ABORIGINAL PEOPLES, THE ADMINISTRATION OF JUSTICE AND THE AUTONOMY AGENDA: AN ASSESSMENT OF THE STATUS OF CRIMINAL JUSTICE REFORM IN CANADA WITH REFERENCE TO THE PRAIRIE REGION

By

LUKE McNAMARA

A Thesis Submitted to the Faculty of Graduate Studies
in Partial Fulfillment of the Requirements for the Degree of

MASTER OF LAWS

Faculty of Law
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ISBN 0-315-77970-5

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ABSTRACT

For more than 20 years the Canadian criminal justice system has been the subject of reforms designed to address overwhelming evidence of the system's disproportionate and discriminatory impact on Aboriginal peoples. For the most part, this approach has been unsuccessful, primarily because of a failure to recognize the critical nexus between justice reform and the demand of the First Nations, Métis and Inuit peoples of Canada for constitutional recognition of their right to govern in their own communities. An examination of several recent reports of Aboriginal justice inquiries suggests that this connection is finally being made, with the consequence that community-based autonomy has emerged as the underlying principle of justice reform initiatives. Recommendations for the establishment of comprehensive Aboriginal justice systems as a component of the inherent right of Aboriginal self-government are illustrative of a dramatic and encouraging re-direction of the reform agenda. However, before this major restructuring of the Canadian justice landscape can be effected, several key issues including the role of the *Charter of Rights and Freedoms*, and the jurisdictional framework for Aboriginal justice autonomy, must be resolved.

RÉSUMÉ

Depuis plus de 20 ans, le système de justice criminel canadien a été le sujet de réformes qui ont été conçues pour aborder les impacts de la disproportionalité et de la discrimination du système judicière envers les peuples autochtones. En général, cette approche a connu peu de succès du au manque de connaissance des points critiques qui lient la réforme judiciaire et les demandes des Premières Nations, des Métis et des peuples Inuit du Canada pour la reconnaissance de leur droits constitutionnels qui leurs réservent le droit à l'auto-détermination de leur communauté respective. Un examen de plusieurs récents rapports de demandes de justice autochtones suggère qu'une entente a finalement été convenu, ayant pour conséquences l'émergence de l'autonomie de la communauté comme le principe de base des nouvelles initiatives de la réforme judicière. Les recommendations pour l'établissement complet du système de justice autochtones comme une composante de droits inhérents des autochtones à l'auto-détermination gouvernementale, démontre un changement de direction dramatique mais encourageant de la réforme à l'ordre du jour. Cependant, avant qu'une restructuration majeure de la justice canadienne soit mis en application, plusieurs problèmes clés, tel la Charte des droits et libertés et l'autonomie de la structure de juridiction de la justice autochtones, devront être résolus.

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PREFACE

Two weeks after my arrival in Canada in August 1991 the Manitoba Justice Minister released the long awaited *Report of the Aboriginal Justice Inquiry of Manitoba*.[1] I had been accepted into the Master of Laws program at the University of Manitoba, and my intention was to complete a research thesis dealing with the general topic of 'Aboriginal people and the criminal justice system'. Beyond a desire to study within this broad area, my plans were fairly nebulous. However, after an early meeting with Dean Roland Penner, Professor Butch Nepon and Professor Alvin Esau (who were later to become members of my Supervising Committee), I set about the task of introducing myself to the key issues in Canada that pertained to my area of interest. It seemed logical to use the Inquiry's report as my first point of reference.

Two things quickly became obvious. First, the existence of the Public Inquiry into the Administration of Justice and Aboriginal People[2] was not a unique event in Canada. In fact, it represented part of a significant trend in the field of Canadian law and justice: the resort to independent inquiries to address fundamental questions about the impact of the social control institutions of the dominant culture on Aboriginal people. I also noted that following the 'precedent' of the Royal Commission on the Donald Marshall, Jr., Prosecution in Nova Scotia,[3] all three provinces in the Prairie region (Alberta, Manitoba

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1. Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Province of Manitoba, 1991).

2. The Inquiry will be referred to throughout this thesis as the "Aboriginal Justice Inquiry of Manitoba".

3. Royal Commission on the Donald Marshall, Jr., Prosecution, *Report* (Halifax: Province of Nova Scotia, 1989).

and Saskatchewan) produced, during the twelve months between March 1991 and March 1992, reports of investigations dealing with the impact on Aboriginal people of the criminal justice system.[4]

The second observation which I made was that all of these reports described a justice environment for Aboriginal people that was remarkably similar to that which I had left behind in Australia, where the *National Report of the Royal Commission into Aboriginal Deaths in Custody*[5] had been released only three months prior to my departure.

Several questions began to emerge from my early readings and discussions. For example, why had Aboriginal justice generally, and the phenomenon of Aboriginal over-representation specifically, emerged as a focus of academic, legal and political concern in both Canada and Australia, and what forces were shaping the quite different directions being pursued in terms of solutions and law reform in both countries? It occurred to me that these questions could provide the basis for a comprehensive comparative study of the topic of Aboriginal people and the criminal justice system in Canada and Australia.

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4. In Alberta, the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta, *Justice on Trial* (Edmonton: Province of Alberta, March 1991); and in Saskatchewan, both the Saskatchewan Indian Justice Review Committee, *Report of the Saskatchewan Indian Justice Review Committee* (Regina, January 1992), and the Saskatchewan Métis Justice Review Committee, *Report of the Saskatchewan Métis Justice Review Committee* (Regina, March 1992). This is not to suggest that Aboriginal justice is not an important issue in other parts of Canada. Indeed, recent reports produced in Ontario: Osnaburgh/Windigo Tribal Council Justice Review Committee, *Tay Bway Win: Truth, Justice and First Nations* (Report prepared for the Ontario Attorney General and Solicitor General, July 1990); Québec: J-P. Brodeur, C. La Prairie & R. McDonnell, *Justice for the Cree: Final Report* (Nemaska: Grand Council of the Crees (of Québec)/Cree Regional Authority, August 1991); and by the Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, December 1991), illustrate that the concerns of Aboriginal people about how they are treated by the existing justice system is receiving attention in almost all parts of the country.

5. Royal Commission into Aboriginal Deaths in Custody, *National Report* (Canberra: Australian Government Publishing Service, May 1991).

However, as I began my research with this general direction in mind, I soon realised that this was simply too large a project to be realistically attempted within the context of a Master of Laws program and a limited time frame.

There did seem, however, to be several legitimate mechanisms for limiting the scope of my project. The first was to avoid, as far as possible, simply retelling the literature on Aboriginal justice which has emerged, particularly since the 1970s. I decided to attempt to assess and 'chart' the direction which Aboriginal justice reform has begun to take in recent years, by focusing on the several reports which were released in the one year period identified above. In essence, my aim has been to examine the emergence of 'autonomy' as a justice solution, including an analysis of the implications of this approach and an exploration of its relationship with the broader shift in Canada towards formal recognition of the Aboriginal right of self-government.

The recommendations contained in the reports are discussed in some detail on the basis that they reveal a great deal about the status of justice reform in Canada. However, the reports also formed the basis of my research in a much wider respect. For example, the material collected and produced by the Aboriginal Justice Inquiry of Manitoba offered an enormous amount of current statistical data and interpretive literature on issues relating to Aboriginal people and the administration of justice. Perhaps most significantly, these reports, via the thousands of submissions which they generated and summarized, gave me access to some of the stories of Aboriginal people about how justice (mal)functions in their communities, and an insight into the types of solutions for which they assert both a right and a need.

Following my earlier observations regarding the appearance of reports in the Prairie region, it seemed that my research objectives would be well served by a specific emphasis on the status of justice reform in Alberta, Saskatchewan, and Manitoba, albeit within the context of relevant events and justice initiatives throughout the country. A large proportion of Canada's Aboriginal population lives in the Prairie region.[6] For example, approximately 42 percent of the total status-Indian population of Canada reside in Alberta, Saskatchewan, and Manitoba.[7] Also, prisons in the region have some of the highest levels of Aboriginal incarceration in the country.[8] These factors, along with the greater availability of research materials dealing with conditions in the Prairie region, encouraged me to adopt this regional emphasis.

Another effect of this particular limitation on the scope of my project was that it largely excluded the Inuit who form only a very small proportion of the Aboriginal population of the Prairie provinces. While there can be no doubt that Inuit communities have legitimate justice concerns, and that these share important similarities with the related concerns of Métis and First Nations peoples, I believed that no useful purpose

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6. For an introduction to the history of the Aboriginal peoples of Canada's Prairie region, see H.A. Dempsey, "The Blackfoot Indians" in R.B. Morrison & C.R. Wilson (eds), *Native Peoples: The Canadian Experience* (Toronto: McClelland & Stewart, 1986); P.D. Elias, *The Dakota of the Canadian Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988); J.E. Foster, "The Plains Métis" in R.B. Morrison & C.R. Wilson (eds), *Native Peoples: The Canadian Experience* (Toronto: McClelland & Stewart, 1986); J.S. Milloy, *The Plains Cree: Trade, Diplomacy and War, 1790-1870* (Winnipeg: University of Manitoba Press, 1990); and O.P. Dickason, *Canada's First Nations: A History of Founding Peoples From Earliest Times* (Toronto: McClelland & Stewart, 1992) at 192-201.

7. Canada, Privy Council Office, *Aboriginal Peoples, Self-Government, and Constitutional Reform* (Hull: Supply and Services Canada, 1991) at 5.

8. Correctional Services of Canada, *Basic Facts About Corrections in Canada 1991* (Ottawa: Correctional Services of Canada, 1991).

would be served by attempting to address the status of justice reform in relation to *all* of Canada's Aboriginal peoples, simply for the purpose of completeness. Indeed, a broad brush stroke approach would have been inconsistent with my interest in community-based Aboriginal autonomy as a political and justice reform objective. I have not, therefore, directly addressed the position of Canada's Inuit communities in relation to the operation of the criminal justice system, although I hope that some of the more general discussions of Aboriginal autonomy and the administration of justice may be worthy of consideration in relation to the Inuit justice agenda.

At the same time, a Prairie regional focus meant that I could not exclude Canada's 'other' Aboriginal people - the Métis.[9] As far as possible I have attempted to deal with the particular concerns of Métis communities in relation to the justice system, where they may differ from First Nations peoples. However, while, as Sawchuk has observed, "[t]here has been an explosion in Métis scholarship over the last decade",[10] Métis legal and justice issues are "badly under represented in the literature".[11] Indeed,

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9. The term "métis" is sometimes used to refer generally to people of dual Indian-white ancestry. Throughout this thesis the following meaning for the term "Métis" has been adopted:

> Capitalized, *Métis* is not a generic term for all persons of this biracial descent but refers to a distinctive sociocultural heritage, a means of self-identification, and sometimes a political and legal category, more or less narrowly defined.

- J. Brown, "Métis", in *The Canadian Encyclopedia. Volume 2* (Edmonton: Hurtig Press, 2nd ed., 1988) at 1343. See also P.L.A.H. Chartrand, "Terms of Division: Problems of 'Outside-Naming' for Aboriginal People in Canada" (1991) 2(2) *The Journal of Indigenous Studies* 1 at 12-16.

10. J. Sawchuk, "The Métis: A Bibliography of Historic and Contemporary Issues" in S.W. Corrigan & L.J. Barkwell (eds), *The Struggle For Recognition: Canadian Justice and the Métis Nation* (Winnipeg: Pemmican Publications, 1991) at 207.

11. *Ibid.*

to a much greater extent than in relation to studies of Aboriginal identity, rights or land claims, general concerns about the operation of the justice system are usually treated in the literature as fairly common as between status Indians, non-status Indians and Métis. For example, after observing that "[t]he literature pertaining to the impact of the administration of justice on the Métis people is virtually non-existent", Chartrand states that "[a] review of the literature that exists makes it apparent that the majority of problems and concerns facing the Métis are similar, if not identical, those experienced by the more inclusive Native category employed by the majority of authors."[12]

It is obviously important not to extend the generalization too far, and so, where appropriate, I have attempted to consider the specfic circumstances of the Métis people of Manitoba, Saskatchewan and Alberta.

This issue of sensitivity to 'difference' is related to another problem with which I had to contend in approaching the task of researching and writing on matters relating to Aboriginal justice. Essentially it is the dilemma of being a non-Aboriginal person working in a field that is, fundamentally about *being* Aboriginal (or more accurately, Métis, Cree, or Blackfoot etc.), and seeking to avoid the oppressive and assimilationist tones which have traditionally coloured such analyzes.[13] The support of several people -

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12. P.L.A.H. Chartrand, *Métis People and the Justice System* (Winnipeg: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, October 1989) at 13.

13. For Havemann and his research colleagues, the appropriate response to this "ethical conundrum" was to focus "attention upon the imposed legal system, that is, a system of the 'colonial' state while trying to avoid the tendency, common among researchers, 'to blame the victims' for their plight": P. Havemann, "The Indigenization of Social Control in Canada" in B.W. Morse & G.R. Woodman (eds), *Indigenous Law and the State* (Dordrecht: Foris Publications, 1988) at 72. This article is based on a report prepared for the Solicitor General of Canada: P. Havemann, K. Couse, L. Foster & R. Matnovich, *Law and Order For Canada's Indigenous People. A Review of Recent Research Literature Relating to the Operation of the Criminal Justice System and Canada's Indigenous People* (Regina: Prairie Justice Research, University of Regina, 1985).

both Aboriginal and non-Aboriginal - has helped me to address this difficulty. Their guidance has assisted me in developing a perspective which, I hope, allows me to be sensitive to the need for Aboriginal people - "the true experts on aboriginal issues"[14] - to tell their own story, while contributing in some way to the search for a resolution of the range of matters that come under the heading of Aboriginal justice.

The choice of appropriate terminology was also problematic, particularly in the context of a broad-based analysis of justice reform policy affecting the first peoples of Canada. As Fossett Jones has noted:

> ...[T]he constant use in the secondary literature of words such as *native*, *Indian*, and *aboriginal* encourages generalization, perhaps even reinforcing the notion that what seems to be true of the Netsilingmiut of Spence Bay, N.W.T. can be safely said of the Dakota Sioux of Portage La Prairie, Manitoba. The problem is a semantic one. There is no single word that neatly subsumes to everyone's satisfaction all of those people descended in some degree or another from the original peoples of the continent.[15]

While conscious of this legitimate concern I have adopted the term 'Aboriginal' throughout this thesis on the basis that it is currently the term that is most commonly adopted to embrace all first peoples in Canada.[16]

Finally, while determining that a detailed comparative study was not practical, I felt that a minor Australian component would be a productive addition to my thesis. I have, therefore, incorporated the reports of the Royal Commission into Aboriginal

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14. "Preface", in D. Jensen & C. Brooks (eds), *In Celebration of Our Survival: The First Nations of British Columbia* (Vancouver: University of British Columbia Press, 1991) at 8.

15. R. Fossett Jones, *Alternatives to Incarceration: Literature Review and Selected Annotated Bibliography* (Winnipeg: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, 1990) at 1.

16. This usage is also consistent with section 35 of the *Constitution Act, 1982* which defines "aboriginal peoples of Canada" as including the "Indian, Inuit and Métis peoples of Canada." In relation to the indigenous peoples of Australia, the terms "Aborigine" and "Aboriginal" are used throughout this thesis to refer to both Torres Strait Islanders and the original peoples of the Australian mainland and Tasmania.

Deaths in Custody within my collection of primary source materials, while also raising Australian parallels, where appropriate, in relation to a variety of justice-related matters.

This thesis is the product of a 12 month long learning experience - about Canada, about Aboriginal peoples, and about the workings of law, social control and justice. This process has been challenging, enjoyable, frustrating, and frequently inspiring. I have been motivated by the many dimensions of the struggle of Canada's first peoples for justice on their own terms. My modest hope is that this thesis (and the educative process which it represents) might contribute in some way to this endeavour by providing a constructive addition to the growing body of literature dealing with Aboriginal people and the administration of justice.

ACKNOWLEDGEMENTS

Throughout the period of my enrolment in the Master of Laws program at the University of Manitoba I have benefited from the supervision of Professor Butch Nepon and Dean Roland Penner, and the support of Professor Alvin Esau, Head of Graduate Study. I am grateful to the Law Foundation of Manitoba and the Legal Research Institute, University of Manitoba for the financial assistance which has made my time in Canada possible.

No one associated with the Faculty of Law has made my studies more profitable or enjoyable than the staff of the E.K. Williams Law Library. Their contribution in terms of facilitating access to the vast collection of the Public Inquiry into the Administration of Justice and Aboriginal People and in accomodating a hefty overdue books account was substantial. However, the greatest contribution of the library staff was in sustaining that 'other' side of being a graduate student; from regular (and rarely reference related) consultations with Reference Librarian John Eaton, to first rate coffee breaks (which I managed to sniff out with monotonous regularity!).

