto unavailable in other major Ontario urban areas, such as Hamilton, for example, where there is a significant native population. In their Community Council Report for July-September 1993 ALS staff reported over 40 native social service and cultural organizations active in metropolitan Toronto. The Metropolitan Police Department has a prominent presence of native officers in its special ethnic services branch plus officers in the field divisions. ALS informants indicate also that the politics of reserve versus offreserve positions, so prominent in Western Canada, is not so dominant, and thus the Toronto program can be 'status blind'.

justice system. They considered that these problems were addressed neither by the justice system nor informally within the community.<sup>8</sup> In Metropolitan Toronto many native persons migrating from the reserves became caught up in substance abuse and related activities such as prostitution. They had become a visible 'revolving door' subpopulation in provincial criminal courts. A Native Justice Report indicated that in the Toronto area there was criticism concerning the inability of the justice system to meet the needs of native offenders. Both Sandy Lake and Attawapiskat communities faced a significant problem of substance abuse and of disregard for band by-laws concerning intoxicants. In addition there was apparently considerable alienation from the justice system, partly because of language differences but especially because of the ineffectiveness of the sanctions employed.

The aboriginal diversion initiatives in the four communities identified above are quite similar. All are 'post charge' programs where the final authority for diverting an accused rests with the crown prosecutors.<sup>9</sup> Participation in the program by the accused is voluntary. Charges are 'stayed' for the divertee and withdrawn upon successful completion of the diversion disposition.<sup>10</sup> While

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<sup>8</sup> The precipitating factor in the case of the Indian Brook diversion proposal was the inception of fraud charges against some 17 persons, most connected to one prominent kinship grouping, for drawing band welfare when ineligible. Still the band's high level of development and aggressiveness in the management of its own affairs, together with the recommendations of the Marshall Inquiry, were crucial factors in its advancing proposals for aboriginal justice alternatives.

<sup>9</sup> In Attawapiskat it is possible to divert offences against band by-laws prior to the formal laying of charges. In Indian Brook and Metropolitan Toronto the protocol signed by band and provincial authorities allows for an appeal process in the event that the crown refuses diversion in a particular instance. In two years there has only been one appeal (to the regional Crown authority) in Indian Brook. It was unsuccessful and diversion was refused on the grounds that (a) the incident involved a non-native as well as native victim; (b) a weapon was used by the accused; (c) the victims did not both of them want the matter diverted; and (d) the incident was deemed 'domestic' and thereby non-divertable according to the protocol. There have been one or two appeals in the Toronto program. In both areas crown prosecutors have also occasionally rejected potentially divertable cases for a variety of reasons. In Toronto the diversion coordinators have increasingly dealt with senior crown officials partly because the latter have been found to be more willing than their junior counterparts to divert cases. It is not clear what appeal procedures if any are available in the Sandy Lake and Attawapiskat programs.

<sup>10</sup> In the case of the Toronto program the stayed charges are withdrawn in the

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eligible offences are not restricted to summary offences (misdemeanors), they are considered to be minor rather than major crimes. In all cases the accused appears before a small panel of fellow native community residents. The sanctions available to the diversion panel are 'intermediate sanctions'.<sup>11</sup> None of the programs deals with matters of family violence. While there are variations in organizational structure, all programs have a small staff including a project coordinator, and generally operate on governmental funding of approximately \$100,000 annually.

There are significant differences as well among these aboriginal justice initiatives. In Sandy Lake and Attawapiskat the native justice panels are involved in both diversion and sentence advisory programs.<sup>12</sup> In Attawapiskat, unlike the ALS program (Toronto) and Indian Brook, the panel apparently can determine whether or not the accused is indeed responsible for the offence (Royal Commission on Aboriginal Peoples 1993: 401). The programs at Sandy Lake and Attawapiskat utilize only elders as diversion panel members or in sentencing advisory roles. In each community three elders are paid a significant stipend for their involvement in these programs.<sup>13</sup> The vast majority of diverted cases in both communities have

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first instance once the accused opts for and is accepted for diversion. A recent extension of the protocol to allow diversion of offenses under federal statute (e.g., narcotics possession and minor trafficking) provides that in these cases, in the event of failure on the part of the divertee to proceed successfully through diversion, the case is to be returned to the regular courts for processing. This latter procedure is provided for all cases in the other three programs.

<sup>11</sup> While no diversion program can jail a divertee, the dispositions in Attawapiskat can include probation and thereby potentially impact on the workload of provincial justice officials. Usually dispositions include community service hours, small fines, restitutions and apologies.

<sup>12</sup> Sentence advisory processes involve panel members sitting with the judge of the provincial court to discuss sentencing considerations. For a while Sandy Lake elders were essentially doing only 'sentence advisory' rather than also meeting on their own for diversion processes. In Attawapiskat the elders did 'sentence advisory' when the defendant faced more serious charges and was not diverted.

<sup>13</sup> In both communities the three elders have received together slightly over \$30,000 yearly. Program coordinators have each received approximately \$30,000. In Attawapiskat all elders have been male whereas one of Sandy Lake's elders is female. In both communities the coordinators and the elders are selected by chief and council. The three initial Sandy Lake elders were selected at a joint meeting of Attorney-General staff and band officials from a list of seven elders nominated by the band council. It may be noted that both communities have experienced problems maintaining their programs when elections resulted in new political leaders and the possibility of new program coordinators.

involved violation of band bylaws concerning intoxicants. The most frequent sanction employed has been the imposition of a small fine. The ALS program in Toronto employs a diversion panel drawn up from recommendations made by native organizations in the area. The panel members are volunteers and generally handle cases on a rotation basis. The ALS program deals with a very wide range of offences, from court offences (such as failure to appear, failure to comply) to prostitution, common assault, property crimes and, more recently, violations of federal statutes such as the Narcotics Act. The largest single category of offences dealt with over the past few years has been that of court offences, followed closely by theft and prostitution (ALS, June 1994). The diversion disposition has typically been a community service order, or counselling in association with ALS staff or other native agencies in the area, or both (Moyer and Axdon 1993: 66).