Many individuals, Aboriginal organizations, government departments and university research centres have provided me with valuable information and material relevant to my research. I am particularly grateful to the following: Mary Tastad and Leslie Polsom, Native Law Centre, University of Saskatchewan; Carol La Prairie, Aboriginal Justice Research Unit, Department of Justice Canada; Margie Cronin, Aboriginal Law Centre, University of New South Wales; Peter Spurway, Nova Scotia

Department of Attorney General; Monica McNamara; Trish McNamara; the Aboriginal Council of Winnipeg; the Assembly of First Nations; the Native Women's Association of Canada; the Manitoba Métis Federation; the Native Council of Canada; the Grand Council of the Crees (of Québec) and the Cree Regional Authority; the Windigo Tribal Council; and the Royal Commission on Aboriginal Peoples. Other sources included the Elizabeth Dafoe Library, University of Manitoba; Prairie Justice Research, University of Regina; the Northern Justice Resource Centre, Simon Fraser University; the Micmac Maliseet Institute, University of New Brunswick; the Institute of Intergovernmental Relations, Queen's University; the Treaty & Aboriginal Rights Research Centre of Manitoba; the Institute of Criminology, Victoria University of Wellington; the Human Rights Research and Education Centre, University of Ottawa; the Law Reform Commission of Canada; the Secretariat of the Solicitor General of Canada; the Ontario Ministry of the Attorney General; the Ontario Law Reform Commission; the Centre for Constitutional Studies and the J.A. Weir Memorial Law Library, University of Alberta; the Alberta Law Reform Institute; and the Saskatchewan Department of Justice and Attorney General. Thanks also to Trish Malone for valuable research assistance.

My commitment to Aboriginal justice research has been strengthened by the support and inspiration I have received from a number of people. I am particularly grateful to Doris Young; Wendy Whitecloud, Faculty of Law, University of Manitoba; Professor Paul Chartrand, Department of Native Studies, University of Manitoba; Professor Garth Nettheim, Faculty of Law, University of New South Wales; Professor Donna Greschner, College of Law, University of Saskatchewan; Associate Chief Judge

Murray Sinclair; and Graham Tuplin, President of the Native Council of Prince Edward Island.

My greatest debts of thanks is reserved for Karen McNamara, who has contributed to the completion of this thesis in more ways than I could possibly list here.

INTRODUCTION

I. OUTLINE

This thesis examines the growing concern in Canada during the past two decades about the criminal justice experience of Aboriginal people. It considers the themes and impact of this debate as it has developed since 'Aboriginal people and the criminal justice system' emerged as an identifiable topic of investigation during the 1970s. In particular, it examines the implications of recent proposals for a shift towards a significant level of Aboriginal community autonomy over social control policies and institutions - most clearly demonstrated by calls for the establishment of comprehensive Aboriginal justice systems. While this assessment will be undertaken in relatively general terms, more detailed reference will be made to the status of justice reform in the three Prairie region provinces: Alberta, Manitoba and Saskatchewan. Mention will also be made of relevant developments in Australia on the basis that there may be substantial lessons to be learned from such a comparative approach.

The remainder of this section introduces the broader context in which this assessment of justice reform must be undertaken, including a discussion of the various stages on which the political struggle of the Aboriginal peoples of Canada is being acted out, and of the nature of 'Aboriginal justice' as both a political issue and a subject of socio-legal investigation. This discussion will provide some necessary background for later analysis of one of the themes which this thesis is designed to explore: the way in which various approaches to criminal justice reform have run contrary to, overlapped with, supported, and ultimately converged with the broader

political aspirations of the Aboriginal peoples of Canada.

Following this introduction, the body of the thesis is divided into two parts. Part A includes five chapters which deal with the evolution of Aboriginal justice reform, while Part B focuses in more detail on the increasingly important questions which are raised by the prospect of Aboriginal autonomy in the administration of justice.

Chapter 1 critiques the notion that 'over-representation' is the key problem faced by Aboriginal people in terms of contact with the criminal justice system. It considers the implications of this emphasis, and examines the extent to which it has shaped, and often dominated, Aboriginal justice literature and reform initiatives.

Chapter 2 surveys the types of reforms which have been implemented in the last twenty years, in an effort to address the problem of over-representation. These include the strategy of 'indigenization' of police forces and other positions within the court and corrections systems, cross-cultural training, courtworker programs and the use of alternatives to incarceration. The extent to which these approaches seriously address the demands of Aboriginal justice will be questioned, before introducing the possibility of a change in direction in justice reform policy as demonstrated by the appearance during 1991 of several major reports, including in all three Canadian provinces in the Prairie region - Alberta, Saskatchewan and Manitoba.

The Aboriginal Justice Inquiry of Manitoba is discussed in considerable detail in Chapter 3 on the basis that it best illustrates the new direction in justice reform. Chapter 4 applies a similar though less detailed analysis to the work of the Task

Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta, the Saskatchewan Indian and Métis Justice Review Committees, as well as a national report of the Law Reform Commission of Canada. The development which these reports represent is contrasted with the status of Aboriginal justice reform in Australia with a focus on the Royal Commission into Aboriginal Deaths in Custody.

Chapter 5 assesses the key themes of the reports' respective reform strategies and considers the emergence of autonomy as a major theme in justice reform policy. It introduces the promotion of Aboriginal justice systems as the primary solution to the problems faced by Aboriginal people who come into contact with the current criminal justice process.

Part B expands on this preliminary discussion by addressing several of the important theoretical and practical issues raised by proposals for the establishment of Aboriginal justice systems. Throughout this section reference is made to both the operation of tribal courts in the United States - which is commonly cited as a model for Aboriginal courts in Canada - and, to a lesser extent, comparable developments in Australia.

Chapter 6 places the proposal for Aboriginal justice systems within the context of the ongoing debate over constitutional recognition of the Aboriginal right of self-government. Chapter 7 considers the implications for Aboriginal justice systems of the *Canadian Charter of Rights and Freedoms*, including a consideration of whether due process protections are negotiable.

Finally, issues relating to the jurisdiction of Aboriginal justice systems are

examined in Chapter 8. This chapter also considers the role of a general model or framework for facilitating the exercise of Aboriginal autonomy in relation to the administration of justice.

II. THE ABORIGINAL AGENDA IN CANADA

The 1990s are shaping as a pivotal decade for the Aboriginal people of Canada.[1] In the aftermath of the Aboriginal community's key role in the demise of the Meech Lake Accord,[2] along with ongoing assessment of the ramifications of events in Oka, Québec during the summer of 1990,[3] the concerns of Canada's First Nations, Métis and Inuit peoples have begun to receive a significant and increasingly constructive level of attention from federal and provincial governments. A long period of intensive political activity by Aboriginal leaders and organisations is producing significant results in a number of areas including land rights, self-government and criminal justice administration, all of which have important implications for

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1. See Canada, House of Commons, Standing Committee on Aboriginal Affairs, *Unfinished Business: An Agenda For All Canadians in the 1990's* (Ottawa: Queen's Printer, 1990).

2. For a celebration of the Aboriginal role, see M.E. Turpel & P.A. Monture, "Ode to Elijah: Reflections of Two First Nations Women on the Rekindling of Spirit at the Wake for the Meech Lake Accord" (1990) 15 *Queen's Law Journal* 345; also M. Angus, ... *"And the Last Shall Be First." Native Policy in an Era of Cutbacks* (Toronto: NC Press Limited, 1991) at 64-66.

3. See D. Lavery & B. Morse, "The Incident at Oka: Canadian Aboriginal Issues Move to the Front Burner" (1991) 48 *Aboriginal Law Bulletin* 6. For a detailed account of the crisis, see G. York & L. Pindera, *People of the Pines: The Warriors and the Legacy of Oka* (Toronto: Little, Brown & Co.(Canada), 1991); and R. Hornung, *One Nation Under the Gun* (Toronto: Stoddart, 1991). See also Canada, House of Commons, *The Summer of 1990. Fifth Report of the Standing Committee on Aboriginal Affairs* (Ottawa: Queen's Printer, 1991); and D. Neel, "Life on the 18th Hole" in D. Jensen & C. Brooks (eds), *In Celebration of Our Survival: The First Nations of British Columbia* (Vancouver: University of British Columbia Press, 1991).

Aboriginal communities throughout the country. Important developments include the creation of a Royal Commission on Aboriginal Peoples, the negotiation of a constitutional reform package which includes a proposal for the recognition of Aboriginal self-government, and the ongoing success of indigenous organizations in the task of developing international law recognition of the rights of indigenous peoples.

1. Royal Commission on Aboriginal Peoples

In August 1991 Prime Minister Brian Mulroney announced the establishment of the Royal Commission on Aboriginal Peoples,[4] to be co-chaired by George Erasmus, former National Chief of the Assembly of First Nations and René Dussault, Justice of the Québec Court of Appeal. The seven-member commission consists of four Aboriginal members and three non-Aboriginal members. Former Chief Justice of the Supreme Court of Canada, Brian Dickson (who served as the Prime Minister's special representative) expressed in his report the belief that a commission of this size and constitution would allow for "appropriate contributions from the various aboriginal communities - Status Indians on reserve, urban and off-reserve Indians, Métis and Inuit" and would also provide "the opportunity to consider the important issues of geographic, linguistic and gender balance."[5]

The Commission's terms of reference are extremely broad:

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4. Established by Federal Order in Council, 26 August 1991, Reference P.C. 1991-1597.

5. B. Dickson, *Report of the Special Representative Respecting the Royal Commission on Aboriginal Peoples* (Ottawa, August 1991) at 21.

> The Commission of Inquiry should investigate the evolution of the relationship among aboriginal peoples (Indian, Inuit and Métis), the Canadian government, and Canadian society as a whole. It should propose specific solutions, rooted in domestic and international experience, to the problems which have plagued those relationships and which confront aboriginal peoples today. The Commission should examine all issues which it deems to be relevant to any or all of the aboriginal peoples of Canada, and in particular, should investigate and make concrete recommendations concerning...[6]

The former Chief Justice identified a number of matters that the Royal Commission would be expected to address including the:

* history of relations between Aboriginal peoples, the Canadian government and Canadian society as a whole;

* recognition and affirmation of Aboriginal self-government; its origins, content and a strategy for progressive implementation;

* land base for Aboriginal peoples, including the process for resolving comprehensive and specific claims, whether rooted in Canadian constitutional instruments, treaties or in Aboriginal title;

* historical interpretation and application, and potential future scope, of section 91(24) of the *Constitution Act, 1867*[7] and the responsibilities of the Canadian crown;

* legal status, implementation and future evolution of Aboriginal treaties, including modern-day agreements;

* constitutional and legal position of the Métis and off-reserve Indians;

* special difficulties of Aboriginal people who live in the North; and the

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6. *Id* at 10-11.

7. Section 91(24) of the *Constitution Act, 1867* gives the Parliament of Canada power to make laws with respect to "Indians, and Lands reserved for Indians."

* *Indian Act*[8] and the role, responsibilities and policies of the Department of Indian Affairs and Northern Development.

The terms of reference also require the Commission to consider social, economic, cultural, educational and justice issues of concern to Aboriginal peoples, the position and role of Aboriginal elders, and the situation of Aboriginal youth.

The Commission was authorised to create regional or issue-specific task forces or advisory bodies to assist the Commissioners, to commission and publish special studies or commentaries where appropriate, to invite Aboriginal persons to sit as special advisers when the Commission conducts hearings in specific Aboriginal communities, and to submit interim reports on specific issues.[9] The Commission's public consultation process was launched in Winnipeg on 21 April 1992, and will continue in two stages for approximately twelve months.[10]

2. Constitutional Reform: The 'Canada Round'

On 24 September 1991 Prime Minister Mulroney announced the Government of Canada's plan for comprehensive amendments to the *Constitution Act, 1982*. The

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8. R.S.C., c.I-5.

9. In February 1992 the Royal Commission issued a position paper dealing with the constitutional reform process and the right of Aboriginal self-government: Royal Commission on Aboriginal Peoples, *The Right of Aboriginal Self-Government and the Constitution: A Commentary* (Ottawa: Royal Commission on Aboriginal Peoples, 1992). This action was criticized by the Métis National Council and the Inuit Tapirisat of Canada as constituting an unwarranted interference in the constitutional debate: H. Branswell, "Panel sparks royal rebuke: Métis, Inuit angered by position paper on self-government", *Winnipeg Free Press*, February 14, 1992, C36. Rather ironically, the Royal Commission's formulation of the right of Aboriginal self-government was subsequently widley adopted: see discussion in Chapter 6 at text corresponding to notes 78-79 *infra*.

10. See "Royal Commission Launched in Winnipeg", *The Circle*, Volume 1(2), April/May 1992, at 5-6.

wide-ranging proposals dealt with a number of issues considered to be key elements in the "renewal" of Canada. Those which have attracted the most attention are the proposals for "recognition of Québec's distinctiveness and Canada's linguistic duality",[11] the replacement of Canada's non-elected Senate with "an elected, effective and more equitable Senate",[12] and Aboriginal self-government.

In terms of the political aspirations of Canada's Aboriginal peoples, this latter proposal appeared to represent an important step towards the realization of the fundamental right of Aboriginal autonomy:

> The Government of Canada proposes an amendment to the Constitution to entrench a general justiciable right to aboriginal self-government within the Canadian federation and subject to the *Canadian Charter of Rights and Freedoms*, with the nature of the right to self-government described so as to facilitate interpretation of that right by the courts. In order to allow an opportunity for the Government of Canada, the governments of the provinces and the territories, and aboriginal peoples to come to a common understanding of the content of this right, its enforceability would be delayed for a period of up to 10 years. The Special Joint Committee should examine the broad parameters of the right to be entrenched in the Constitution and the jurisdictions that aboriginal governments would exercise.

The proposals envisioned that "aboriginal governments would potentially exercise a combination of jurisdictions presently exercised by the federal, provincial and municipal governments..."[13] While those areas covered would vary depending on the particular circumstances and wishes of each Aboriginal community, the federal government's proposals stated that the:

> jurisdiction of aboriginal governments could potentially encompass a wide range of matters including land and resource use, language and culture, education, policing and

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11. Government of Canada, *Shaping Canada's Future Together: Proposals* (Ottawa: Supply and Services Canada, October 1991) at 10.

12. *Id at* 23.

13. *Id* at 8.

administration of justice, health, social development and community infrastructure.[14]

The government also proposed that an ongoing constitutional process to deal with Aboriginal issues be entrenched in the Constitution, thereby establishing a forum which would allow provincial governments and Aboriginal leaders to "monitor the progress made in the negotiation of self-government agreements."[15] Finally, the government proposed "that aboriginal representation should be guaranteed in a reformed Senate."[16]

This most recent proposal on the recognition of Aboriginal rights in Canada represents an extension of the process which was initiated by the *Constitution Act, 1982*. Section 35(1) provides that "existing aboriginal and treaty rights are hereby recognized and affirmed". The background to this most recent attempt at constitutional entrenchment of the Aboriginal right of self-government will be reviewed in Chapter 6 along with a preliminary assessment of the 'Canada round' negotiations which came to an end in July 1992.

3. International Law Developments

In 1981 the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities established a Working Group on Indigenous Populations with a mandate to "review developments pertaining to the promotion and protection of

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14. *Ibid.*

15. *Ibid.*

16. *Id* at 9.

the human rights and fundamental freedoms of indigenous populations..." and to "give special attention to the evolution of standards concerning the rights of indigenous populations..."[17] Since 1985 the Working Group has been primarily concerned with drafting a Universal Declaration on Universal Rights.[18] Representatives of Canada's indigenous peoples have regularly participated in the Working Group's activities.[19]

At its ninth session in 1991, the Working Group considered a draft declaration which addresses a range of indigenous concerns including spiritual and religious traditions, control of education systems, the ownership and control of land, the recognition of indigenous laws and customs, social and economic programs and political participation.[20] The key part of the declaration is a provision which guarantees the right of indigenous peoples to self-determination,[21] which has long

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17. Cited in R.L. Barsh, "Indigenous Peoples: An Emerging Object of International Law" (1986) 80 *American Journal of International Law* 369 at 372.

18. This followed a request by the Sub-Commission in 1984 that the Working Group "focus its attention on the preparation of standards on the rights of indigenous populations" and "to consider in 1985, the drafting of a body of principles on indigenous rights based on relevant national legislation, international instruments and other juridicial criteria": Sub-Comm'n Res. 1984/35B (August 27). At its 4th session in 1985 the Working Group undertook to produce a draft declaration of indigenous rights for eventual adoption by the United Nations General Assembly: UN Doc.E/CN.4/Sub.2/1985/2,Ann.II.

19. Indigenous non-government organisations which have been granted United Nations consultative status include the Inuit Circumpolar Conference and the Four Directions Council. The Working Group has also encouraged other organizations without formal consultative status to make oral and written contributions. Some 380 persons participated in the Working Group's 6th session in 1988, including representatives from over 70 indigenous organizations. See H. Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accomodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990) at 84. One commentator recently observed that "indigenous peoples and their organisations have been extaordinarily successful in claiming the forum provided by the Working Group as their own": S. Pritchard, "UN Working Group on Indigenous Populations" (1992) 54 *Aboriginal Law Bulletin* 13.

20. See *ibid.*

21. Article 1 of both the International Covenant on Social and Economic Rights (1966) and the International Covenant on Civil and Political Rights (1966) states that "all peoples have the right of self-determination." However, this international law concept has traditionally been defined so as to be non-applicable to indigenous populations living within the borders of a recognised sovereign state, such as the First Nations, Inuit and Métis peoples of Canada. See J. Crawford, *The Creation of States in International Law* (Oxford:

been the primary goal of indigenous organizations.[22] Paragraph 1 of the 1991 draft states:

> Indigenous peoples have the right to self-determination, in accordance with international law. By virtue of this right, they freely determine their relationship with the States in which they live, in a spirit of co-existence with other citizens, and freely pursue their economic, social, cultural and spiritual development in conditions of freedom and dignity.[23]

It is expected that the final draft declaration will be completed by the Working Group in 1993, during the International Year for the World's Indigenous People.[24] After obtaining the approval of the Sub-Commission, the draft will likely be considered by both the Human Rights Commission and ECOSOC before eventually coming before the General Assembly for proclamation as a Universal Declaration on the Rights of Indigenous Peoples.[25]

III. ABORIGINAL JUSTICE: RESEARCH AND AGENDA SETTING

The last decade has seen the development of an unprecedented profile for

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Clarendon Press, 1979) at 84-106; M. Pomerance, *Self-Determination in Law and Practice. The New Doctrine in the United Nations* (The Hague: Martinus Nijhoff, 1982); and G. Nettheim, "'Peoples' and 'Populations': Indigenous Peoples and the Rights of Peoples" in J. Crawford (ed), *The Rights of Peoples* (Oxford: Clarendon Press, 1988).

22. At its 6th session in 1988 the Working Group observed that "according to the overwhelming majority of indigenous representatives, self-determination and self-government should be amongst the fundamental principles of the draft declaration ... Many of the speakers underlined that it was essential for the draft declaration to guaranteee in the strongest language possible free and genuine indigenous institutions": *Report of the Working Group on Indigenous Populations on Its Sixth Session*, UN Doc. E/CN.4/Sub.2/1988.

23. *Report of the Working Group on Indigenous Populations on Its Ninth Session*, E/CN.4/Sub.2/1991/40/Rev.1, Ann.IIA.

24. Designated by General Assembly Resolution 45/164 of December 18 1990, UN Doc. E/CN.4/Sub.2/1991/39.

25. See D. Sanders, "Draft Universal Declaration on the Rights of Indigenous Peoples" [1992] 2 *Canadian Native Law Reporter* 1.

Aboriginal concerns over the inadequacies of the criminal justice system. Indeed, 'justice' has emerged as a key element of the Aboriginal political agenda,[26] and 'Aboriginal justice'[27] has evolved into a distinct field of academic research.[28]

Griffiths and Verdun-Jones have observed that:

> The role of research in the formulation of criminal justice policies and the development of programs and services in the administration of justice is a complex one. There has traditionally been a split between academics and practitioners that has hindered the free flow of information and ideas, although there are other political and bureaucratic factors at work as well.[29]

Aboriginal justice research may be an exception to this general rule. Recent criticisms

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26. In 1989 the then National Chief of the Assembly of First Nations identified "justice" as one of six areas in which Aboriginal aspirations were being focused: see G. Erasmus, "Epilogue: The Solutions We Favour for Change" in B. Richardson (ed), *Drumbeat: Anger and Renewal in Indian Country* (Toronto: Sumerhill Press, 1989) at 300.

27. The term 'Aboriginal justice' is often used in relation to the whole range of issues of which Aboriginal people are seeking resolution, including land claims, self-government and socio-economic concerns. It is used in the context of this thesis to refer more specifically to the particular question of the impact of the criminal justice system on Aboriginal people, and the remedies which are sought in response to this particular form of oppression. On the difficulties of precise definition of subject matter in this area, see J. Harding with B. Spence, *An Annotated Bibliography of Aboriginal Controlled Justice Programs in Canada* (Regina: Prairie Justice Research, School of Human Justice, University of Regina, 1991) at 1-4.

28. Recognition of the disproportionate levels of Aboriginal incarceration has been identified as a motivation for the promotion of the academic field of "justice studies"; see J. Harding, K. Couse & R. Schriml, *A Defence of Justice Studies: A History and Analysis of the Human Justice Program. Occasional Paper Number 4* (Regina: Prairie Justice Research, School of Human Justice, University of Regina, 1988) at 6. Aboriginal justice has since developed into an important and expanding component of socio-legal research generally: see J. Harding, *The Future of Socio-Legal Research and Studies: Are We Squandering a Decade of Investment? Occasional Paper Number 5* (Regina: Prairie Justice Research, School of Human Justice, University of Regina, 1988) at 5; and A. Esau & W.W. Pue, *Manitoba Socio-Legal Research* (Winnipeg: Legal Research Institute, University of Manitoba, 1990). For a guide to the breadth of the topic of Aboriginal justice, see C. Horn & C.T. Griffiths, *Native Northern Americans: Crime, Conflict and Criminal Justice. A Research Bibliography* (Burnaby: Northern Justice Society Resource Centre, Simon Fraser University, 4th ed., 1989); and J. Harding & B. Forgay, *Breaking Down the Wall: A Bibliography on the Pursuit of Aboriginal Justice* (Regina: Prairie Justice Research, School of Human Justice, University of Regina, 1991). For a review of this body of literature, see Osnaburgh/Windigo Tribal Council Justice Review Committee, *Tay Bway Win: Truth. Justice and First Nations* (Report prepared for the Attorney General and Solicitor General of Ontario, 1990) at 94-116.

29. C.T. Griffiths & S.N. Verdun Jones, *Canadian Criminal Justice* (Vancouver: Butterworths, 1989) at 597.

of the justice system for its failure to deal effectively with Aboriginal people have not been offered in isolation, but increasingly, are explicitly linked with a pattern of non-Aboriginal domination in which the *Indian Act* and the criminal justice system were, and continue to be, two of the most powerful legal mechanisms.[30] As a topic of investigation and action then, 'Aboriginal justice' is now more strongly aligned with broader Aboriginal autonomy aspirations and political activity, than with criminology's critiques of the operation of criminal laws and the way justice is administered in this and other similarly structured countries.[31]

The atypical nature of Aboriginal justice research in terms of the level of convergence between academics and policy makers is also reflected in the extent to which both the research and political environments, and the developing literature, has been dominated in recent years by the appointment of public inquiries[32] to address the issue of how the criminal justice system operates in relation to Aboriginal people.

In Australia, following a number of important pioneering works during the 1970s dealing with the impact of the criminal justice system on Aboriginal

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30. See Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba. Volume 1: The Justice System and Aboriginal People* (Winnipeg: Province of Manitoba, 1991), at 62-72; and R.H. Bartlett, *The Indian Act of Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 2nd ed., 1988).

31. See for example, the critical approach of radical and left realist criminology to the 'law and order' agenda; illustrated in R. Matthews, "Taking Realist Criminology Seriously" (1987) 11 *Contemporary Crises* 371; I. Taylor, "The Law and Order Issue in the British General Election and the Canadian Federal Election of 1979: Crime, Populism and the State" (1980) 5 *Canadian Journal of Sociology* 285; and C. Cunneen, "Aborigines and Law and Order Regimes" (1990) 3 *Journal for Social Justice Studies* 37.

32. Somewhat ironically, the utility and fairness of public inquiries generally has been under question in recent years, and the subject of reform proposals. See for example, Ontario Law Reform Commission, *Report on Public Inquiries* (Toronto: Ontario Law Reform Commission, 1992); and Alberta Law Reform Institute, *Public Inquiries. Issues Paper No. 3* (Edmonton: Alberta Law Reform Institute, 1991).

communities,[33] Aboriginal justice began to emerge as an important topic of investigation.[34] Since the mid-1980s attention has focused firmly on the incidence and circumstances of Aboriginal deaths in custody.[35] A Royal Commission into Aboriginal Deaths in Custody was established in 1987 "in response to a growing public concern that deaths in custody of Aboriginal people were too common and public explanations were too evasive to discount the possibility that foul play was a factor in many of them."[36] Investigation of this particular issue has prompted greater

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33. For example, E. Eggleston, *Fear, Favour, or Affection. Aborigines and the Criminal Law in Victoria, South Australia and Western Australia* (Canberra: Australian National University Press, 1976); B. Sanson-Fisher, "Aborigines in Crime Statistics: An Interaction Between Poverty and Detectors" (1978) 11 *Australia and New Zealand Journal of Criminology* 71; and M. Daunton-Fear and A. Frieberg, "'Gum-Tree' Justice: Aborigines and the Courts" in D. Chappell and P. Wilson (eds), *The Australian Criminal Justice System* (Sydney: Butterworths, 2nd ed., 1977).

34. The Australian Institute of Criminology has played a major role in the emergence of a growing body of Aboriginal justice research literature. See for example, B. Swanton (ed), *Aborigines and Criminal Justice* (Canberra: Australian Institute of Criminology, 1984); K. Hazlehurst (ed), *Justice Programs for Aboriginal and Other Indigenous Communities. Seminar Proceedings No. 7* (Canberra: Australian Institute of Criminology, 1985); and the material catalogued in K. Hazlehurst (ed), *Aboriginal Criminal Justice: A Bibliographical Guide* (Canberra: Australian Institute of Criminology, 1986).

35. For an introduction to the multi-disciplinary literature on Aboriginal deaths in custody, see D. Biles, D. McDonald & J. Flemming, *Australian Deaths in Custody 1980-1988: An Analysis of Aboriginal and Non-Aboriginal Deaths in Prison and Police Custody. Research Paper No. 7* (Canberra: Royal Commission into Aboriginal Deaths in Custody, 1989); R.D. Goldney & J.P. Reser, "Aboriginal Deaths in Custody" (1989) 151 *Medical Journal of Australia* 181; J.P. Reser, "Aboriginal Deaths in Custody and Social Construction: A Response to the View That There Is No Such Thing As Aboriginal Suicide" (1989) 2 *Australian Aboriginal Studies* 43; R.G. Broadhurst & R.A. Maller, "White Man's Magic Makes Black Deaths in Custody Disappear" (1990) 25 *Australian Journal of Social Issues* 279; and I. Temby, "Preventing Custodial Deaths: A Systematic Approach" (1989) 22 *Australian and New Zealand Journal of Criminology* 193.

36. E. Johnston, *Royal Commission into Aboriginal Deaths in Custody - National Report: Overview and Recommendations* (Canberra: Australian Government Publishing Service, 1991) at 1. While agitation for a major inquiry was led by members of the Aboriginal community, the federal government's decision to establish a Royal Commission was also the result of growing criticism of Australia's human rights record in relation to Aboriginal people. See M. Hogan, "Aboriginal Deaths in Custody: Some Comments" in M. Hogan, D. Brown & R. Hogg (eds), *Death in the Hands of the State* (Redfern: Redfern Legal Centre Publishing, 1988); National Committee to Defend Black Rights, "Statement to the United Nations Working Group on Indigenous Populations" (1988) 53/54 *IWGIA Newsletter* 19; J. Burger, *Land and Justice: Aborigines Today* (London: Anti-Slavery Society, 1987); Amnesty International, *Amnesty International*

scrutiny of the wider justice experience of Aboriginal people. Indeed, as in Canada, Aboriginal justice has become one of the core components of the Aboriginal political struggle for self-determination.[37]

One of the primary aims of this thesis is to assess the major developments in the field of 'Aboriginal justice' which have taken place during the last two years. Specifically, it considers the significance of the appearance during 1991/92 of several reports of public inquiries and commissions dealing with this topic. Analyzed in the context of almost two decades of proposed and actual reform to the criminal justice system with the aim of 'better accommodating' Aboriginal people, major reports from Alberta,[38] Saskatchewan,[39] and Manitoba,[40] as well as a revised federal justice policy,[41] and a report from the Law Reform Commission of Canada,[42] reflect a

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Report 1988 (London: Amnesty International Publications, 1988); and K.D. Suter, "Australian Aborigines: The Continuing Crisis" (1989) 13(1) *Human Rights International Reporter* 11.

37. For example, in a submission to the Royal Commission into Aboriginal Deaths in Custody, the National Aboriginal and Islander Legal Services Secretariat stated that "[i]t is NAILSS' thesis that the phenomenon of deaths in custody is directly linked to the past and continuing denial to Aboriginal and Islander Peoples of their right of self-determination": S. Pritchard, *Self-Determination: The Rights of Indigenous Peoples Under International Law* (Submission prepared on behalf of NAILSS for the Royal Commission into Aboriginal Deaths in Custody, 1990) at 2.

38. Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta, *Justice on Trial* (Edmonton: Province of Alberta, 1991).

39. Saskatchewan Indian Justice Review Committee, *Report* (Regina, 1992); and Saskatchewan Métis Justice Review Committee, *Report* (Regina, 1992).

40. Note 30 *supra*.

41. Department of Justice, *Aboriginal People and Justice Administration: A Discussion Paper* (Ottawa: Department of Justice Canada, September 1991).

42. Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, 1991).

significant and, perhaps crucial stage in one important dimension of the Aboriginal struggle: the undoing of years of damage wrought following the violent imposition of an alien regime of social control and justice administration. This new direction in Canada is perhaps best illustrated by the *Report of the Aboriginal Justice Inquiry of Manitoba*, which advocates for Aboriginal communities a level of autonomy in the administration of justice which is unprecedented since the erosion of traditional Aboriginal social and political institutions began following Manitoba's entry into Confederation in 1870.[43]

The establishment of Aboriginal justice systems is the key element of this new direction. Politically, this proposal constitutes one of the more controversial dimensions of the Aboriginal self-government agenda. As a reform strategy, it represents a critical break with the assimilationist themes which have traditionally informed criminal justice policy in this country.

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43. This event was identified by the Aboriginal Justice Inquiry of Manitoba as the starting point of a new era for Manitoba's Aboriginal inhabitants: "The Justice Regime under Canadian Rule", see note 30 *supra* at 62-83. It formed part of what Friesen has described as the creation in the western interior of "new political and judicial arrangements to replace the now irrelevant authority of the Hudson's Bay Company": G. Friesen, *The Canadian Prairies: A History* (Toronto: University of Toronto Press, 1987); Chapter 7: "Prairie Indians 1840-1900: The End of Autonomy" at 13. The significance of this era for the Métis people of Canada is discussed in F.L. Barron & J.B. Waldram (eds), *1885 And After: Native Society in Transition* (Regina: Canadian Plains Research Center, University of Regina, 1986). On the more specific issue of the extension of the criminal justice system to Aboriginal people in Manitoba, see J.S. Milloy, *A Partnership of Races: Indian and White, Cross-Cultural Relations and Criminal Justice in Manitoba, 1670-1949* (Peterborough: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, 1990); D. & L. Gibson, *Substantial Justice: Law and Lawyers in Manitoba 1670-1970* (Winnipeg: Peguis Publishers, 1972) at 30-31; and M. Brogden, "Introduction: Criminal Justice and Colonization" in S.W. Corrigan & L.J. Barkwell (eds), *The Struggle For Recognition: Canadian Justice and the Métis Nation* (Winnipeg: Pemmican Publications, 1991) at 1. For a discussion of a similar process in New Zealand and Australia, see respectively, J. Pratt, "Citizenship, Colonisation and Criminal Justice" (1991) 19 *International Journal of the Sociology of Law* 293; and J. Hookey, "Settlement and Sovereignty" in P. Hanks & B. Keon-Cohen (eds), *Aborigines and the Law* (Sydney: George Allen & Unwin, 1984).

PART A

CHAPTER 1

THE 'PROBLEM' OF ABORIGINAL OVER-REPRESENTATION IN THE CRIMINAL JUSTICE SYSTEM

I. INTRODUCTION

The arrest and incarceration of Aboriginal people at rates which far exceed their proportion of the general population has become widely adopted as the key indicator of a fundamental flaw in the criminal justice system. Recognition of the need to seriously address the reality of Aboriginal over-representation at all stages of the criminal justice process has been steadily growing in recent years and, indeed, appears to have become entrenched as the focus of the Aboriginal justice reform initiative. However, while the volumes of statistics continue to accumulate, as one investigation after another uncovers the 'truth' of how the justice system operates, it is becoming increasingly apparent that the very notion of 'over-representation' may be fundamentally inappropriate as a framework for addressing Aboriginal justice concerns.

This chapter has four main components. First, it examines the emergence of over-representation as the key justice problem for Aboriginal people both in Canada and Australia. Second, it provides a statistical overview of the current situation in the three Prairie region provinces, and nationally in Australia. Third, a critique of the notion of over-representation is offered, with particular emphasis on the reform implications of this particular problem-solution model. Based on this analysis, the chapter concludes by raising alternative approaches to the issues surrounding Aboriginal experiences of the criminal justice system, which both reflects the multi-dimensional nature of this experience and exhibits a consciousness of the justice reform and political environments in which these issues resonate.

II. THE IDENTIFICATION AND EXPLANATION OF A 'PROBLEM'

In 1975 a national conference[1] of government representatives, academics, justice professionals and members of Aboriginal organizations met to discuss "[c]oncern over the jailing of [a] disproportionate number of Canada's native people."[2] Based on the objective of ensuring "the equitable treatment of native peoples within the Canadian criminal justice system,"[3] the conference adopted a reform program that set the general pattern for Aboriginal justice policy for the next decade.[4]

Since this conference,[5] the topic of 'Aboriginal people and the criminal justice system' has generated an ever-increasing body of literature and prompted a (somewhat less rapid) political awakening that Aboriginal concerns and aspirations in relation to this issue are legitimate and must be addressed. For example, in a recent study on the

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1. *Native Peoples and Justice. Reports on the National Conference and the Federal-Provincial Conference on Native Peoples and the Criminal Justice System, Edmonton, February 3-5, 1975* (Ottawa: Ministry of the Solicitor General, 1975).

2. *Id* at 3.

3. *Id* at 4.