In Indian Brook the diversion panel is drawn from persons who mostly have been nominated at large and subsequently screened in an interview process.<sup>14</sup> The panel members, mostly women covering a wide age range, are volunteers and they hear cases largely on a rotation basis, subject to conflict of interest guidelines and their training and experience as 'chair'. The offences most frequently dealt with have been fraud, public mischief and disturbance, and simple assault or threat of assault. The Indian Brook program, like the ALS one, has not handled intoxication or 'possession and sale of intoxicants' offences. Unlike ALS, it has also not handled court offences since the local crown prosecutors have defined these as requiring a response from the offended provincial criminal court. The dispositions utilized in the Indian Brook program have generally been community service hours, a small fine, or both.

In all the diversion programs a clear, explicit objective has been to reduce incarceration and deal more effectively with offenders and attendant social problems. The claim that 'we can do better and do it fairer', at least within the mandate obtained, has been advanced. In the case of the three reserves (Indian Brook, Sandy lake and Attawapiskat) there has also been an emphasis on community development and a sense that the diversion initiative represents a significant step on the road to greater native direction and control over justice matters in the community. While the ALS program in Metropolitan Toronto,

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<sup>14</sup> In Indian Brook the diversion coordinator solicits nominations from the community at large and then willing candidates are screened by means of an intensive, structured interview. If the interviewing team is in favorable consensus, the coordinator then sends the recommendation to chief and council for final approval. Thus far all recommendations have been accepted, although council has sometimes raised useful questions concerning potential conflict-of-interest cases (such as where a candidate was brought forward on the recommendation of a local police officer).

given the comparatively small proportion of natives in the metro area, is ostensibly less specifically focused on crime levels and community development, its proponents and coordinators express concern to enhance native institutional development, and the acceptance of responsibility in the offreserve.<sup>15</sup> They espouse the explicit position that better integration within the native 'community' is the key to reducing native criminality. Objectives pertaining to the incorporation of different cultural considerations into justice matters and to explicit claims for self-government have been more muted. Indeed the latter themes have often been mentioned more emphatically by collaborating government and justice system officials.<sup>16</sup>

## The Aboriginal Experience

### *The divertee*

The aboriginal diversion programs appear to represent attractive options for accused native persons. ALS in Toronto has seen its number of divertees increase steadily over a two year period, and while information is not available on the number of eligible persons there who did not select diversion, the impression is that the penetration rate (the number opting for the program as a proportion of the total eligible) is reasonably high.<sup>17</sup> Accused persons are directed to diversion largely by native court workers and secondarily by defence lawyers. The

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<sup>15</sup> An ALS coordinator has indicated that the program follows the principle that nominations received from the native organizations in the area are to be accepted because it is desired to develop a sense of ownership among area's natives and native organizations for the program. Certainly they see their activity to be one of institution-building in the metro area.

<sup>16</sup> Reference has already been made to the comments of political authorities such as the Attorney-General of Nova Scotia. The Obonsawin-Irwin studies also show that 'external' justice system officials were more likely than community leaders to discuss the programs' objectives and benefits in terms of a distinctive cultural impact and the furtherance of community control (e.g. Obonsawin-Irwin 1992a: 10, 15).

<sup>17</sup> Moyer and Axon indicate that up to February 1993 fewer than 10 persons had refused the diversion option (Moyer and Axon 1993: 59). But at the same time they are puzzled by the fact that the number of divertees appears to be a small proportion of the total native cases coming to the provincial criminal courts in the Toronto area (Moyer and Axon 1993: 77). It is unclear whether these latter estimates are exaggerated, or involve largely non-divertable charges (such as liquor and motor vehicle offences), or both.

'recruitment process' is very active and the organization has a keen appreciation that 'we need the cases'. Attawapiskat also apparently has had a very high penetration rate as all cases of offences against band by-laws regarding 'intoxicants' - the vast majority of diverted charges - are routinely diverted. There are grounds for holding, especially in the case of the ALS program, that the levels of 'no-shows' and 'failure to comply' are lower than in the provincial criminal courts.<sup>18</sup>

Detailed data available on Indian Brook's diversion program indicate that it has only a modest penetration rate. This is largely because, unlike its ALS counterpart, there is by explicit strategy little active recruitment of cases, nor is there in place at provincial courts an infrastructure of native court workers and legal aid counsellors. Generally the decision to divert is made by the Crown after consulting police and without significant input from the Indian Brook program staff. The modest degree of penetration is attributable secondarily to process problems (such as no show after an adjournment, which can shortcircuit the diversion alternative) and the desire of accused persons either to have their case quickly dealt with or to 'have their day' in provincial criminal court. The level of 'no-shows' does not appear to differ much between the Indian Brook diversion program and the nearby provincial court, especially when one considers that persons with an extensive record or a pattern of failing to appear or to comply, are usually not diverted.

Presumably the unquestioned advantage of the diversion program for divertees is that the latter do not 'get a record' for the offence. This assumes of course that the accused would be convicted in the provincial criminal court. In the case of Indian Brook some persons initially diverted later rejected that alternative and were acquitted upon their return to provincial court. This happened only in a handful of cases and no data are available on the realisation of this possibility in the other three diversion programs. In all programs cases are diverted only if they

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<sup>18</sup> In its first year of operation the Attawapiskat elder panel dealt with some 255 cases while the elder council in Sandy lake participated in considering about 115 cases. No information is available on failure to appear or failure to comply. In the ALS program by July 1993 only four of the 63 diverted persons had failed to attend their scheduled hearing and the compliance rate for diversion dispositions was reported to be over 90%. In the fiscal year 1993-94 104 cases were heard by the ALS community council. The average number of cases per month has grown from slightly over five to slightly over eight. There was a slight decline in the number of cases diverted in the last quarter (June 1994) but ALS officials consider it to be an anomaly. In Indian Brook over the first two years of operation the average number of scheduled diversion cases per month was approximately two.

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would otherwise be prosecuted by the Crown. It is not clear how different the diversion dispositions rendered in Toronto and the northern communities of Sandy Lake and Attawapiskat have been from the sentences that would be meted out for such offences in regular provincial criminal court; there is no incarceration and less probation (and none in Toronto), but the former at least would presumably not have been commonplace in the provincial court for the kinds of offences diverted in the three jurisdictions. Diversion officials and community leaders contend that there has been significantly less incarceration (Obonsawin-Irwin 1992a: 63. Clearly the 'sentence advisory' activity of the elder panels in Sandy Lake and Attawapiskat may well have reduced incarceration for the most serious offences. In Toronto the diversion of the failure to appear or to comply offences has undoubtedly reduced short jail terms.) Certainly there has been more emphasis in diversion upon community service orders, counselling and small fines. In the case of Indian Brook, detailed comparison of provincial court sentences and diversion program dispositions for similar offences indicates that the former emphasize probation, suspended sentences and small fines whereas the latter emphasize community service orders and small fines. In all four programs the evaluations have indicated that divertees, more so than the community in general and especially more so than victims, have been quite satisfied with the dispositions rendered and quite positive about the program in general (Obonsawin-Irwin 1992b: 34, 1992a: 29, 59; Moyer and Axon 1993).

It is difficult to assess the extent to which the divertees have been changed as a result of their diversion experience and the extent to which they have experienced 'shame and reintegration' or become more accountable to the community. In the case of Indian Brook there have been few repeaters in the program but the number of divertees has been modest and the Crown typically has not diverted persons with significant records. Moreover systematic data have not been gathered on whether diverted persons have subsequently appeared in provincial court on other offences. No data are available concerning recidivism or repeaters in diversion from the other three locales though there are some indications in community assessments and justice officials' actions that recidivism is a problem. Indeed there is a sense, especially in Toronto where many divertees have very serious addiction problems, that 'healing' takes time and one should not get preoccupied with recidivism in the short run. A diversion official in the ALS program asked: "What's the standard [for assessing recidivism] for crack offenders with twelve priors?".

Divertees in Toronto, Indian Brook and perhaps also Attawapiskat are most frequently young unemployed males between 18 and 29 years of age with a history of substance abuse and a minor criminal record; in Toronto and Indian Brook female divertees constitute a significant minority. It appears that diverted persons spent more time in the diversion process than they would have in the

provincial court process, and that on the average they were more likely to have had to do something in atonement (e.g., community service). ALS officials indicate that over 50% of their 'clients' have had more than 20 separate contacts with diversion staff; their diversion hearings also have usually been at least one hour in duration (Moyer and Axon 1993: 64). The corresponding figures for Indian Brook would be about half of these. Detailed data are not available for Sandy Lake and Attawapiskat but the more minor nature of the offences and the large number of offenders dealt with in these projects would suggest that processing and contact time would be less. One observer of the Attawapiskat elder court reported that cases followed at ten minute intervals; of course there may well be significant informal counselling also given by the elders. Certainly in all locales there has been more probing of the reasons for the offence and the social and personal circumstances of the person diverted than would be the case in provincial criminal courts. And it is clear that an expectation in all programs has been that creative, effective dispositions would result. As one ALS staff member remarked: "we hope the council will come up with meaningful suggestions and the person will want to follow through on them" (Globe and Mail: July 27, 1991). At the same time it is not clear that such probing has led to any effective therapy or strategies of rehabilitation. Indeed dispositions usually appear to be quite conventional and in themselves unlikely to be more effective than similar ones meted out in provincial courts, so that evaluators have suggested a reduction of the program pending consideration of healing strategy (Obonsawin-Irwin: 1992b: 56). On the other hand, the process of diversion, including the probing and the formation of a signed agreement of the divertee with the disposition reached by peers, may be quite significant.

Anecdotal evidence from these diversion programs provides some basis for holding that shame has often been experienced by the offender appearing before community native peers. There were clear signs of that (such as tears, perspiration, hanging heads), interpreted thus by native members of the hearing panel as well as the writer on frequent occasions in the first year of the Indian Brook operation. At that time the divertee sat in front of respected community persons in a room bedecked with native symbols (the same arrangements as in Attawapiskat). Moyer and Axon reported that intensive probing was often associated with signs of shame and emotional intensity in the ALS hearings (Moyer and Axon 1993: 63). Both the Indian Brook and ALS hearings are now quite informal with all persons - usually just the panel members and the accused - gathered in relaxed, roundtable format. The strategy here is to create an environment where the divertee will open up more and collaborate in a healing or therapy process. This strategy perhaps shifts the hearing impact from shame-creation to problem-solving. The absence of victims, police and witnesses provides a wide scope for the accused to make the most favorable case for himself/herself; panel members nevertheless as a rule unequivocally establish the

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hearing's premise that the divertee has done something wrong and needs to do something to counter such behaviour. Indeed even staff in the ALS program, where divertees are referred to as clients and healing the client is the paramount objective, have noted that that ALS is trying to avoid mediation since "the council's role is best when they can say 'you're behaving improperly' and you can't say that in a mediation-type format".