4. The strategy adopted in 1975 and its impact on justice reform throughout the 1980s are discussed in Chapter 3.

5. I am not suggesting that this particular government-sponsored conference itself spawned the large and growing body of literature on this issue, let alone the emergence of a strong Aboriginal justice lobby which has subsequently played a central role in bringing about many of the dozens of government reports and commissions of inquiry which have appeared since 1975. It was, however, one of the first occasions on which 'Aboriginal peoples and criminal justice' was dealt with as a discreet topic requiring investigation and indicative of the need for fundamental changes in the way justice is administered in this country. See also Canadian Corrections Association, *Indians and the Law. A Survey Prepared for the Honourable Arthur Laing*. (Ottawa: Queen's Printer, 1967), which has also been described as "a milestone in the effort to address the issues of high Indian crime rates": P. Hemmingway, J. Hylton, L. Elkin & O. Brass, *An Opinion Study Concerning Causes and Solutions of Problems Related to Canadian Indians and Crime Using a Quasi-Clinical Approach* (Ottawa: Ministry of the Solicitor General, 1984) at 3.

state of policing reform in Canada, Harding commented that "[s]ince the 1960's, we have witnessed a change from widespread denial of systemic discrimination in policing of Aboriginal people to the pondering of fundamental alternatives to the traditional organization and role of peace officers as law enforcers."[6] This shift has followed the evolution of a more satisfactory formulation of the problem of Aboriginal contact with the criminal justice system.

In 1989 Whitley observed, perhaps somewhat belatedley, that:

> There are two views which are advanced to account for the *overrepresentation problem.* One view holds simply that native people are disproportionate in criminal conduct and commit more of the serious crimes which attract severe penalties. The other view places emphasis on the "criminal justice system and how its personnel and agents act with intentional or unintentional discrimination".[7]

While this particular articulation of the overrepresentation problem is somewhat unsatisfactory,[8] it does reflect the fact that at least into the early 1980s, the dominant theme of research literature which attempted to explain the over-involvement of Aboriginal people with the criminal justice system was an interpretation of the problem which focused on individual Aboriginal offenders and their "conspicuous

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6. J. Harding, "Policing and Aboriginal Justice" (1991) 33 *Canadian Journal of Criminology* 363. As well as attracting considerable attention from more general justice inquiries, this change has also resulted in investigations dealing specifically with policing in Aboriginal communities. For example, deteriorating Aboriginal-police relations on the Blood Reserve in Alberta led to the appointment of a public inquiry: Commission of Inquiry on Policing in Relation to the Blood Tribe (Commissioner C.H. Rolf), *Policing in Relation to the Blood Tribe. Report of a Public Inquiry* (Edmonton: Province on Alberta, February 1991).

7. S.J. Whitley, *Criminal Justice and the Constitution* (Toronto: Carswell, 1989) at 307-308, with quotation from C. Pitcher La Prairie & A. Himelfarb, "Native Juveniles in Court: Some Preliminary Observations" (unpublished paper, 1982).

8. The inadequacies of the standard explanation of Aboriginal over-representation are discussed in part V *infra.*

criminality".[9] This approach was based on a conceptual framework which assumed that:

> The Canadian criminal code is a 'just' system of laws to apply to indigenous people; and ... [t]he criminal justice system is an inherently fair and effective system to enforce such law.[10]

However, as Lilles has pointed out, "[i]n equality is an assumption of cultural homogeneity; the concept operates to maintain the existing socio-cultural order."[11] The implications of such a concept for Aboriginal people can be particularly severe. As Lilles observes, with specific reference to Aboriginal people living in isolated northern communities, "[t]he 'equal' treatment by the justice system of those Native people who are culturally and otherwise distinctive is, at best, problematic and, at worst, discriminatory."[12]

More generally, McCaskill argues that the "conventional explanation" which "views native offenders as members of a pathological community characterized by extensive social and personal problems" is "a misleading and inaccurate way of

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9. See P. Havemann, "The Over-Involvement of Indigenous People With the Criminal Justice System: Questions About Problem 'Solving' - A Canadian Case Study" in K.M. Hazlehurst (ed), *Justice Programs for Aboriginal and Other Indigenous Communities. Seminar Proceedings No. 7* (Canberra: Australian Institute of Criminology, 1985) at 126-128. This article discusses some of the major findings of a report completed for the Ministry of the Solicitor-General: P. Havemann, K. Couse, L. Foster & R. Matonovich, *Law and Order for Canada's Indigenous People: A Review of Recent Research Literature Relating to the Operation of the Criminal Justice System and Canada's Indigenous People* (Regina: Prairie Justice Research, School of Human Justice, University of Regina, 1985).

10. Havemann, *id* at 126.

11. H. Lilles, "Some Problems in the Administration of Justice in Remote and Isolated Communities" (1990) 15 *Queen's Law Journal* 327 at 332.

12. *Ibid.* See also C.T. Griffiths (ed), *The Community and Northern Justice* (Burnaby: The Northern Justice Society and Simon Fraser University, 1989).

understanding the conflict between native people and the justice system."[13]

A distinguishing feature of more recent approaches to the question has been a willingness to challenge this basic assumption about the 'justice' of the Canadian criminal process by shifting the empirical and analytical focus from the individual offender to the system which is responsible for his or her processing.[14] According to this analysis, over-representation is "analyzed as a structural problem addressing questions of social injustice based on inequalities in society as they are reflected in the legal system."[15] For Aboriginal people this approach involves challenging "the application, legitimacy, and meaning of the justice system as it affects native people in Canada."[16]

This shift has had important implications for the types of solutions offered. In particular it has facilitated the emergence of justice initiatives which are strongly consistent with the wider Aboriginal political agenda.

One of the most significant contributions to this newly emerging literature is that made by several recent reports of public inquiries. These include reports in each of the three Prairie region provinces - the *Report of the Task Force on the Criminal*

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13. D. McCaskill, "Native People and the Justice System" in I.A.L. Getty & A.S. Lussier (eds), *As Long As the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: University of British Columbia Press, 1983).

14. For example, Morse and Lock conducted a survey of Aboriginal offenders "in a first attempt to go beyond 'blaming the victim' by assessing how the people most directly concerned - the Native offenders themselves - perceive their treatment and express how they would like to have change implemented": B. Morse & L. Lock, *Native Offenders' Perceptions of the Criminal Justice System* (Ottawa: Report prepared for the Canadian Sentencing Commission, 1988) at 2.

15. *Ibid.*

16. *Ibid.*

Justice System and its Impact on the Indian and Métis People of Alberta,[17] the *Report of the Saskatchewan Indian Justice Review Committee*,[18] the *Report of the Saskatchewan Métis Justice Committee*,[19] and the *Report of the Aboriginal Justice Inquiry of Manitoba*[20] - and a report of the Law Reform Commission of Canada.[21] A similar process has taken place in Australia, culminating in the 1991 release of the 11 volume *National Report of the Royal Commission into Aboriginal Deaths in Custody*.[22]

These reports, and in particular, the *Report of the Aboriginal Justice Inquiry of Manitoba*, represent a major advance in the way in which the issues of Aboriginal involvement in the justice system have been addressed, and in the formulation of solutions to this particular problem. The Aboriginal Justice Inquiry of Manitoba has been accurately described as "probably the most in-depth public inquiry into

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17. Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta, *Justice on Trial. Volume 1: Main Report* (Edmonton: Province of Alberta, March 1991) (hereinafter "*Alberta Task Force Vol 1*").

18. Saskatchewan Indian Justice Review Committee, *Report* (Regina, January 1992) (hereinafter "*Saskatchewan Indian Justice Report*").

19. Saskatchewan Métis Justice Review Committee, *Report* (Regina, January 1992) (hereinafter "*Saskatchewan Métis Justice Report*").

20. Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba. Volume 1: The Justice System and Aboriginal People* (Winnipeg: Province of Manitoba, August 1991) (hereinafter "*AJI Report Vol 1*").

21. Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, December 1991).

22. See Royal Commission into Aboriginal Deaths in Custody, *National Report* (Canberra: Australian Government Publishing Service, May 1991).

aboriginal justice issues undertaken to date."[23]

III. THE EVIDENCE FROM THE PRAIRIE REGION

In this section, selected statistical evidence is summarized to introduce elements of the Aboriginal experience of how the system administers justice in the Prairie provinces.[24] This outline, along with an introduction to the justice environment for Aboriginal people in Australia, provides a more specific context for the discussion of Aboriginal over-representation in the remainder of the chapter.

1. Manitoba

In 1991 the Aboriginal population of Manitoba was estimated to be 130,000 or 11.8 percent of the total provincial population of almost 1,100,000.[25] This number includes 77,000 status Indians, 6,000 non-status Indians, and 47,000 Metis. Thirty-

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23. *Saskatchewan Indian Justice Report* at 4.

24. The aim of this section is not to provide a complete picture of the wide range of circumstances in which Aboriginal people live, nor even of the many ways in which the criminal justice system impacts unfairly upon them. Greater detail is available in the reports of the Aboriginal Justice Inquiry of Manitoba, the Alberta Task Force and the Saskatchewan Justice Review Committees. The first part of this chapter draws on these reports to *illustrate* the extent to which the current justice administration process fails Aboriginal people. The background of demograhic and social conditions for Aboriginal people in the Prairie region is discussed in M. Lautt, "Natives and Justice: A Topic Requiring Research Priority?" in D. Hepworth (ed), *Explorations in Prairie Justice Research. Canadian Plains Report 3* (Regina: Canadian Plains Research Center, University of Regina, 1979) at 57-76.

25. *AJI Report Vol 1* at 8. These figures are based on research commissioned by the Aboriginal Justice Inquiry of Manitoba: Dansys Consultants, *Aboriginal People in Manitoba: Population Estimates for 1986 and 1991* (Ottawa: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, November 1990). Figures from the 1986 census indicated that Aboriginal people constituted only 8.1 percent of the provincial population: *ibid.*

seven percent of Aboriginal people live on 102 reserves throughout the province,[26] while about 31 percent live in the city of Winnipeg.[27]

Research carried out for the Aboriginal Justice Inquiry of Manitoba on Provincial Court data revealed that:

* Aboriginal people account for more than 50 percent of people in correctional institutions;[28]

* Aboriginal males between 18 and 34 spend 1.5 times longer in pre-trial detention than other suspects;[29]

* only 1 in 5 Aboriginal accused are successful in obtaining bail, compared to more

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26. There are 61 First Nations in Manitoba, but some bands have more than one land reserve: *ibid.* Reserve lands were allocated in the Prairie region in accordance with the numbered treaties: J. Woodward, *Native Law* (Vancouver: Carswell, 1989) at 236. See also R.H. Bartlett, "The Establishment of Indian Reserves on the Prairies" [1980] 3 *Canadian Native Law Reporter* 3; and R.H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: Native Law Centre, University of Saskatchewan, 1990). This process largely excluded the Métis people: D. Sprague, *Canada's Treaties With Aboriginal People. Working Paper Series No. 3* (Winnipeg: Canadian Legal History Project, University of Manitoba, 1991). Regarding the experience of Manitoba's Métis people in relation to land claims and entitlements under *The Manitoba Act* S.C., 1870, c.3), see P.L.A.H. Chartrand, *Manitoba's Métis Settlement Scheme of 1870* (Saskatoon: Native Law Centre, University of Saskatchewan, 1991). Various competing analyses of this event have been advanced recently. For an introduction to the debate, see *inter alia* T. Flanagan, "The Market for Métis Lands in Manitoba: An Exploratory Study" (1991) 16 *Prairie Forum* 1; and D. Sprague, "Dispossession vs. Accommodation in Plaintiff vs. Defendant. Accounts of Métis Dispersal from Manitoba, 1870-1881" (1991) 16 *Prairie Forum* 137.

27. *AJI Report Vol 1* at 8. On the particular problems faced by Aboriginal people living in urban centres, see S.J. Clatworthy, *The Demographic Composition and Economic Circumstances of Winnipeg's Native Population* (Winnipeg: Institute of Urban Studies, University of Winnipeg, 1980); D. McCaskill, "The Urbanisation of Indians in Winnipeg, Toronto, Edmonton, and Vancouver: A Comparative Analysis" (1981) 1(1) *Culture* 82; L. Krotz, *Urban Indians: The Strangers in Canada's Cities* (Edmonton: Hurtig Publishers, 1980); M. Lipman & C. Brandt, *Urban Native Housing in Canada* (Winnipeg: Institute of Urban Studies, University of Winnipeg, 1986); and L. Shorten (ed), *Without Reserve: Stories From Urban Natives* (Edmonton: NeWest Press, 1991). See also C. Pompana & D. Easter, Urban Indian Association, *Presentation No. 786 to the Public Inquiry into the Administration of Justice and Aboriginal People* - Transcript of a Community Hearing (Winnipeg, November 21, 1989) 7593-7633.

28. *AJI Report Vol 1* at 8, 101.

29. *Id* at 102.

than half of non-Aboriginal defendants;[30] and

* approximately 25 percent of Aboriginal persons received sentences that involve some degree of incarceration, compared to 10 percent of non-Aboriginal persons.[31]

2. Alberta

The Aboriginal population of Alberta was estimated in 1990 at more than 123,000. This figure, which includes approximately 79,000 persons of First Nations and 44,000 Métis,[32] represents 5.1 percent of the total provincial population.[33]

Statistics collected by the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta reveal that:

* in 1989, 29.5 percent of persons admitted to Alberta provincial and federal correctional facilities were Aboriginal.[34] For Aboriginal women the figure was 44.6 percent;[35]

* it has been estimated that by the year 2011, the level of Aboriginal admissions will

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30. *Id* at 221.

31. *Id* at 103.

32. S. Loh, *Population Projections of the Native Groups in Canada, 1986 to 2011* (Ottawa: Statistics Canada, 1990) at 5.

33. *Alberta Task Force Vol 1* at 8-18.

34. *Ibid.*

35. *Id* at 6-7.

rise to 38.5 percent of the total intake;[36]

* of all persons charged by the Edmonton and Calgary police services it is estimated that 13.7 percent are Aboriginal;[37]

* 38.5 percent of young Aboriginal offenders were admitted to young offender centre facilities compared to 21.4 percent for non-Aboriginal offenders;[38] and

* Aboriginal people are less likely to receive a probation release than they are to be admitted to a correctional centre, and have a very high involvement in the fine option program.[39]

3. Saskatchewan

In December 1990 there were approximately 75,000 registered Indians living in Saskatchewan.[40] Fifty-four percent of this number[41] reside on more than 140

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36. *Ibid.* The projected Aboriginal population of Alberta in 2011 is 203,333 or 6.5 percent of the provincial total: *id* at 8-15.

37. *Id* at 6-5.

38. *Id* at 6-6. Despite the adoption of a policy of decreasing the use of custody dispositions in Alberta Youth Courts, "Native young offender sentenced admissions recorded a consistent increase from 1986 to 1989": *id* at 6-7.

39. *Id* at 6-5, 6-6. Statistics released recently by Correctional Services Canada, reveal the level of prison over-representation in the Prairie region is a magnification of the national picture. 11.2 % of male and 15.4 % of female inmates in federal penitentiaries are Aboriginal, although Aboriginal people constitute less than 4 percent of Canada's total population: *Basic Facts About Corrections in Canada 1991* (Ottawa: Correctional Services of Canada, 1991). These figures are based on data contained in the *Offender Population Profile System*, as of March 31, 1991.

40. Based on Indian and Northern Affairs Canada, *Indian Register Population By Sex and Residence, 1990* (Ottawa: Indian and Northern Affairs Canada, 1990) at xi.

41. *Id* at 43.

land reserves throughout the province.[42] The 1986 Census identified only 24,015 Métis and 11,450 non-status Indians living in Saskatchewan,[43] although these figures are probably significantly lower than the actual numbers.[44] For example, the Métis Society of Saskatchewan estimates that the Métis population of the province is more than 70,000.[45]

Part 4 of the *Report of the Saskatchewan Indian Justice Review Committee*[46] provides an overview of the criminal justice conditions of Saskatchewan's Aboriginal peoples. Statistics collected by the Committee indicate that:

* Aboriginal admissions accounted for 68 percent of all sentenced admissions to provincial correctional centres in 1990-91;[47]

* 84 percent of incarcerated women applying for conditional release from provincial facilities were Aboriginal;

* 63 percent of participants in the fine option program were Aboriginal;

* Aboriginal youth constituted 45 percent of all young offenders receiving some form of disposition under the *Young Offenders Act*, including 72 percent of those in custody

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42. See A.J. Siggner, The Socio-Demographic Conditions of Registered Indians", *Canadian Social Trends* (Statistics Canada), Winter 1986, 2 at 3. See also G.K. Jarvis, *An Overview of Registered Indian Conditions in Saskatchewan* (Ottawa: Indian and Northern Affairs Canada, 1987).

43. Loh, note 32 *supra* at 5.

44. See Statistics Canada, *Canada: A Portrait* (Ottawa: Supply and Services Canada, 1991) at 42.

45. *Saskatchewan Indian Justice Report* at 5. This disparity reflects the difficulty of estimating Métis population figures with any degree of accuracy, given the problem of definiton and the almost total reliance on self-identification.

46. *Ibid.*

47. *Id* at 11. The figure for female admissions was 85 percent.

programs; and

* 15 percent of all violent offences reported in Saskatchewan in 1989 were reported on-reserve, and violent offences represented 21 percent of all reserve offences.[48]

IV. ABORIGINAL PEOPLE AND THE AUSTRALIAN JUSTICE SYSTEM

1. Introduction

> Two hundred years ago, Europeans came to this country to establish a prison. The Koorie people who they displaced had a strong system of justice but they didn't have prisons. Part of the story of white settlement has been that the prison system that was established to deal with British criminals, now discriminates strongly against Koories. Not only are Koories imprisoned much more frequently than white people, but for many of them, the experience of imprisonment is especially traumatic.[49]

When the first British settlers arrived in Australia in 1788 the Aboriginal population of the continent is estimated to have been as high as 750,000.[50] The 1986 census revealed that the Aboriginal and Torres Strait Islander population of Australia was 227,638 - 1.46 percent of the national population.[51] More than 120,000 of this number live in Queensland and New South Wales,[52] although the highest proportion

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48. *Id* at 11-12. These figures are taken from a study completed by the Canadian Centre for Justice Statistics, *Crime in Aboriginal Communities, Saskatchewan 1989* (Ottawa: Statistics Canada, 1991).

49. C. Barry, "Programmes for Koorie Prisoners: Past, Present and Future" in D. Biles (ed), *Current Australian Trends in Corrections* (Sydney: The Federation Press, 1988) 31 at 37. The term 'Koorie' is commonly used to refer to the Aboriginal people in south-eastern Australia, and is often the preferred term of self-identification.

50. R. White & A. Mulvaney, "How Many People?" in A. Mulvaney & R. White (ed), *Australians to 1788. A Historical Library* (Sydney: Fairfax, Syme & Weldon, 1987) at 117.

51. Cited in H. McRae, G. Nettheim & L. Beacroft, *Aboriginal Legal Issues: Commentary and Materials* (Sydney: The Law Book Company, 1991) at 33.

52. Including the Australian Capital Territory.

of Aboriginal people (22.43 percent) live in the Northern Territory.[53]

Aboriginal people have been considered to come within the jurisdiction of Australian courts since the decision of Supreme Court of New South Wales in *R. v. Murrell*[54]. Although there was some initial defiance of the decision,[55] the fundamental difficulties of Aboriginal contact with the justice system were not seriously addressed until the 1960s[56] and the 1970s[57]. Throughout much of the twentieth century, "the criminal justice system became an instrument of oppression as it was used to enforce the now discredited policies of protection and assimilation."[58]

Since the 1970s the topic of 'Aboriginal people and the criminal justice system' has moved through a similar evolution to that which has occurred in Canada. For example, the 'blaming the victim' approach which dominated the literature in the early stages is illustrated in the following conclusion, which is based on a study of 1984 prison statistics:

> In short, the criminal justice system is not likely to be responsible for high Aboriginal

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53. McRae et al, note 51 *supra*.

54. (1836) Legge 72. This landmark decision has been affirmed. See, for example, *R. v. Wedge* [1976] 1 NSWLR 581.

55. See McRae et al, note 51 *supra* at 259.

56. See example, C. Howard, "What Colour is the 'Reasonable Man'?" [1961] *Criminal Law Review* 41; and M. Kriewaldt, "The Application of the Criminal Law to the Aborigines of the North" (1960) 5 *University of Western Australia Law Review* 1.

57. In 1976, the Australian Law Reform Commission was asked to investigate and report on the feasability of recognizing elements of Aboriginal customary law in the context of the criminal justice system: see Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law. Report No. 31* (Canberra: Australian Government Publishing Service, 1986).

58. McRae et al, note 51 *supra* at 239.

> rates of imprisonment - it may merely be responding logically and even sympathetically to the offending pattern of Aboriginals.[59]

The most disturbing practical consequence of explanations such as this, is that they greatly limit the nature of possible reform strategies. For example, following a discussion of the difficulties faced by Northern Territory Aborigines when they came into contact with the criminal justice system, Coldrey concludes that the greatest need is for "Aboriginal people to understand the criminal justice system and how it operates."[60] "Demystification"[61] and relieving Aborigines of their ignorance, are thus advanced as the key solutions to overcoming the injustices suffered by Aboriginal people in the context of justice administration.[62]

More recently, the system itself has come under greater scrutiny in terms of the capacity of police, courts and prisons to deal effectively and justly with Aboriginal people. As McRae, Nettheim and Beacroft note, the question has become:

> ... "what is wrong with the criminal justice system that it causes such problems for Aborigines?" rather than "what is the problem with Aborigines that they cause such problems for the criminal justice system?"[63]

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59. J. Walker, "Prison Cells With Revolving Doors: A Judicial or Societal Problem" in K.M. Hazlehurst (ed), *Ivory Scales: Black Australia and the Law* (Kensington: NSW University Press, 1987) 106 at 107.

60. J. Coldrey, "Aboriginals and the Criminal Courts" in K.M. Hazlehurst (ed), *Ivory Scales: Black Australia and the Law* (Kensington: New South Wales University Press, 1987) 81 at 91.

61. *Ibid.*

62. Coldrey concludes: "I look forward to the day when Aboriginal people will find the vagaries of the European legal system no more intimidating and no more infuriating than do most of the Australian community": *ibid.* The extent to which Aboriginal justice reform strategies such as cross-cultural training, Aboriginal recuitment, the Anunga Rules and courtworker programs can be considered as deriving from the same inadequate reform mentality will be addressed in Chapter 2.

63. McRae et al, note 51 *supra* at 245.

The results of this new perspective have been startling in terms of the light shed on how justice is administered to Aboriginal people in Australia. For example, a report commissioned by the Human Rights and Equal Opportunity Commission's National Inquiry into Racist Violence[64] found "compelling reasons for considering the use of violence against Aboriginal youth as part of an institutionalised form of racial violence"[65] and as "part of the routine practices of policing."[66] The court process and the correction system have attracted similar attention[67].

2. Justice Indicators

Studies conducted by the research unit of the Royal Commission into Aboriginal Deaths in Custody indicated that:

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64. C. Cunneen, *A Study of Aboriginal Juveniles and Police Violence* (Sydney: Report Commissioned by the National Inquiry into Racist Violence, Human Rights and Equal Opportunity Commission, 1991). See also Human Rights and Equal Opportunity Commission, *Racist Violence: Report of a National Inquiry in Australia* (Canberra: Australian Government Publishing Service, 1991).

65. C. Cunneen, "Aboriginal Young People and Police Violence" (1991) 49 *Aboriginal Law Bulletin* 6 at 8. This article summarises the findings of the Human Rights and Equal Opportunity Commission report cited above.

66. *Id* at 9. There is also evidence to support the claim that, at least in relation to Aboriginal youth, police exercise their discretion at the point of apprehension, in a discriminatory manner: F. Gale and J. Wundersitz, "The Operation of Hidden Prejudice in Pre-Court Procedures: The Case of Australian Aboriginal Youth" (1989) 22 *Australian and New Zealand Journal of Criminology* 1.

67. See, for example T. Sydall, "Aboriginals and the Courts I and II" in K.M. Hazlehurst (ed), *Justice Programs for Aboriginal and Other Indigenous Communities. Seminar Proceedings No. 7* (Canberra: Australian Institute of Criminology, 1985); J. Kearins, "Factors Affecting Aboriginal Testimony" (1991) 16 *Legal Service Bulletin* 3; A. Ligertwood, "Aborigines in the Criminal Courts" in P. Hanks and B. Keon-Cohen (eds), *Aborigines and the Law* (Sydney: George Allen and Unwin, 1984); Barry, note 49 *supra*; Walker, note 59 *supra*; D. Brown, "Are We Sending Too Many People to Gaol?" in A. Gollan (ed), *Questions For The Nineties* (Sydney: Left Book Club Co-Operative, 1990); and R. Midford, "Imprisonment: The Aboriginal Experience in Western Australia" (1988) 21 *Australian and New Zealand Journal of Criminology* 168.

* at the time of survey in August 1988, Aboriginal people constituted 29 percent of the persons held in police custody nationally, although they are only 1.1 percent of the Australian population aged 15 years and above;[68]

* Aborigines are at least 10 times more likely than non-Aborigines to be in prison;[69]

* 51 percent of all sentenced prisoners received in the state of Western Australian prisons during 1988/89 were Aboriginal;[70] and

* between 1980 and 1988 Aborigines were 23 times more likely to die in custody than were non-Aborigines.[71]

V. A CRITIQUE OF THE OVER-REPRESENTATION APPROACH

In a report prepared for the Committee of the Canadian Bar Association on Imprisonment and Release in 1988, Jackson stated:

> Statistics about crime are often not well understood by the public and are subject to

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68. D. McDonald, *National Police Custody Survey August 1988. National Report. Research Paper No. 13* (Canberra: Royal Commission into Aboriginal Deaths in Custody, 1990).

69. D. Biles, *Aboriginal Imprisonment - A Statistical Analysis. Research Paper No. 6* (Canberra: Royal Commission into Aboriginal Deaths in Custody, 1989). This is considered to be a conservative estimate. Other studies have concluded that Aboriginals are as much as 23 and 28 times more likely to go to prison than non-Aboriginals: see respectively, S. Murkejee, "Aboriginal Imprisonment" in *Crime Digest*, Australian Insititute of Criminology, January, 1988; and L. Munro & G. Jauncey, "Keeping Aborigines Out of Prison: An Overview" - a paper presented on behalf of the National Aboriginal and Islander Legal Services Secretariat at the *Keeping People Out of Prison Conference*, Australian Institute of Criminology, 27-29 March 1990.

70. D.J. O'Shea, *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia: Volume 1 - Royal Commission into Aboriginal Deaths in Custody* (Canberra: Australian Government Publishing Service, 1991) at 171. According to the 1986 Census, Aboriginal people constitute 2.69 percent of the total Western Australian population.

71. D. Biles, D. McDonald & J. Flemming, "Aboriginal and Non-Aboriginal Deaths in Custody" (1990) 23 *Australian and New Zealand Journal of Criminology* 15. The significance of the data on deaths in custody has been the subject of debate. See the literature listed in Introduction, note 35 *supra*.

> variable interpretation by the experts. In the case of the statistics regarding the impact of the criminal justice system on native people the figures are so stark and appalling that the magnitude of the problem can be neither misunderstood nor interpreted away.[72]

Certainly, the statistics cited above are striking. They reflect a level of negative contact with the police, courts, and jails for Aboriginal people that has no parallel in relation to any other racial or ethnic group in Canada. There is no doubt about the magnitude of the figures. What is less clear, is the nature of the problem. Resolution of this issue is fundamental to the formulation of a productive reform strategy to improve the administration of justice.

To the extent that a system which is designed for the maintenance of social order, when it impacts disproportionately on a particular sector of society, can be seen as inherently unjust, the identification of over-representation as a problem is uncontroversial. It is difficult to contest the validity of the statistical evidence which reveals this disproportionate impact. Indeed, as Zimmerman has observed, "while the term 'overrepresentation' may be inaccurate, it has nevertheless become the catchword for the undeniable phenomenon of the disproportionate numbers of native people in conflict with the law and incarcerated."[73] But the emergence of over-representation as the Aboriginal justice "catchword" may have important implications beyond the mere possibility of innaccuracy.

Indeed, some commentators have begun to question not simply the accuracy

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72. M. Jackson, "Locking Up Natives in Canada" (1989) 23 *University of British Columbia Law Review* 215.

73. S. Zimmerman, *"The Revolving Door of Despair": Native Involvement in the Criminal Justice System* (Ottawa: Research paper prepared for the Law Reform Commission of Canada and the Aboriginal Justice Inquiry of Manitoba, June 1991) at 1.

but the ramifications of simplistically identifying over-representation as *the* problem faced by Aboriginal people in the context of justice administration. For example, La Prairie suggests that it is "probably erroneous to continue to depend on 'over-representation' as a viable explanation for the situation of aboriginal people as offenders in the criminal justice system."[74]

Of particular concern is the way in which the over-representation model reflects a mono-problem analysis that is applied generally to all Aboriginal people. The authors of a report dealing with the justice concerns of James Bay Cree communities[75] observed that much of the literature

> ... on the issue of aboriginal people in their relation to the justice system ... seems trapped in the common perception that aboriginal groups in Canada share characteristics along most dimensions and that justice problems and solutions are no exception. These perceptions have been reinforced in research efforts which often identify the nature of the problem in terms of broad generalizations about cultural conflict, over-representation in correctional institutions and various forms of discrimination.[76]

Also problematic is the absence of analysis on what over-representation actually means as a justice indicator. As Barkwell has observed on the basis of research conducted by the Manitoba Métis Federation,

> Although most Aboriginal people feel that descriptive studies of over-incarceration and systemic discrimination have been "done to death", ... [there are] few research efforts that actually evaluate the justice system with a view to holding it accountable for its failures ... As long as the planners and policymakers of the justice system are allowed to rationalize its failures by pointing to, and blaming, large and vaguely-defined "social problems," and claim that these are factors beyond control, they will continue to sidestep questions of

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74. C. La Prairie, *If Tribal Courts Are the Solution, What is the Problem?* (Consultation document prepared for the Department of the Attorney General, Province of Nova Scotia, 1990) at iv-v.

75. J-P. Brodeur, C. La Prairie & R. McDonnell, *Justice For the Cree: Final Report* (Nemaska: Grand Council of the Crees (of Québec) and the Cree Regional Authority, 1991).

76. *Id* at 3.

relevancy and will continue to feed the syndrome of blaming the victim.[77]

The Manitoba Métis Federation has identified the problem of over-representation as being the product of the "devaluation of a people and their culture."[78] Indeed, it appears that for many Aboriginal people, over-representation is seen both symbolically and realistically, as the product of a long history of dispossession and subjugation before non-Aboriginal values and institutions.[79] It reflects an ongoing process of racist, and often violent, domination and cultural destruction. In this context, and in the context of attempts by criminologists to explain Aboriginal 'criminality', the conceptualization of a problem is rather more complex.

Increasingly, the problem is being articulated in terms of a denial of legitimate autonomy, an approach which has implications in terms of the evaluation of any proposed solutions. Isolating over-representation as the problem may be incompatible with Aboriginal concerns about justice and other issues and may diminish the priority which Aboriginal communities are prepared to give to this topic. For example,

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77. L.J. Barkwell in S.W. Corrigan & L.J. Barkwell (eds), *The Struggle For Recognition: Canadian Justice and the Métis Nation* (Winnipeg: Pemmican Publications, 1991) at 71.

78. L.J. Barkwell, D.N. Gray, D.N. Chartrand, L.N. Longclaws & R.H. Richard, "Devalued People: The Status of the Métis in the Justice System" in S.W. Corrigan & L.J. Barkwell (eds), *The Struggle For Recognition: Canadian Justice and the Métis Nation* (Winnipeg: Pemmican Publications, 1991) at 73.

79. There are many accounts of the various manifestations of this process. See for example, G.York, *The Dispossessed: Life and Death in Native Canada* (London: Vintage, 1990); J.S. Frideres, *Native Peoples in Canada: Contemporary Conflicts* (Scarborough: Prentice Hall, 3rd ed., 1988); J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1989); and L. Krotz, *Indian Country: Inside Another Canada* (Toronto: McClelland & Stewart, 1990). There is also a rapidly expanding body of literature by Aboriginal authors which documents the ways in which Aboriginal communities across Canada have responded to the non-Aboriginal onslaught. Two excellent examples are B. Richardson (ed), *Drumbeat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press, 1989), and D. Jensen & C. Brooks (eds), *In Celebration of Our Survival: The First Nations of British Columbia* (Vancouver: University of British Columbia Press, 1991).

following a discussion of the significance of the events at Oka, the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta noted that:

> The events of the summer of 1990 consumed the time and attention of many of the Indian and Métis communities to such an extent that they were unwilling or unable to discuss with us the issue of the involvement of Aboriginals in the criminal justice system.[80]

Care is necessary then, to avoid the conceptualization of the evidence of disproportionate levels of Aboriginal arrest and incarceration as the ultimate symptom of their oppression, and to avoid accepting the fiction "that a more appropriate and effective justice system will solve all problems of aboriginal communities."[81] This understanding is crucial in the current environment of strong support for Aboriginal autonomy because as Brodeur, La Prairie and McDonnell have observed, the result of ascribing to the justice system a broad problem-solving capacity is that "[t]he solutions then become aboriginal control over justice without a clear delineation of the problems this approach can address and those it cannot."[82]

VI. FORMULATING AN APPROPRIATE PROBLEM-SOLUTION MODEL

A more satisfactory framework for discussion and action on the justice problems faced by Aboriginal people must focus on the range of concerns considered important in individual Aboriginal communities. For example, Milling and Puskas

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80. *Alberta Task Force Vol 1* at 1-4.

81. Brodeur, La Prairie & McDonnell, note 75 *supra* at 3.

82. *Ibid.* This issue will be discussed in more detail in Chapter 5 which deals with the emergence of autonomy as the focus of Aboriginal justice reform.

have addressed the specific problem of "access to justice" as experienced by the Aboriginal community on the Walpole Indian Reserve in Ontario.[83] One of the major findings of this particular research project was the need for a model of legal service delivery designed to meet the requirements of specific reserve communities.[84] The authors concluded that, "[i]n light of the current movement toward native self-government ... the most viable delivery model would be one which involves the participation of the native community at all stages, from planning, through administration, to the actual provision of legal services."[85]

The report *Justice For the Cree*, based on a major research project commissioned by the Grand Council of the Crees (of Québec) and the Cree Regional Authority,[86] adopts a similar focus, albeit on a rather larger scale.[87]

The implications of an autonomy-based model for Aboriginal justice initiatives will be discussed in more detail in Part B of this thesis, but what these studies reveal is the value of a community-level and community-specific approach to Aboriginal justice problems, both in conceptualization, and in terms of proposed solving

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83. R. Milling & R. Puskas, "Native Access to Justice: Legal Needs on the Walpole Island Indian Reserve" (1989) 1 *Windsor Review of Legal and Social Issues* 34.