Reintegration is a major objective in all programs. In ALS the diversion disposition often entails the client becoming involved in area native organizations, a thrust that is backed up with ALS staff contact. In Indian Brook the divertee is often addressed by a respected elder after the disposition is rendered, and diversion staff write congratulatory letters to all those who fulfil their disposition terms. In Sandy Lake and Attawapiskat elders directly counsel the divertees. It is unclear at this point, and probably premature to try to determine whether divertees have developed a new sense of accountability as a result of their diversion experience. Still there are inspiring success stories reported in evaluations of ALS, Indian Brook and Attawapiskat.

In summary the diversion programs overall have a good penetration rate and a level of 'no-shows' and 'failure to comply' that is at least no worse than that of the provincial courts. Divertees have indicated a high satisfaction with their diversion disposition and with the program in general. While available data do not allow clear conclusions concerning recidivism in any sense, it is evident that divertees spend more time in the diversion process than they would in the conventional court process, that they are more involved in the process and their life circumstances subject to greater probing, and that they experience the outcomes more concretely as atonement or rehabilitation. There are grounds for holding that more shame and reintegration is effected in the diversion process, but while anecdotal evidence shows some success stories it is too early to assess whether these diversion initiatives produce more accountability to the community or changed behavioural patterns. Insofar as they do, this would seem to be the result of involving the offender in a new process more than the generating of effective, healing dispositions. Certainly the effectiveness of the dispositions per se have been questioned by many community residents (see Clairmont 1994; Obonsawin-Irwin 1992b).

### *Victims and reconciliation*

The alleged failures of the current justice system to appropriately involve victims (to do them justice and reduce their alienation rather than contributing to it) and to effect reconciliation among offenders, victims and the community at large, have been commonly cited by proponents of popular justice and restorative justice as

well as by advocates of aboriginal justice initiatives. It is not at all clear however that the diversion programs under discussion here will produce different outcomes. There appears to be very little involvement of victims in any of the four programs. In the Northern Ontario communities the emphasis has clearly been placed upon elders counselling and directing the divertees while in both the ALS and Indian Brook programs the focus is upon the accused meeting with and being counselled and directed by respected native community representatives. In the ALS program there is apparently some consultation with victims, especially by the native officers in the special ethnic division of the police department. But victims rarely if ever attend the hearing or are informed about its consequence. Clearly the focus is on healing the accused. In Indian Brook there is more contact initially by local native officers and sometimes the Crown prosecutor, and subsequently by the diversion staff. Still the contact is quite limited, and virtually the only victims who have ever appeared at diversion hearings have been police officers who have been assaulted or obstructed. It would appear that the Crown is more likely to consider it important to consult the victim where he or she is non-native or the offence was committed outside the community.<sup>19</sup>

It is important to note that many of the cases considered in the four diversion programs entail what criminologists refer to as 'victimless' offences. In Sandy Lake and Attawapiskat the major offence, as noted above, is violation of band by-laws concerning intoxicants. In the Toronto program the leading offences have been prostitution offences, and more especially court offences (such as failure to appear) where it might be unrealistic to expect judges, prosecutors or probation officers to participate in diversion. In Indian Brook a large proportion of hearings have dealt with welfare fraud where the more abstract band or community may not be seen by the divertee to have been victimized.<sup>20</sup> Direct restitution and apologies have been diversion dispositions, and even in Toronto letters of apology have sometimes been required of divertees. But it would appear that these dispositions or a more obviously reconciliatory type are much less frequently used than community service orders, small fines (under which the monies stay in the community but are not directed to restitution or compensation), and directed or suggested counselling. Community service 'sentences' are commonplace in

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<sup>19</sup> According to reports this certainly is the case with the ALS and Indian Brook programs. In the latter the Crown interprets the protocol to apply primarily to native-native incidents.

<sup>20</sup> At Indian Brook hearings some panelists had a tough time getting divertees to accept a zero-sum definition of the situation, i.e. to recognise that the money they had obtained by fraud could have gone to other persons or to needed projects in the community. Many accused persons saw it rather as a matter of scamming a federal government supply without such implication.

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diversion and may well have an impact which entails reconciliation but they are considered primarily as generating shaming, especially insofar as they require highly visible, distinctive, physical work, such as cleaning up a seniors' complex or a roadside area, which is actually quite uncommon.

Survey and other data on victims' responses in the three communities of Sandy Lake, Attawapiskat and Indian Brook indicate that victims have significant reservations about the fairness and effectiveness of the diversion dispositions. They appear more likely than divertees and others in the community to contend that divertees are being given no more than a slap on the wrist by panel members who, if not sympathetic to the accused, are at least focusing upon the accused's healing needs (Obonsawin-Irwin 1992a: 30, 59; 1992b: 21, 25, 36, 53, 60). Under these circumstances it is not surprising that the South Vancouver Island diversion program which, with a similar focus, dealt with more serious matters of sexual assault and family violence, was forced to shut down because of adverse reaction by victims and other community residents (Times-Colonist, January 11, 1993). The program at Sandy Lake is currently in jeopardy over a somewhat similar controversy concerning the disposition of a serious sexual assault. There the community has become divided over whether a serious sexual assault charge against a prominent elder should be tried in the community or in the district court. The victim, the victim's supporters and the local police are arrayed against chief and council who have threatened not to allow provincial court activity in the community if this case is not held in the community. The victim's grouping and the police, supporting the decision of justice officials, contend that fairness to the victim demands the case be moved to the district court while chief and council raise the issue of natives' inherent right to govern themselves (Wawatay News, July 28, 1994). Of course in the case of the four diversion programs considered here victims might well consider the sentences meted out by the conventional court for these types of minor crimes to be equally ineffective and no more than a slap on the wrist.