84. *Id* at 56.

85. *Id* at 34.

86. See Brodeur, La Prairie & McDonnell, note 75 *supra*. This was one of four volumes which resulted from the study. The other three are titled *Communities, Crime and Order*; *Policing and Alternative Dispute Resolution*; and *Customary Practices*.

87. For a brief summary of the scope of the project, see R.F. McDonnell, "Justice for the Cree: Research in Progress in James Bay" (1991) 33 *Canadian Journal of Criminology* 171.

strategies. Indeed, it is fundamentally inconsistent with this approach to focus exclusively on over-representation as the measure of the justice problems faced by Aboriginal people.

Clark has suggested that a more productive analysis would result from employing "a model based on decision points" within the criminal justice system.[88] The aim of this approach would be to highlight individual locations within the process where there are disparities between the treatment of Aboriginal and non-Aboriginal accused.[89] Alternatively, from a perspective which considers the economic efficiency of the justice system, the 'problem' may be identified as the financial and human resources which are spent on processing Aboriginal people throughout the system.[90]

Whether the focus of investigation is the economic efficiency of the process, gender differences[91] or regional concerns,[92] the essence of this model is to offer solutions that address specific problems in the justice administration process. This high level of specificity does not mandate that reforms can only be piecemeal in

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88. S. Clark, *Sentencing Patterns and Sentencing Options Relating to Aboriginal Offenders* (Ottawa: Department of Justice Canada, 1989) at 9.

89. *Id* at 9-11. Several other recent studies have addressed the experience of Aboriginal people at sentencing. See for example, C. LaPrairie, "The Role of Sentencing in the Over-representation of Aboriginal People in Correctional Institutions" (1990) 32 *Canadian Journal of Criminology* 429; M. Sinclair, "Dealing With the Aboriginal Offender: Indians and Criminal Law" (1990) 14(2) *Provincial Judges Journal* 14; B.P. Archibald, "Sentencing and Visible Minorities: Equality and Affirmative Action in the Criminal Justice System" (1989) 12 *Dalhousie Law Journal* 377; and R. Ross, "Leaving Our White Eyes Behind: The Sentencing of Native Accused" [1989] 3 *Canadian Native Law Reporter* 1.

90. See Peat, Marwick, Stevenson and Kellog Consultants, *An Analysis of Costs of the Justice System Attributable to Aboriginal People* (Winnipeg: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, May 1990).

91. C. LaPraririe, "Native Women and Crime: A Theoretical Model" (1987) 7(1) *Canadian Journal of Native Studies* 121.

92. See Lilles, note 11 *supra*; and Griffiths, note 12 *supra*.

nature. Indeed, explanations which avoid the tendency to generalise about the nature and implications of Aboriginal over-representation, and which confront the specific elements of various Aboriginal experiences of the operation of the justice system, are capable of generating compelling evidence in support of a fresh approach to Aboriginal justice reform, including the implementation of autonomy-based changes to the existing structure of the justice process.

CHAPTER 2

'TINKERING' WITH THE JUSTICE SYSTEM: THE DOMINANT THEME OF CONVENTIONAL REFORM STRATEGIES

I. INTRODUCTION

The first step is to recognize that tinkering won't work, and what will work is empowerment. Until the justice system can accommodate the reality of our self-determination, it can hardly begin to deal with over-representation of natives in prisons, the lack of native jury members or judges, discrimination in policing or corrections.

- Christopher McCormick, Native Council of Canada[1]

McCaskill has observed, "[g]iven ... that the judicial system is unjust in its dealings with native people and that this injustice is manifested in the large numbers of Indian people incarcerated in correctional institutions, there appears to be no alternative but to address seriously the question of reforming the legal and judicial systems."[2] As this comment indicates, there has long been a close relationship between the identification of a problem of over-representation/systemic discrimination, and the strategy of adopting a range of mechanisms designed to reform the existing justice system without substantially altering its basic structure and underlying principles.[3]

In 1975 the Conference on Native Peoples and the Criminal Justice System

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1. Cited in Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba. Volume 1: The Justice System and Aboriginal People* (Winnipeg: Province of Manitoba, 1991) (hereinafter "*AJI Report Vol 1*") at 258.

2. D. McCaskill, "Native People and the Justice System" in I. Getty & A. Lussier (eds), *As Long As the Sun Shines and Water Flows* (Vancouver: University of British Columbia Press, 1983) at 294.

3. According to Hurlbert, the very notion of "reform" involves "some degree of preservation of the subject matter of the reform exercise": W.H. Hurlbert, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Edmonton: Juriliber, 1986) at 7, cited in P.L.A.H. Chartrand, *Métis People and the Justice System* (Winnipeg: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, October 1989) at 56-57.

adopted "guidelines for action" which included closer involvement of native persons in the planning and delivery of justice services, greater control by native communities over service delivery, cultural sensitivity training for non-native staff in the criminal justice system, recruitment of native persons for service functions at all stages of the criminal justice system, increased use of native para-professionals, and a greater policy emphasis on prevention, community-based diversions and alternatives to imprisonment, and the protection of young persons.[4]

Since this landmark meeting, more than twenty reports have made numerous recommendations designed to address the problem of Aboriginal contact with the criminal justice system. To a large extent many of these contributions to the Aboriginal justice literature follow the broad pattern established in 1975.

The Alberta Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta identified the following "'Top Ten' Trends in Recommendations" between 1967 and 1990:

> * Have cross-cultural training for non-Native staff
> * Employ more Native staff
> * Have more community-based programs in corrections
> * Have more community-based alternatives in sentencing
> * Have more special assistance to Native offenders
> * Have more Native community involvement in planning, decision-making and service delivery
> * Have more Native advisory groups at all levels
> * Have more recognition of Native culture and law in Criminal Justice System service delivery
> * Emphasize crime prevention programs

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4. *Id* at 38.

> * Self-determination must be considered in planning and operation of the Criminal Justice System.[5]

This chapter examines the major reforms which have been instituted during the last two decades for the purpose of addressing the Aboriginal justice problem discussed in Chapter 1. It is not an exhaustive review of the history of Aboriginal justice reform. Rather its objective is to identify, by an analysis of several of the most substantial reform initiatives, the central themes that have guided Aboriginal justice policy to date. A critique of the conventional approach to improving the system for the administration of justice is used as the basis for advancing a more appropriate model of justice reform which supports the value of autonomy for Aboriginal peoples.

Part II considers the dual strategies of cross-cultural training and Aboriginal recruitment, a two-pronged approach which in many ways symbolises the conventional reform strategies which have dominated the last two decades. Part III considers reforms in the important area of policing, including the establishment of the Royal Canadian Mounted Police (RCMP) Native Constable Program, and the limited development of autonomous Aboriginal police forces. The status of the Aboriginal Courtworker program in the Prairie provinces is examined in Part IV, while Part V discusses the use of alternatives to incarceration. Part VI provides a comparative element to the analysis by summarizing the dominant pattern of Aboriginal justice reform in Australia.

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5. "A Review and Compilation of the Recommendations of Twenty-Two Major Reports from 1967 to 1990 on Aboriginal People and the Criminal Justice System" in Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta, *Justice on Trial. Volume III: Working Papers and Bibliography* (Edmonton: Province of Alberta, 1991) 4-1 at 4-7.

Part VII considers the main themes of Aboriginal justice reform policy as demonstrated by the programs described earlier. This section seeks to identify the overall emphasis of this area of law and justice change prior to the appearance of the several major reports which are the subjects of Chapters 3 and 4. I will argue that the dominant approach can be accurately characterised as 'tinkering'- an approach to justice reform which fails to question the legitimacy of the existing system. The implications of this approach for Aboriginal people have been profound. The inadequacies of this reform strategy are then discussed, before introducing those alternative approaches to justice reform which have begun to emerge, and which hold the promise of a more productive decade for Aboriginal justice reform during the 1990s.

II. CROSS-CULTURAL TRAINING AND ABORIGINAL RECRUITMENT

Since the 1975 National Conference on Native Peoples and the Criminal Justice System, educational programs designed to improve individual and institutional awareness of Aboriginal culture and concerns, and policies designed to increase the number of Aboriginal people working in the justice system, have been introduced or proposed at all stages of the criminal justice process.[6] This approach has focused primarily on police departments but has regularly been advocated for all involved in the justice administration process, including lawyers, judges, prison employees and parole officers.

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6. In Australia, see J.H. Muirhead, *Royal Commission into Aboriginal Deaths in Custody - Interim Report* (Canberra: Australian Government Publishing Service, December 1988) at 44-52.

The rationale for cross-cultural training has been expressed by the Law Reform Commission of Canada in the following terms:

> Lack of cultural sensitivity operates in a subtle way: we all make assumptions based on our own experience about the way that people behave, and we judge others based on those assumptions. When those other people are from a different culture, however, our assumptions can be mistaken. As one prosecutor has noted: "I had been reading evasiveness and insincerity and possible lies when I should have been reading only respect and sincerity." These mistakes, if made by police, lawyers, judges or correctional officials, can have devastating consequences.[7]

Cross cultural orientation programs[8] generally attempt to provide participants with general knowledge on contemporary issues such as Aboriginal rights, bilingualism and multiculturalism. Facilitators (professors, public servants, community college instructors, police trainers or representatives of Aboriginal organizations) attempt to promote group discussion on issues of relevance to the target audience such as culture and values, discrimination and prejudice. Case studies and simulated games are frequently employed in an attempt to connect the topic being discussed with the work duties of the particular category of justice employee.

Most police officers and correctional facility employees receive some such training as part of their initial job training or orientation, but according to a report prepared for the Aboriginal Justice Inquiry of Manitoba, "[t]he only systematic formal cross cultural training programmes being offered in the justice community in Canada

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7. Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice. Report No. 34* (Ottawa: Law Reform Commission of Canada, 1991) (hereinafter "*LRCC Report*") at 30, with reference to R. Ross, "Leaving Our White Eyes Behind: The Sentencing of Native Accused" [1989] 3 *Canadian Native Law Reporter* 1 at 2.

8. This summary is based on the detailed summary of cross-cultural programs contained in Cross-Cultural Consulting Inc., *Cross-Cultural Orientation: A Model for the Justice System* (Winnipeg: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, March 1990).

are by police."[9]

The 26 week training course which RCMP recruits undergo at the Regina Academy includes three days of multicultural training, approximately half of which is devoted to an examination of Aboriginal issues.[10] Optional multiculturalism in-service training is also available. Further, in some northern communities, band council members provide RCMP officers with an informal orientation to the local Aboriginal culture and lifestyle.[11] Other Prairie region police departments generally receive less cross-cultural training, with a variable Aboriginal content.[12] In fact, on the basis of a national survey of police forces, Shewchuk suggests that "[t]he RCMP is among the few forces which offers a specific course on Aboriginal peoples."[13]

Shewchuk's general conclusion on cross-cultural education for police officers summarizes well the ambivalence about current approaches to Aboriginal awareness:

> While police forces viewed cross-cultural training as desirable, the variation in content, the limited amount of time devoted to training and absence of systematic evaluations does not support the efficacy of this training ... [S]ome sessions present useful information to assist police officers in their work, however, cross cultural training also runs the risk of reinforcing ethnocentrism.[14]

Persons working at other stages of the criminal justice process generally

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9. *Id* at 33.

10. *Id* at 75.

11. *Id* at 76.

12. *Id* at 88-89.

13. *Id* at 90.

14. *Id* at 88. See also J. Harding, "Policing and Aboriginal Justice" (1991) 33 *Canadian Journal of Criminology* 363 at 367-368. Recently, greater emphasis has been placed on the need for "racism awareness" or "anti-racism training": see *LRCC Report* at 30.

receive an even less adequate level of cross-cultural training than police officers.[15] For example, in Saskatchewan correctional facilities, "[w]hile all staff receive cross cultural training on commencing employment, there is no comprehensive, ongoing program to teach staff about aboriginal culture, spirituality and political aspirations."[16]

The Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta was particularly concerned by the "almost complete lack of cross-cultural training initiatives, specifically Aboriginal awareness training initiatives, ... for all service providers working in the courts area of the criminal justice system."[17] The response of the Alberta Department of the Attorney General to this concern is illustrative of the attitudes with which Aboriginal justice reform initiatives must contend:

> It has never been suggested that in order for the process to be fair, the Prosecutor (or the Judge or the defence lawyer for that matter) should receive formal training in any particular ethnic culture. The Criminal Justice System is not ethnocentric in its operation. Rather, it focuses its decisions on the material evidence and only on the evidence brought forward and admitted by the Judge.[18]

Aboriginal recruitment and affirmative actions programs have frequently been advocated on the basis that "[h]iring more Aboriginal persons might make the system

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15. See S. Stevens, *Cross-Cultural Training for Justice Personnel on Aboriginal Cultures and Their Unique Legal Status* (Vancouver: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, June 1990).

16. Saskatchewan Indian Justice Review Committee, *Report* (Regina, 1992) (hereinafter "*Saskatchewan Indian Justice Report*") at 52. In Manitoba, see *AJI Report Vol 1* at 452. However, the Alberta Task Force concluded that "both the federal and the provincial correctional services have made considerable progress in establishing Aboriginal specific cross-cultural training": Alberta Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta, *Justice on Trial. Volume 1: Main Report* (Edmonton: Province of Alberta, 1991) (hereinafter "*Alberta Task Force Vol 1*") at 8-38.

17. *Alberta Task Force Vol 1* at 8-38.

18. Cited *id* at 8-40.

seem less alien to Aboriginal people and create a greater sense of 'ownership'."[19] While this approach has met with limited success in certain areas[20] - at least in terms of the actual number of Aboriginal people working in the criminal justice system - it remains unclear just what impact greater numbers of Aboriginal people has in terms of the ability of the system to operate justly in relation to Aboriginal offenders. For example, the Aboriginal Justice Inquiry observed that "very few of the people employed by the Manitoba justice system are Aboriginal and ... *virtually none of the people in decision-making positions is Aboriginal.*"[21]

Aboriginal recruitment objectives have also been relatively unsuccessful at the policing stage: the point at which Aboriginal people enter the justice administration process. In Alberta, approximately 1 percent of police officers in Edmonton and Calgary, and 2.5 percent of RCMP officers are Aboriginal.[22] The Saskatchewan Indian Justice Review Committee has noted that "[i]n sharp contrast to its municipal counterparts, the RCMP has made significant strides in employing Aboriginal officers and civilian support staff. As of September 1991, 91 of 1,100 officers (8 percent) in

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19. *LRCC Report* at 28.

20. See discussion at text corresponding to notes 25-26 *infra*.

21. *AJI Report Vol 1* at 361 (emphasis added). Efforts to address the very small numbers of Aboriginal lawyers and judges have primarily taken the form of law school special entry schemes and support programs such as the Indigenous Law Program at the University of Alberta (see *Alberta Task Force Vol 1* at 8-32), and the Academic Support Program at the University of Manitoba. The Native Law Centre at the University of Saskatchewan conducts a summer pre-law orientation program for Aboriginal students preparing to enter law schools throughout the country. See D. Purich, Director, Native Law Centre, *Presentation No. 678 to the Public Inquiry into the Administration of Justice and Aboriginal People* - Transcript of a Community Hearing (Winnipeg, April 4, 1989) at 6258-6279.

22. Figures are based on a December 1989 survey: *Alberta Task Force Vol 1* at 2-41. The proportion of departmental workloads which involve Aboriginal persons are, respectively, 18.6%, 8.4% and 32.7%. See also E.A. Shewchuk, *National Survey of Police Forces* (Winnipeg: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, December 1989) at 38-39.

the Saskatchewan RCMP officer contingent were aboriginal."[23] In June 1989, the level of Aboriginal representation in both the Winnipeg Police Department and the RCMP D Division was approximately 1 percent.[24]

Attempts to increase Aboriginal representation as employees in the correctional system have been rather more successful, although there are significant provincial, regional and departmental variations.[25] For example, the Saskatchewan Indian Justice Review Committee observed that the Corrections Division of the Saskatchewan Department of Justice has successfully adopted a proactive policy for the recruitment of Aboriginal staff. The Committee reports that between 1988/89 and September 1991 Aboriginal recruits accounted for approximately 17 percent of all new employees. Overall, 11 percent of the province's corrections staff are Aboriginal.[26]

Cross-cultural training and the related strategy of increasing the level of Aboriginal representation in positions of authority throughout the system, are indicative of an approach which assumes that it is both possible and desirable to make the justice system a more culturally sensitive environment for Aboriginal offenders. In this respect, they most clearly illustrate the nature of the dominant Aboriginal justice reform strategy which has been to 'tinker' with the existing criminal justice system.

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23. *Saskatchewan Indian Justice Report* at 25. The Committee earlier observed that "the aboriginal recruitment efforts of the major municipal police forces have, by and large, met with failure": *id* at 23.

24. Shewchuk, note 22 *supra* at 72, 78. In January 1989 the RCMP National Recruiting Team established the goal of increasing the proportion of Aboriginal officers nationally from 1% to 3.2%: *id* at 77.

25. The number of Aboriginal people employed in corrections, and at other stages of the the criminal justice system in Alberta is sumarized in *Alberta Task Force Vol 1* at 8-42. In Manitoba, the Aboriginal Justice Inquiry observed that "Aboriginal staff in our prison system are conspicuous by their absence": *AJI Report Vol 1* at 452.