Some victims have expressed satisfaction with the diversion processes and outcomes. Certainly there are victims, whether in Indian Brook or Northern Ontario, who, like other members of the community, support the continuance of the diversion option. The criticism appears to be the most pronounced in Attawapiskat where victims question both the decisions and the role of the elders. As it is, the programs do allow for some community control and direction, and of course with time and a wider range of divertable offences there may come strategies showing greater sensitivity to victims and reconciliation at the community level. In all programs there is clearly a current process of institution-building at the local level. Still there is not much indication at present of such strategies or tactics and the programs appear to reproduce in these respects the existing system. Thus they treat the state or community as the victim, and provide

no significant role for the concrete individual victim, and no mechanisms for mediating disputes and bringing people together,<sup>21</sup> or for hearings conducted by special persons with at least some special training. There is some indication that in these justice initiatives, as in the provincial criminal court proceedings, the victim is considered unpredictable and potentially an administratively troublesome presence.

### *Community and institution building*

As noted above, diversion initiatives have been associated with the idea of community empowerment and with community development in the sense of the reinvention and development of community institutions so that native persons can exercise more autonomous control over local justice matters. Even the ALS project in metropolitan Toronto has this objective. There the diversion staff typically accept without further assessment persons nominated by area native organizations to be panel or council members, precisely because the staff is striving to develop a sense of ownership for the project among these diverse organizations. This development is linked to both the aims of effective rehabilitation of native offenders and self-government in the off-reserve. In the case of Indian Brook emphasis has been placed upon developing a program that is removed from band politics and operated at arms-length from chief and council and other interests such as police, Crown, and Family Services. It is unclear how successful the ALS has been in its objective, but the diversion staff has indicated that they have been able to transcend the common divides between status and nonstatus, reserve and offreserve interests, to operate a program that is status-blind (ALS, March 1993). Data indicate significant success in the case of Indian Brook. Virtually all recommendations advanced by the diversion staff, whether with respect to potential members or to more autonomous operational procedures, have been accepted by the chief and council. Through these means as well as through extensive training of panel members and the development of conflict-of-interest guidelines in the selection of panelists for specific cases, the Indian Brook program has established itself in the highly factionalized community.

In Sandy Lake and Attawapiskat it appears that the diversion organization has

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<sup>21</sup> In this respect it is noteworthy that in many communities factionalism is a significant social problem. It is unclear how diversion programs as presently operative can affect this cause of much minor (and some major) offence. In Indian Brook private prosecutions are quite commonplace as persons try to resolve problems through the outside court system even as police and crown prosecutors refuse to take up the matter. At present none of these private prosecutions are ever diverted.

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been more closely tied to chief and council. In one instance the diversion coordinator position went to the elected council member who had the 'justice portfolio'. This close connection between band politics and the diversion organization may lie at the root of the difficulties the diversion project has faced in those communities, since it appears that there have been major transition problems brought on by changes in elected band leadership. Evaluators of the Attawapiskat program reported in 1992 that "there is still not a feeling of community ownership for the process" (Obonsawin-Irwin 1992b: 51).

In all diversion programs it appears that respected native persons (those 'leading a good life') have become involved as panel or council members. And in the ALS, Attawapiskat and Indian Brook projects the panel members have received significant training or orientation with respect to the principles and practices of the 'outside' justice system.<sup>22</sup> These features provide a strong underpinning for the kind of community institutionalization referred to above. The ALS program is embedded in a larger organization which commands significant legal and managerial expertise. While that level of sophistication does not exist for the other three projects, they have the advantage of being in real, set-apart communities.

In the three native communities the program has been evaluated in positive terms by the community at large and there is a strong desire to have the diversion initiative continued. In Indian Brook a recent community survey revealed in addition that community residents saw the program as too hived-off, involved in too little outreach, and so in some ways replicating the outside system. In Northern Ontario community residents have also called for more community development and have expressed reservations about the way the program is operated and the role of elders within it. According to most provincial justice system officials, community leaders and the community in general, these initiatives have, albeit modestly, realized the objective of adapting the criminal justice system to community needs and control. Still the level of community involvement in these programs may be significantly less than in other non-diversion justice initiatives in native communities such as Hollow Water and Pukatawagan in Northern Manitoba. There extensive community resources are routinely mobilized across a variety of contexts and using multiple alternative dispute resolution techniques including mediation, to deal with offenders and offences (Ross 1993; Globe and Mail: March 14, 1994).

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<sup>22</sup> There was, at least until 1993, little training of any kind given to the elders at Sandy Lake (Obonsawin-Irwin 1992a: 21). The training for ALS council members was quite modest, namely, a day and a half orientation (Moyer and Axon 1993: 37). But a sizeable majority of these persons were employed full-time with native organizations or government agencies dealing in native issues.

### Analytical Considerations: Equity, Effectiveness, Efficiency

A major concern about popular justice and the local community focuses on the issue of equity. In a small community a local elite may exercise considerable power. This may especially be the case where the community is somewhat isolated and there are few if any countervailing elites. Researchers (e.g., LaPrairie 1992) and knowledgeable experienced authorities (e.g., Ross 1993) have raised these concerns in the case of justice initiatives such as diversion in small native communities. Even in small communities such as Indian Brook and Attawapiskat there is increasing evidence of significant socio-economic differences which provide potentially a fertile soil for differential and biased justice (see for example, on Attawapiskat, Howley 1992). Indeed community members themselves have articulated such concerns in recent surveys, expressing considerable caution concerning the prospects of a full-blown, autonomous native justice system or a segment of such (see for an example Clairmont 1992). The perceived lack of equity in the South Vancouver Island diversion program which dealt with serious sexual charges was the major factor in that program's demise in 1993. As one local native critic observed: "The implementation must be fair, accessible and accountable. The present structure and personnel involved with the South Island Justice project meet none of these factors" (Times-Colonist, January 11, 1993). As noted above, a similar controversy has recently developed in Sandy Lake.