26. *Saskatchewan Indian Justice Report* at 55. 22 of the 30 employees in the Northern Corrections program are Aboriginal.

To a greater or lesser extent, each of the reforms discussed below can be identified as belonging to the same general category.

III. POLICING

Growing recognition of the need to reform the way Aboriginal people and communities are policed has been encouraged by evidence of the extent to which the criminal justice process systematically discriminates against Aboriginal accused. As Harding has observed:

> There remains a strategic reason for putting extra attention on overcoming racism within Canadian policing. As the front-end of the criminal justice system, discriminatory discretion in policing shapes everything that follows. If any significant change is to be made in the steady trend to overincarcerate Aboriginal people, something must change in policing itself.[27]

Harding identifies four main approaches to policing reform that have been implemented since the 1970s in an effort to address the problems experienced by Aboriginal people in terms of contact with the criminal justice system: cross cultural training programs for police departments, legal education for Aboriginal people, special constable programs, and tribal policing programs.[28]

The first approach, which has been applied throughout the justice system, was discussed above. The main thrust for employing the second approach has been the development of an Aboriginal courtworker program. This initiative will be reviewed following an examination of the third and fourth approaches.

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27. Harding, note 14 *supra* at 364.

28. *Id* at 367.

1. The Special Constable Program

The RCMP Indian Special Constable Program[29] was established in 1973 on the recommendation of a Federal Task Force on Policing on Reserves.[30] The Task Force's approach to policing reform was based on the assumption that "[a]ny minority group should, where appropriate, be policed *within the local police structure* by members of its own community."[31]

In support of its recommendation for the establishment of a special constable program, the Task Force concluded: "[w]ithin the structure of competent and well organized police forces these constables should be capable of providing a high standard of policing on reserves."[32] The original mandate of the RCMP Option 3b Program was to:

> provide for policing of Indian people by Indian people; provide a policing service to Indian communities equal to services provided generally to other Canadians, and flexible enough to accommodate the unique policing needs of Indian communities; involve Indian people in law enforcement careers; increase awareness of non-native RCMP force members of Indian culture, customs, rights, etc.; encourage initiation of crime prevention programs in Indian communities; and to decrease the number of Indian persons coming

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29. The name was later changed to Native Special Constable Program as it incorporated both Indian and Métis recruits: *Alberta Task Force Vol 1* at 2-29.

30. Task Force on Policing on Reserves, *Report* (Ottawa: Department of Indian and Northern Affairs, 1973). The program is commonly referred to as "Option 3b" because it was one of several alternatives considered by the Task Force which included an extension of band council policing, and the creation of autonomous native police forces.

31. Cited in C.T. Griffiths & J.C. Yerbury, "Natives and Criminal Justice Policy: The Case of Native Policing" (1984) 26 *Canadian Journal of Criminology* 147 at 150. Griffiths and Yerbury suggest that the decision of the Task Force to select this particular option was strongly influenced by the recommendation of the Canadian Corrections Association that Indian reserves should be policed by a single police force with the assistance of native constables: *id* at 149. See Canadian Corrections Association, *Indians and the Law. A Survey Prepared for the Honourable Arthur Laing* (Ottawa: Queen's Printer, 1967).

32. *Ibid.*

> into conflict with the law.[33]

Since its inception, the program extended to the point where it operated in all parts of the country, except Ontario, Québec and New Brunswick.[34] In July 1989 there were approximately 190 special constables stationed at 268 RCMP detachments.[35]

The most commonly observed problems with the program were: frequent conflict between constables and the Aboriginal communities they policed, inadequate definition of the role of the special constable and the subordinate status of the position within the RCMP policing structure, and insufficient capacity for Aboriginal input into the operation of the program.[36]

Concern about these and related issues led the Native Counselling Services of Alberta to conclude in 1980 that:

> ... Option 3b cannot now be regarded as a viable program for most reserves. Although it was conceptually solid and there was potential for its constructive development, the program has become politically defunct. The current trend is clearly towards autonomous Indian policing.[37]

In 1989 an evaluation conducted by an assistant commissioner of the RCMP recommended "that the Force abolish the Native and/or Indian Special Constable designation". The report suggested that the program had "outlived its usefulness" and

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33. H. Feagen, "The Royal Canadian Mounted Police Special Constable Program" in C.T. Griffiths (ed), *Circuit and Rural Court Justice in the North. A Resource Publication* (Burnaby: The Northern Conference and Simon Fraser University, 1984) at 2-23.

34. Angus Reid Group, *Effects of Contact With Police Among Aboriginals in Manitoba* (Winnipeg: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, July 1989) at 8. Similar programs have operated at the provincial level in Ontario and Québec.

35. *Id* at 8.

36. Griffiths & Yerbury, note 31 *supra* at 151-153.

37. Native Counselling Services of Alberta, *Policing on Reserves: A Review of Current Programs and Alternatives* (Edmonton: Native Counselling Services of Alberta, 1980) at 25.

highlighted the need to begin "looking at its replacement with something more attuned to the 1990s".[38]

The program was formally eliminated in May 1990 and was replaced with the Aboriginal Constable Development Program which will provide Aboriginal constables with training so that their status can be upgraded to that of full constable.[39] In June 1991 the federal government announced a new Aboriginal policing policy. The objectives of the new policy are designed to be consistent with Aboriginal self-government activity.[40]

2. Autonomous Aboriginal Police Forces

The Dakota-Ojibway Tribal Council (DOTC) in Manitoba is the only regional autonomous Aboriginal police force which operates in the Prairie region. The Louis Bull Police Force and a new initiative on the Blood Reserve in Alberta operate on a smaller scale.[41] A third form of Aboriginal policing developed in recent years is the use of Aboriginal satellite detachments of the RCMP. Several such detachments operate on reserves in Saskatchewan.[42]

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38. R.H.D. Head, *Policing For Aboriginal Canadians: The RCMP Role* (November 1989) cited in *Alberta Task Force Vol 1* at 2-31.

39. *AJI Report Vol 1* at 613.

40. Indian and Northern Affairs Canada, *Indian Policing Policy Review / Task Force Report* (Ottawa: Supply and Services Canada, January 1990); and see Department of Justice Canada, *Aboriginal People and Justice Administration: A Discussion Paper* (Ottawa: Department of Justice, September 1991) at 32-37.

41. The Louis Bull Program in Alberta has been in operation since 1987: Angus Reid, note 34 *supra* at 16. A similar project has been developed on the Blood Reserve with the co-operation of the Alberta Solicitor General, DIAND and the RCMP: *Alberta Task Force Vol 1* at 2-60.

42. *Saskatchewan Indian Justice Report* at 29.

The DOTC Police program was established in 1973 on a pilot project basis. Since 1978 the DOTC Police Force has been operating on eight Dakota and Ojibway Reserves in Manitoba on a shared cost basis between the Department of Indian Affairs and Northern Development (DIAND) and the Manitoba Department of Justice. As the DOTC Chief of Police commented in 1984:

> It was not easy to convince the government that we wanted a chance to prove ourselves; that with proper training, equipment, and sufficient man power, we could develop a police department on the reserves.[43]

The DOTC Force is administered by a committee which consists of a band councillor from each reserve involved in the project, and a representative from the Manitoba Department of Attorney General, DIAND and the RCMP.[44]

The program has been reviewed on a number of occasions, and while each review has recommended that the program be continued, a number of problems have been identified. For example,

> Serious difficulties and problems are noted in terms of administration, operation and funding. The problems have reached the lower levels of the organization and are reflected in a high turnover rate. Community support has not been great and dissatisfaction with the service appears to continue. Citizens are concerned "about low visibility, inconsistent or too lenient enforcement practices...as well as the problematic status for constables posted to their home reserves".[45]

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43. B. Hawkins, "The Dakota-Ojibway Tribal Police" in C.T. Griffiths (ed), *Circuit and Rural Court Justice in the North. A Resource Publication* (Burnaby: The Northern Conference & Simon Fraser University, 1984) at 2-36. See also Dakota Ojibway Tribal Council Police (L. Cameron, R. Prince, C. Dejarlais & I. Spence), *Presentation No. 679 to the Public Inquiry into the Administration of Justice and Aboriginal People* - Transcript of a Community Hearing (Winnipeg, April 4, 1989) at 6280-6314.

44. Shewchuk, note 22 *supra* at 66.

45. Angus Reid Group, note 34 *supra* at 15, citing R. Depew, *Native Policing in Canada: A Review of Current Issues* (Ottawa: Ministry of the Solicitor General, 1986).

IV. ABORIGINAL COURTWORKER PROGRAMS

The first courtworker programs were established in the early 1960s as a volunteer service by the Native Friendship Centres in Winnipeg and Edmonton. Federal government funding assistance commenced in 1969 following the release of a Canadian Corrections Association report[46] which advocated the provision of special legal services to Aboriginal people in criminal courts. In May 1972 the Department of Justice assumed responsibility for courtworker pilot projects, and in 1977 formally established the courtworker program on the basis of a cost-sharing agreement with provincial/territorial governments.[47]

One of the key reasons for this initiative was that it was seen as an appropriate mechanism for reducing the disproportionate rates of Aboriginal incarceration. Hathaway has identified this factor as one element of a three-pronged rationale for the federal government's decision to formally establish the courtworker program:

> Second, the courtworker model was consistent with federal policy of encouraging native people to be actively involved in the resolution of their own problems. Third, the legal service orientation of the program contributed to the realization of general goals for the provision of special assistance to the disadvantaged.[48]

According to the federal-provincial cost-sharing agreements courtworker programs were intended to provide:

> [C]ounselling, other than legal counselling, to persons charged with an offense under any federal or provincial statute or municipal by-law in order that such persons may receive information about court procedures, be apprised of their rights, or be referred to legal

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46. Canadian Corrections Association, note 31 *supra*.

47. Department of Justice, note 40 *supra* at 44.

48. J.C. Hathaway, "Native Canadians and the Criminal Justice System: A Critical Examination of the Native Courtworker Program" (1986) 49 *Saskatchewan Law Review* 201.

> aid or other resources.[49]

The injustice experienced by Aboriginal people was considered to be a product of "a lack of knowledge":

> Native People seldom had knowledge of the law, the terminology and procedures of the court, agencies from which they could get assistance, how to obtain lawyers, their rights, their responsibilities in the process, or the kind of information needed by the court to carry out fair sentencing. Criminal Justice personnel seldom had knowledge of Native lifestyle, culture, the motivation behind behaviour exhibited by Native People, the language difficulties they faced, or the consequences of inappropriate sentencing on Native People, such as the special hardships they faced in trying to pay fines or obeying inappropriate probation orders.[50]

As a reform strategy then, the courtworker program reflected the assumption that a greater understanding of the justice process on the part of Aboriginal defendants, and improved sensitivity to the conditions and needs of Aboriginal people on the part of judges, lawyers and other court personnel, was an appropriate strategy for addressing the justice problems faced by Aboriginal people. In particular, the program objective was that, through the work of courtworkers, Aboriginal persons charged with an offence would be more likely to be "informed participants in the judicial process."[51]

The essence of the courtworker's role is to provide a link between Aboriginal accused and court procedures and personnel:

> The courtworker is a person trained in court procedure, whose primary mandate is to assist persons in conflict with the law and to act as an intermediary between accused persons in trouble and persons in the criminal justice system. The courtworker makes contact with the accused when he is charged and stays in contact throughout the process.

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49. Cited *id* at 205.

50. Native Counselling Services of Alberta, "Native People and the Criminal Justice System: The Role of the Native Courtworker" (1982) 1 *Canadian Legal Aid Bulletin* 57.

51. E.A. Shewchuck, *Report on Courtworkers in Canada* (Winnipeg: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, 1989) at 7.

> The courtworker is an advocate and a friend of the accused. As an advocate, his function is to inform the accused of his legal rights and duties so that the accused knows what is taking place as he moves through the process.[52]

It was the original intention of the Department of Justice that each courtworker program would be contracted to an Aboriginal agency which would be responsible for instituting and operating the program. This was considered to be consistent with the federal government's recently adopted policy of providing a framework in which "Indian people could, with other Canadians, work out their own destiny."[53] However, this condition was deleted in 1978 when the Manitoba Government refused to give control of the program to a non-government agency. As a result, the nature of carrier agencies for the courtworker program vary from jurisdiction to jurisdiction, ranging from autonomous Aboriginal agency to provincial government operation.

1. Manitoba

The Manitoba Court Communicator program is the only program in Canada to be operated by a provincial government. Since its inception, it has been formally

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52. Ben Cardinal, courtworker, Fort St. John, British Columbia, in C.T. Griffiths (ed), *The Community and Northern Justice* (Burnaby: The Northern Justice Society and Simon Fraser University, 1989) at 79.

53. Cited in Hathaway, note 48 *supra* at 203. This policy emerged from the "infamous Federal Government White Paper, which proposed the abolition of Indian status and thereby crystallized 100 years of assimilationist policies, [and] served as a catalyst for the development of indigenous peoples' organizations": P. Havemann, "The Indigenization of Social Control in Canada" in B.W. Morse & G.R. Woodman (eds), *Indigenous Law and the State* (Dordrecht: Foris Publications, 1988) 71 at 81. See also S.M. Weaver, *Making Indian Policy: The Hidden Agenda 1968-70* (Toronto: University of Toronto Press, 1981); and J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1989), Ch. 13 - "Political Relations After the White Paper". Driben and Trudeau have observed that "what is doubly disappointing about the situation is that those responsible for the White Paper have never been willing to admit that key parts of the policy were implemented: P. Driben & R.S. Trudeau, *When Freedom Is Lost: The Dark Side of the Relationship Between Government and the Fort Hope Band* (Toronto: University of Toronto Press, 1983) at 37.

administered by the Chief Provincial Judge, with direction provided by a Native Advisory Committee.[54] An evaluation of the program in 1987[55] recommended that responsibility be transferred to an Aboriginal carrier agency, in line with the general trend toward the use of autonomous or semi-autonomous carrier agencies.[56] One proposed model which would have been consistent with the direction being taken in Alberta[57] was for the establishment of a community native justice worker program. This alternative would involve "expand[ing] the court communicator service to a more preventative focus with community legal clinics located in aboriginal communities with resident persons employed on a part-time or full-time basis."[58]

The program, which in 1991, was renamed the Manitoba Native Courtworker Program, is currently being restructured "to move away from the general perception that courtworkers are servicing the court and not the clients."[59] One measure taken to address this perception is the appointment of an advisory council with representation from Aboriginal organizations.[60]

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54. Shewchuk, note 51 *supra* at 31.

55. T. Lajeunesse, *The Manitoba Court Communicator Program: A Review* (Winnipeg: Manitoba Attorney General, 1987).

56. Shewchuk, note 51 *supra* at 9. Significantly, a survey of Manitoba lawyers conducted for the Aboriginal Justice Inquiry of Manitoba revealed that the need to transfer the program to an Aboriginal carrier agency was considered to be relatively unimportant compared with the need for improved training of court communicators: L. Messer, *A Survey of Manitoba Lawyers* (Winnipeg: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, February 1990) at 65.

57. See discussion at text corresponding to notes 63-67 *infra*.

58. Shewchuk, note 51 *supra* at 35.

59. Department of Justice, note 40 *supra* at 45.

60. *AJI Report Vol 1* at 219.

2. Saskatchewan

In 1979 the Saskatchewan Association of Friendship Centres (SAFC) undertook to administer a courtworker program on a province-wide basis. Despite a favourable evaluation in 1983,[61] the provincial government withdrew funding and the service was terminated in July 1987. However, in 1991 the provincial and federal governments, the Federation of Saskatchewan Indian Nations and the Métis Society of Saskatchewan commenced discussions for the completion of a feasibility study regarding the re-establishment of an Aboriginal courtworker program.[62]

3. Alberta

Since 1970 Alberta's criminal courtworker program has been operated by the Native Counselling Services of Alberta (NCSA), a "non-profit, non-sectarian social service agency which provides legal and social services to Native people."[63] From the perspective of the value of Aboriginal control over service delivery, the program would appear to be the most successful program in the Prairie region.[64] However, the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta noted widespread dissatisfaction with NCSAS, including perceptions

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61. Owen Consulting Group, *Native Courtworker Services of Saskatchewan: Program Evaluation* (Ottawa: Department of Justice Canada, 1983).

62. *Saskatchewan Indian Justice Report* at 33.

63. Shewchuk, note 51 *supra* at 21.

64. See generally Co-West Associates, *Criminal Courtworker Program: Native Counselling Services of Alberta. A Program Review and Evaluation Assessment* (Ottawa: Department of Justice Canada, 1981).

that the agency has been "conscripted by 'the system',"[65] and that it "is not accountable to the Aboriginal community but rather to its funding source, the government."[66] As the Task Force observed:

> Despite the success of NCSA programs, there is a growing sentiment that perhaps the time has come for a significant shift in direction ... The nature of this shift would see NCSA become a training resource for communities rather than staying in its current role of deliverer of services to individuals.[67]

The extent to which this push for a transformation of the courtworker program into a community-based operation can be seen as part of a broader shift in Aboriginal justice reform policy will be discussed in Part VII below.