In the diversion projects considered here the divertees overwhelmingly reported that they were treated fairly and with more sensitivity than they would have experienced in the provincial justice system. Even victims and other community members wanted the program to continue, while occasionally expressing reservations about the fairness of the panel and the 'too lenient' dispositions they rendered. Given the fact that these diversion projects deal with minor crime and avoid family violence perhaps one could expect that position to be common. Still, equity does appear to have been reasonably achieved. The complaints or reservations of victims and members of the community at large have largely been of the sort heard in the larger society, namely criticisms of the alleged leniency of sentencing rather than of unfair diversion dispositions. In Attawapiskat however there has been some significant criticism particularly concerning elders' possible conflict of interest in the hearings. In the Indian Brook project the arms-length relations with chief and council and the development of conflict-of-interest guidelines have clearly reduced though not eliminated any tendency for diversion staff to 'blink' when dealing with powerfully placed persons. The lack of these features in Sandy Lake and Attawapiskat has been noted by the evaluators of these projects, who have called for such changes (see Obonsawin-Irwin 1992b).

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The development of justice initiatives that provide equity appears crucial for community institution building, since equity is a key to the legitimation of authority. However, it is a hard challenge to accomplish that end without reproducing the impersonality and 'distance' of the external justice system. To achieve that objective in turn it may be important to incorporate in a supplemental way extra-community monitoring and interface through linkage with tribal bodies or the provincial justice system.

It has already been noted that the four diversion programs appear to be effective if measured in terms of penetration rate, appearance and compliance levels and the initial assessments of diversion staff and of divertees. There have been a few dramatic successes. At the same time there is no clear evidence concerning recidivism and rehabilitation (that is, concerning healing). Also there is no particular reason to claim effectiveness with respect to the rehabilitation of divertees. As Obonsawin-Irwin (1992a, 1992b) indicate in their evaluations of the Sandy Lake and Attawapiskat initiatives, there is no clear conceptualization or specification of any healing strategy. Indeed, in all three native communities there may be a growing frustration along the lines expressed by one diversion official: "What have we really done? What have we got to work with?"

Given the extensive contact that the ALS program has with its divertree clients, and the organizational resources it taps into, perhaps that program might yield greater effectiveness in terms of healing; at the same time however the program often deals with difficult cases for rehabilitation (such as drug addicts and rootless persons). Its strategy has been to emphasize intensive counselling and supervision and to create greater community bonds - both of these commonly acknowledged rehabilitative strategies. Unfortunately no information is available from the evaluators on whether the program has in fact achieved its healing objectives by generating significant shame, greater accountability or strengthening of community bonds.

In none of the programs is there significant evidence of effectiveness with respect to reconciliation or treatment of victims. The diversion dispositions do not appear to be especially directed to getting at the roots of conflict or factionalization. The dispositions are usually specific and short-term, unlike programs such as the Hollow Water initiative discussed by Ross (1993) which is long-term and entails numerous circles or therapy sessions for offenders. Of course this latter initiative deals with more serious offences and its policies and practices may be too demanding for the kinds of offences dealt with by the diversion programs under consideration here. Still judgment by peers, and community service work may not provide either much therapy or sense of community ownership. It may well be that effectiveness may be seen rather in terms of 'adjusting the justice system to the community' than in dealing with offenders.

There is good reason to hold that the diversion programs are reasonably efficient. Although staff members of the ALS do not stress the cost-saving aspect of their program ("we don't get into this") the ALS program was judged by its evaluators to be very efficient: "It would be difficult to find a similar client-staff project with costs per case as low as this one". There are several reasons for this efficiency, namely, the aggressive recruitment of cases, an excellent infrastructure (with court workers, native legal aid, and managerial expertise), and the fact that cases selected for diversion do not under any circumstances return to the provincial court for processing, thereby saving valuable court and prosecutorial time. Indian Brook's diversion program would have to be judged less efficient. The number of cases handled has been disappointingly small. The protocol for dealing with diverted cases provides no savings for court or prosecutor; diversion there usually requires several court appearances and is defined by officials as 'another factor to consider'. With the 'de-bugging' of procedural problems and attention to factors that are limiting the caseload<sup>23</sup> the program will become more efficient. Hitherto diversion staff have compensated for this problem by involving their organization in other justice activities such as parole advisory and alternative measures.

The Northern Ontario communities have handled a significant number of cases and especially in Attawapiskat have undoubtedly saved some court and prosecutorial resources. Obonsawin-Irwin reported the views of some justice system officials and community leaders that these projects might be somewhat over-resourced and recommended both enlargement of panel functions and reduction of organizational staff (Obonsawin-Irwin 1992a: 17, 47, 1992b: 45). One problem appears to be that resources may not have been optimally matched specifically to diverse organizational tasks, including for example translator and elders' remuneration and various administrative needs. In summer, 1994 the Attawapiskat chief and council barred the provincial court from the community, protesting that its diversion project budget should be increased by \$25,000, not decreased by \$30,000 as contended by provincial authorities. The argument advanced by chief and council was two-fold, namely, that their project was highly cost-effective, and that an effective program required more resources. Because of this dispute the Attawapiskat diversion program had at the time of writing been suspended for over a year.

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<sup>23</sup> In meetings with Crown prosecutors, police and government officials Indian Brook diversion staff have put forward a number of proposals to increase the number of cases directed to the diversion program. These proposals include the diversion of young offenders aged 16 and 17, and of those on minor weapons charges, and more generous interpretation by Crown prosecutors of the protocol on the diversion of repeat offenders and those charged with person offenses.

### Cultural Distinctiveness

To what extent have the diversion programs incorporated values, priorities and practices that are different from the 'outside system' and reflect nativeness? Clearly the programs do reflect native identity in a variety of ways. The Northern Ontario programs feature respected elders as panelists, and all panel members in all programs are native persons. In Indian Brook diversion hearings have often ended with a respected elder commenting on the divertee's situation and by means of traditional lore encouraging them to change their behaviour. In Sandy Lake and Attawapiskat the diversion meetings are conducted in the native Cree language. In the first year of the Indian Brook program the hearings were conducted in a setting featuring in the background the banner of the Mi'kmaq Grand Council, and sweetgrass and other native symbols on a table at which the panel members sat; all hearings were opened with a prayer to the Great Spirit. While the ALS project does not place special emphasis on tradition, staff try to accommodate those having a traditional orientation by having a tradition-oriented person at the hearing. Indeed early in the developmental phase of the ALS project a special meeting was held with six elders and traditional teachers to discuss the project and to get some direction on how to proceed (Moyer and Axon 1993: viii).

Divertees in the ALS and Indian Brook programs can sometimes secure dispositions that reflect native traditions. The dispositions in all programs often emphasize reconciliation and reintegration in the sense of demanding community service work and encouraging identification with the native community, its presumed special values and behavioural styles. The diversion hearings typically occur without lawyers, victims and witnesses and in an informal atmosphere. Perhaps the clearest example of distinctive operating principles is found not in diversion but in the sentence advisory activity in Northern Ontario. There the accused is apparently deemed, by opting for sentence advisory proceedings, to have waived individual rights for himself or his lawyer to be present when sentencing comments and advice are given and to cross-examine those giving these assessments.

At the same time there is some question as to the substance of the native distinctiveness that characterizes these initiatives. In Indian Brook and Sandy Lake there has been some ambivalence among community and panel members concerning the relevance and appropriateness of traditional values and especially native spirituality (Obonsawin-Irwin 1992a: 56). In the ALS program native traditionality is apparently an option that the client may exercise rather than an intrinsic feature. In Indian Brook hearings the native symbols referred to above have been dropped and the format now is for panel members and divertee to meet around a table, the same setting as in the ALS program. Interestingly panel members in all programs have generally received training and orientation with

respect to the criminal codes and provincial justice system, but reportedly not in traditional philosophy, practices (such as talking circles and sweats), spirituality and suchlike. It may well be that, as the programs become more established and as the communities secure greater autonomy, there will be less emphasis on proving themselves to the governmental funders and controllers (as is now acknowledged with different degrees of explicitness to be necessary), and more on developing or reinventing traditions and distinctive styles. On the other hand it may well be that such programs essentially reproduce the outside system under local native management.

### Management and Control

All the diversion programs operate post-charge, dealing with minor crimes (and excluding as well family violence and, usually, sexual assault) where the diverttee's participation is voluntary and where the ultimate decision to divert rests with the Crown prosecutors. The dispositions rendered are not supposed to impact directly on the 'outside' justice system. Clearly the level of autonomy and control over justice matters entailed by such programs is quite modest. Moreover it varies significantly between these programs. The ALS program in Toronto exercises the widest jurisdiction, ranging from court offences to federal statute offences and is perhaps the most aggressive in asserting its control. Diversion staff there indicate that in concert with native court workers and legal aid 'we pick' the divertable cases.

In the Northern Ontario communities the diversion programs focus heavily upon band by-laws and supplement that activity with 'sentence advisory' to provincial judges on more serious criminal matters. The Indian Brook program in practice has had a limited jurisdictional mandate, covering minor crime but no court offences, no youth offenders, and no federal statute offences, and diversion staff essentially respond to Crown decisions to divert rather than becoming involved in the selection of cases. The level of legal sophistication of staff and backup resources could account for differences in control between the ALS program and those in the native communities. But a more fundamental reason may be that, while the former has a more 'client' orientation, the latter have to be concerned with crime prevention and community needs. They cannot adopt an expressly pro-diverttee stance, and program staff in this phase of their initiative try to some degree to insulate the diversion process from police and prosecutorial discretion.

In Toronto, Sandy Lake and Indian Brook there have been significant developments in the justice initiative. ALS has continued to expand its jurisdiction in criminal matters and is posed to develop initiatives in the area of family violence. It has modified its protocol with government and developed new

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strategies for dealing with the Crown; for example ALS staff now deal with senior Crown prosecutors in selecting cases for diversion. The Indian Brook diversion staff have also been negotiating expansion in jurisdiction through changes in both the protocol and its interpretation by police and Crown. In Sandy Lake there has apparently been expansion from sentence advisory functions to the hearing of cases by elders on their own. The strategy for change adopted by diversion staffs appears to proceed through administrative and bargaining tactics rather than legal challenge. Formal appeals of Crown decisions, while allowed, have been infrequent and deemed ill-advised by diversion staffs. The evaluation of the Attawapiskat program in 1992 recommended a temporary diminution of jurisdiction pending a review of strategy regarding dispositions (Obonsawin-Irwin 1992b: 56). As mentioned above, that program has been shut down for some time because of a dispute between band officials and provincial government authorities over the level of funding.

It has been noted that, while community residents in Sandy Lake, Attawapiskat and Indian Brook have serious reservations concerning actual procedure, and significant disagreement over the appropriate jurisdiction for diversion programs, they have accepted the programs in principle. As one Sandy Lake person commented: "it's our own system and control is kept in the community" (Obonsawin-Irwin 1992a: 37). This complex viewpoint seems to underline the need for community development and institutionalization. Diversion staff in the three communities have been urged by evaluators to devote more effort to involving the community at large, either through expanded panels which might, for example, recruit outside the circles of elders in the Northern communities, or through the organization of more information sessions and collaboration in dispositions.

Diversion staff in all four areas appear to have exercised rather exclusive management roles in dealing with divertees, meeting with them, assisting them, monitoring dispositions and suchlike, tending thereby to become a specialized subsystem of the community. Not surprisingly, 'outside' justice officials, while also positively assessing the diversion initiatives, tend to suggest even more specialization. It is unclear, as will be seen below, whether this would be the most promising way to advance the self-government project or deal with the fundamental problems in native communities.

### Advancing Self-Government: Diversion as a Vehicle for Change

It could be argued that the diversion programs discussed here represent an incremental approach to social change directed at increased self-government. They have all focused on minor crime and can be seen as attempts to build up

appropriate community institutions for dealing with justice matters. Presumably as they prove themselves and advance in the realization of their objectives their mandate or jurisdiction will expand and more and more community members will become experienced in diverse aspects of justice decision-making and policy. New community institutions tailored to contemporary realities will have been developed. Such a strategy of change would appear to be consistent with the theoretical concerns raised by MacDonald (1993) and Webber (1993) and the empirical work of LaPrairie (1991), all of which emphasize the importance of building strong community bases for legitimacy. There is some positive support for this strategy in the cases of Indian Brook and ALS in Metropolitan Toronto, in each of which sites the diversion mandates have expanded (e.g., to cases arising from federal statutes, or involving young offenders, or family violence) and there is some evidence of 'community building'. In Indian Brook the justice panel in addition to conducting diversion hearings has taken on a probation and parole advisory function, and negotiations are advanced with respect to having court sittings on the reserve, alternative measures for youth, and sentence advisory hearings for very serious crimes.

At the same time one could question the value of this incremental approach for getting at the nub of native justice problems or advancing the self government project. The argument could be made that it is dealing with peripheral or minor crime rather than the more serious interpersonal (familial and otherwise) violence that is particularly common within some native communities. And it deals with minor matters largely without involving the victim or achieving in any direct way reconciliation and significant community development. It is in basic ways reproducing the approach of the larger society's justice system in handling minor offenses by focusing upon individual offenders, largely ignoring victims' or community's concerns, and without any well-conceived and specified rehabilitation or healing strategy. As Ross (1993) has argued, such diversion programs may be of limited value for native people and deflect scarce resources from more serious problems and more distinctive native remedies.

It might well have been impossible to implement the kind of elaborate healing and community involvement program, with its focus on serious, major offences, called for by Ross, in metropolitan Toronto or Indian Brook. In the former milieu the accused persons' lack of community integration and the political visibility of the program would have been formidable obstacles. In Indian Brook the problem of factionalism (and permeable community boundaries) would appear to have required a phase of consensus and institution building. On the other hand the isolated Northern communities might well be appropriate milieux for programs directed at serious interpersonal and sexual offences. Yet the recent controversies referred to above in South Vancouver Island and Sandy Lake suggest that there are major problems associated with that strategy. In all three native communities

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of Indian Brook, Sandy Lake and Attawapiskat, residents clearly believe their best interests are served presently by a justice system that blends greater native control over a limited range of justice matters with monitoring by and some accountability to the outside justice system (Augur 1991: 21; Obonsawin-Irwin 1992a: 12; Ross 1993: 9-10). It is also clear from recent events in Sandy lake and Attawapiskat that larger political issues and disputes with government can cause band leaders to relegate diversion initiatives to the 'back-burner'.

### Concluding Remarks

The four diversion projects discussed here have been among the most-hailed of recent native justice initiatives in Canada (Royal Commission on Aboriginal Peoples 1993). They could be said to cover the 'communitarian' continuum, from Canada's largest metropolitan area to quite isolated, small Northern communities. The projects share many features, organizational, processual and in terms of objectives and impacts. The ALS project in Toronto differs from the others in its sophisticated resource infrastructure and in its focus on rehabilitating the offender defined as the client. Its staff aggressively pursues diversion - "we will fight for cases" - and has a strong service orientation. In the three native communities considerable attention has to be directed to crime levels and community concerns. Creating new community institutions in the justice field appears to require there, at least initially, a more muted advocacy and a less aggressive recruitment of cases.

The diversion initiatives have proven to be popular with offenders, to involve the latter more in the process of probing the offence and doing something concrete about it than do provincial criminal courts, and to have broad, general support within the communities. In all programs the objectives relating to victims and community reconciliation have proven elusive to date. Comparison has indicated the importance too of separating the operation of diversion from the political arena, since where that was not done the diversion organization has had difficulty surviving. It is quite unclear whether these diversion programs will have significant impact in reducing recidivism and generating rehabilitation and greater accountability among offenders. Whether these relatively modest initiatives will constitute the basis for advancing the self-government project, providing a subculturally distinctive justice system and dealing with the underlying problems besetting many native communities, remains to be seen.

The diversion initiatives have already had an impact on the broader society. In the Toronto area members of other ethnocultural communities have entered court challenges alleging violation of the Charter of Rights and Freedoms insofar as they also have not been able to have their offences diverted. Recently the Ontario

government has suggested that a program similar to ALS might be initiated for Blacks in the metro area (Globe and Mail, November 5, 1994). In Nova Scotia, where official prosecutorial policy both allows for diversion as an alternative to prosecution, and expressly forbids failure to proceed with prosecution on the basis of race, colour, creed, etc., the government is developing plans for similar, general diversion initiatives in the larger society. Some informed officials are of the view that distinct diversion programs for members of other, non-aboriginal, specific ethnocultural communities would be politically quite unacceptable. Nevertheless, separate legal aid services have already been established for Blacks in metropolitan Toronto in reliance on the provision in the Charter of Rights and Freedoms allowing for special initiatives on an explicit, project basis, in the case of some disadvantaged societal groupings. Certainly one could anticipate much policy deliberation concerning the future of adult diversion, especially in urban society. Also, as native diversion initiatives in areas such as metropolitan Toronto and Indian Brook begin to deal with family violence offences, the issue is bound to arise of jurisdiction with respect to non-native offenders. As suggested at the beginning of the paper native justice initiatives may well constitute a flagship for change in the justice field.

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