V. SENTENCING: ALTERNATIVES TO INCARCERATION

In terms of the dominant problem-solution model discussed in Chapter 1, the most simplistic response to evidence of Aboriginal over-incarceration in Canada has been to encourage the use of alternative dispositions. As Griffiths and Verdun-Jones have observed, "[t]he overrepresentation of Native Indians in many provincial, territorial, and federal correctional institutions has led researchers to focus on the sentencing stage of the criminal court process."[68] This particular Aboriginal justice reform strategy forms part of a broader social justice impetus, fuelled by criminological and penological contributions to the debate over the role of correctional

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65. *Alberta Task Force Vol 1* at 7-1.

66. *Id* at 7-2.

67. *Id* at 7-4. The Task Force noted that this change has already commenced. For example, on the Blood Reserve, the community has begun to take over functions previously performed by NCSA: *id* at 7-3.

68. C.T. Griffiths & S.N. Verdun-Jones, *Canadian Criminal Justice* (Vancouver: Butterworths, 1989) at 564.

institutions. It is a direct response to the recognition of a "deepening penal crisis"[69] which is manifested both physically - overcrowding in correctional institutions - and ideologically - a decline in the legitimacy of the penal model of crime prevention and punishment.[70]

Doob has observed that

> ... 'alternatives to imprisonment' are often instituted for a very simple reason: there is a feeling among some associated with the criminal justice system - often administrators rather than judges or legislators - that the sanction of imprisonment is used more than it should be.[71]

In relation to Aboriginal people this reasoning is supplemented by a range of other factors including evidence of the irrelevance of incarceration as a social control mechanism suitable for Aboriginal individuals or Aboriginal communities,[72] and indications that for Aboriginal people the imprisonment experience is particularly

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69. R. Matthews, "Alternatives To And In Prisons: A Realist Approach" in P. Carlen & D. Cook (eds), *Paying For Crime* (Milton Keynes: Open University Press, 1989) at 128.

70. See generally, I. Taylor, "Theorizing the Crisis in Canada" in R.S. Ratner & J.L. McMullan (eds), *State Control: Criminal Justice Politics in Canada* (Vancouver: University of British Columbia Press, 1987).

71. A. Doob, "Community Sanctions and Imprisonment: Hoping For a Miracle But Not Bothering to Even Pray For It" (1990) 32 *Canadian Journal of Criminology* 415 at 421.

72. In a report prepared on behalf of the Native Women's Association of Canada for submission to the Task Force on Federally Sentenced Women, the authors concluded that:

> No amount of tinkering with prisons can heal the before-prison lives of the Aboriginal women who live or have lived within their walls. Prison cannot remedy the problem of the poverty of reserves. It cannot deal with immediate or historical memories of the genocide that Eurpoeans worked upon our people. It cannot remedy violence, alcohol abuse, sexual assault during childhood, rape and other violence Aboriginal women experience at the hands of men. Prison cannot heal the past abuse of foster homes, or the indifference and racism of Canada's justice system in its dealings with Aboriginal people.

- F. Sugar & L. Fox, *Survey of Federally Sentenced Aboriginal Women in the Community* (Ottawa: Native Women's Association of Canada, 1990) at 4.

devastating.[73] But perhaps the central motivation for the use of alternatives to incarceration when sentencing Aboriginal people is the concern that discrimination operates during the sentencing process, and that one of the factors contributing to the disproportionate representation of Aboriginal people in the prison population is that too many of them are being unnecessarily sentenced to terms of imprisonment.[74]

Clark, however, has criticized this "unsubstantiated assumption" and has pointed to the "lack of a sound information base on which to identify patterns, make comparisons, and infer causal relationships."[75] La Prairie has also observed that there is presently minimal statistical evidence of the relationship between the sentencing process and high Aboriginal incarceration rates.[76] She concludes however, that "although limited and incomplete", the existing data "would suggest the disproportionate sentencing of Aboriginal people to periods of incarceration in the absence of other sentencing options. This situation makes one of the most compelling arguments for sentencing reform."[77]

While the debate over whether discrimination in the judicial decision making

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73. The Aboriginal Justice Inquiry of Manitoba received numerous submissions which indicated that the prison system, for example, fails to meet the spiritual needs of Aboriginal inmates, and through its reliance on centralized institutions, severs Aboriginal people from their communities: *AJI Report Vol 1* at 433.

74. See M. Jackson, "Locking Up Natives in Canada" (1989) 23 *University of British Columbia Law Review* 215 at 255-282.

75. S. Clark, *Sentencing Patterns and Sentencing Options Relating to Aboriginal Offenders* (Ottawa: Department of Justice Canada, 1989) at 1.

76. See C. La Prairie, "The Role of Sentencing in the Over-Representation of Aboriginal People in Correctional Institutions" (1990) 32 *Canadian Journal of Criminology* 429 at 431-436.

77. *Id* at 437.

process contributes to Aboriginal over-representation in prisons continues,[78] the use of alternative sanctions has become widely accepted as one of the more practical Aboriginal justice reform strategies.

The main feature of the policy of utilizing alternatives to incarceration has been the preference for community based sanctions.[79] In a report prepared for the Aboriginal Justice Inquiry of Manitoba, Fossett Jones concluded that:

> Community-based sanctions are most accurately defined as "any correctional-related activit[ies] purposively aimed at directly assisting and supporting the efforts of offenders to establish meaningful ties or relationships with the community for the specific purpose of becoming re-established and functional in legitimate roles in the community."[80]

Alternatives of this type may take the form of discharges and suspended sentences, probation, restitution, community service orders, fine option programs and victim/offender reconciliation.[81] Various programs along these lines have been introduced in the Prairie provinces.[82]

The Manitoba fine options/community service order program operates on the basis of a contractual arrangement between the Department of Community Services

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78. See, for example, B.P. Archibald "Sentencing and Visible Minorities: Equality and Affirmative Action in the Criminal Justice System" (1990) 15 *Dalhousie Law Journal* 377; and M. Sinclair "Dealing With the Aboriginal Offender. Indians and the Criminal Law" (1990) 14(2) *Provincial Judges Journal* 14 at 19-22.

79. In Australia, see K.M. Hazlehurst, "Widening the Middle Ground: The Development of Community-Based Options" in K.M. Hazlehurst (ed), *Ivory Scales: Black Australia and the Law* (Kensington: New South Wales University Press, 1987).

80. R. Fossett Jones, *Alternatives to Incarceration: Literature Review and Selected Annotated Bibliography* (Winnipeg: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, January 1990), at 16 citing S.E. Doeren and M.G. Hageman, *Community Corrections* (Cincinnati: Anderson Publishing, 1982).

81. See *AJI Report Vol 1* at 411-427; Fossett-Jones, note 80 *supra* at 10-28; and M. Jackson & J. Ekstedt, *Alternatives To Incarceration/Sentencing Option Programmes: What Are the Alternatives?* (Ottawa: Report prepared for the Canadian Sentencing Commission, 1988).

82. This section is based primarily upon the review of agency administered universal programs completed by Clark, note 75 *supra* at 43-76.

and Corrections and some 145 agencies including First Nations bands, Aboriginal Friendship Centres and Manitoba Métis Federation offices.

There are no sentencing option programs in Saskatchewan specifically designed for Aboriginal people. As in Manitoba, the major universal programs are fine option and community service order programs which are also operated by local agents. Up to 65 percent of participants in Saskatchewan's fine option program are Aboriginal.[83]

In 1988 Ekstedt and Jackson observed a tendency towards the privatization of sentencing option services in Alberta,[84] although Clark concludes that "[g]enerally, Alberta is not well developed in terms of sentencing alternatives."[85] He notes, however, that the Native Counselling Services of Alberta has taken advantage of the trend towards privatization.[86] Examples of the NCSA's work in this area include the High Level Diversion Project which was established in northwestern Alberta in 1977,[87] and the Talking Drum Youth Program.[88]

VI. ABORIGINAL JUSTICE REFORM IN AUSTRALIA

In Australia as in Canada, recognition of the problem of Aboriginal contact with the criminal justice system has prompted a range of reform projects. Strategies

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83. *Id* at 55.

84. Note 81 *supra* at 129.

85. Note 75 *supra* at 52.

86. *Ibid.*

87. See Native Counselling Services of Alberta, "Creating a Monster: Issues in Community Program Control" (1982) 24 *Canadian Journal of Criminology* 323.

88. Clark, note 75 *supra* at 50.

developed on this basis have mainly proceeded on the presumption that while the established justice laws and procedures were, for the most part, effective, the circumstances of some Aboriginal persons was such that 'special rules' might be needed to protect them from the harshness of the system. Three such reforms will be briefly described here as a guide to the similarities between the Aboriginal justice reform models which have prevailed in Canada and Australia throughout the 1970s and 1980s.

1. The Anunga Rules

In the course of his decision in the case of *R. v. Anunga*,[89] Foster J. of the Northern Territory Supreme Court formulated guidelines for police to follow when interrogating Aboriginal persons. These include that: a "prisoner's friend" and/or interpreter be present at the time of questioning; special care be taken to ensure that the suspect understands the standard caution; efforts are made to obtain corroborating evidence; food and clothing be provided; access to legal representation be facilitated; and suspects not be interrogated while drunk or otherwise disabled.[90] Similar rules have been adopted in a number of other Australian jurisdictions, most commonly in the form of police departmental guidelines.[91] Also, recent amendments to the *Crimes*

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89. (1975) 11 ALR 412.

90. *Id* at 415-416.

91. H. McRae, G. Nettheim & L. Beacroft, *Aboriginal Legal Issues: Commentary and Materials* (Sydney: The Law Book Company, 1991) at 256.

Act 1914[92] which are designed to formally regulate the procedures for detaining and questioning of suspects in relation to all Commonwealth offences, contains provisions dealing specifically with the questioning of Aboriginal persons.[93]

The 'Anunga Rules' were not designed to replace the common law rules governing the admissibility of confessional evidence, but were intended to assist judges in deciding whether to exercise the court's discretion to exclude involuntary evidence.[94]

2. Sentencing: Taking Account of 'Aboriginality'

One approach that has emerged in response to concerns about the inappropriate nature of criminal laws and procedures is the willingness of courts to take account of the defendant's Aboriginality during sentencing. A similar approach is evident in the interpretation of Anglo-Australian legal principles including substantive law defences.

Mitigating factors which have, on various occasions, been recognised as applicable in the case of traditionally-orientated Aboriginals include: where the defendant has acted in accordance with tribal customs; where the defendant's conduct will attract 'pay-back' or some other sanction from his or her community; and where

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92. *Crimes (Investigation of Commonwealth Offences) Amendment Act 1991* (Cth).

93. Sweeney has suggested that "though the amendments are restricted to the investigation of Commonwealth offences [of which there are relatively few in Australia where criminal laws are primarily a matter of state jurisdiction] they are likely to have an impact on the manner of investigation of non-Commonwealth offences." In fact he predicts that the safeguards specified in the amended legislation "are likely to become the benchmark against which conduct by State police is judged": D. Sweeney, "Police Questioning of Aboriginal Suspects for Commonwealth Offences - New Laws" (1992) 54 *Aboriginal Law Bulletin* 10 at 12.

94. See N. Rees, "Police Interrogation of Aborigines" in J. Basten et al (eds), *The Criminal Injustice System* (Sydney: Australian Legal Workers Group, 1982) 36 at 43-44.

the offence involves over-use of alcohol.[95]

In 1986 the Australian Law Reform Commission completed an extensive study dealing with the desirability of recognising Aboriginal laws, particularly in the context of dispute settlements and criminal proceedings.[96] The Commission's recommendations relating to substantive criminal law and the sentencing of Aboriginal offenders were formulated primarily on the basis of patterns already established by the courts, particularly in the Northern Territory.[97] The Commission did recommend the creation of what has been described as a "very conservative customary law defence".[98] This defence would operate in the same way as the defence of diminished responsibility: if successful, it would reduce murder to manslaughter. The defence would apply if the defendant could establish, on the balance of probabilities, that the act which caused the death of the victim was done because of a well-founded belief that the customary laws of the Aboriginal community to which the defendant

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95. See generally M.W. Daunton-Fear and A. Frieberg, "'Gum-Tree' Justice: Aborigines and the Courts" in D. Chappell and P. Wilson (eds), *The Australian Criminal Justice System* (Sydney: Butterworths, 2nd ed, 1977).

96. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law. Report No. 31* (Canberra: Australian Government Publishing Service, 1986) (hereinafter "*ALRC Report*").

97. See, for example, *Jackie Anzac Jadurin v. R.* (1982) ALR 424; *R. v. Jungarai* (1981) 9 NTR 30; *R. v. Limbiari* (unreported, NTSC, 28 May 1984). These and several other cases are discussed in McRae et al, note 91 *supra* at 273-279. See also C. Charles, "Sentencing Aboriginal People in South Australia" (1991) 13 *Adelaide Law Review* 90; and J. McCorquodale, *Aborigines and the Law: A Digest* (Canberra: Aboriginal Studies Press, 1987). Despite these examples of individual 'reprieves' for Aboriginal defendants, McCorquodale has concluded that "the overall impression gained ... is that Aboriginality is a judicial perception working to the disadvantage of Aboriginals": J. McCorquodale, "Judicial Racism in Australia? Aboriginals in Civil and Criminal Cases" in K.M. Hazlehurst (ed), *Ivory Scales: Black Australia and the Law* (Kensington: New South Wales University Press, 1987) 30 at 51.

98. McRae et al, note 91 *supra* at 269.

belonged required the act to be done.[99]

3. The Decriminalization of Public Drunkenness

The reform strategy of decriminalizing public drunkenness has been identified in Australia as "[o]ne of the most commonly suggested mechanisms for reducing the numbers of Aborigines held in police custody..."[100] For as Eggleston concluded after pioneering research on Aboriginal contact with the criminal justice system, "[t]he Aboriginal offence *par excellence* is drunkenness."[101]

In 1979, after a long debate on the appropriateness of the criminal justice response to public drunkenness, the offence was decriminalized in New South Wales with the introduction of the *Intoxicated Persons Act*.[102] However, the scheme has been widely criticised for failing to significantly reduce the number of Aboriginal persons detained by police.[103] Also, Cunneen has suggested that recent statutory amendments in New South Wales may have the effect of supporting the

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99. *ALRC Report* para 453. Six years after the completion of this report none of its recommendations have been implemented.

100. McRae et al, note 91 *supra* at 251.

101. E. Eggleston, *Fear, Favour or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia* (Canberra: Australian National University Press, 1976) at 14.

102. See S.J. Egger, A. Cornish and H. Heilpern, "Public Drunkenness: A Case History in Decriminalisation" in M. Findlay, S.J. Egger and J. Sutton (eds), *Issues in Criminal Justice Administration* (Sydney: George Allen and Unwin, 1983); and A. Cornish, "Public Drunkenness in New South Wales: From Criminality to Welfare" (1985) 18 *Australian and New Zealand Journal of Criminology* 73.

103. See, for example, L. Munroe and G. Jauncey, "Keeping Aborigines Out of Prison: An Overview" - a paper presented at the *Keeping People out of Prison Conference*, Australian Institute of Criminlogy 27-29 March 1990; J.H. Muirhead, *Report of the Inquiry into the Death of Edward James Murray* (Canberra: Royal Commission Into Aboriginal Deaths in Custody, 1989) at 139; and C. Bird, *The "Civilising" Mission: Race and the Construction of Crime* (Clayton: Faculty of Law Monash University, 1987) at 16.

recriminalization of public drunkenness.[104]

VII. THE LIMITATIONS OF 'TINKERING'

One of the key questions that must be addressed in this area is: what notions of justice and social control inform this approach to justice reform? For example, Harding has questioned why the "indigenization of policing" came under serious consideration as a reform strategy during the 1970s. He concludes:

> Though lip-service was given to [indigenization] as a step towards more Aboriginal self-government, it seems clear that the need for a more effective social control system was the paramount consideration ... Like cross-cultural training, Native constable programs were primarily concerned with making policing more effective. They were not fundamentally concerned with reducing incarceration rates of Aboriginal people, though the supporters of the program would likely prefer this to happen. If it didn't, however, the program would not be seen to have failed. *Social control, not self-determination, was the main concern.*[105]

Havemann has reached a similar conclusion. He suggests that indigenization "has evolved as an ameliorative policy within the criminal justice system ... [which] compounds the net-widening effect of the hybridized social service and order-maintenance policing which indigenous people experience."[106] To a large extent, the same conclusion is valid with respect to most of the reform strategies discussed above. The dominant element of the majority of Aboriginal justice reforms that have

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104. The *Local Government (Street Drinking) Ammendment Act* (NSW) confirms the power of local city and municipal governments to create "alcohol-free zones", and to introduce fines for breach of such bylaws. See C. Cunneen, "Moves to Recriminalise Public Drunkenness in NSW" (1991) 49 *Aboriginal Law Bulletin* 2; also H. Wootten, *Report of the Inquiry Into the Death of Clarence Alec Nean* (Canberra: Royal Commission Into Aboriginal Deaths in Custody, 1990).

105. Harding, note 14 *supra* at 370 (emphasis added).

106. P. Havemann, "The Indigenization of Social Control in Canada" in B.W. Morse & G.R. Woodman (eds), *Indigenous Law and the State* (Dordrecht: Foris Publications, 1988) at 81. See generally, P. Havemann, L. Foster, K. Crouse & R. Matonovich, *Law and Order for Canada's Indigenous People* (Ottawa: Solicitor General of Canada, 1984).

been implemented since the 1970s has been commitment to the assumption that ensuring justice for Aboriginal people need not involve questioning the legitimacy of the criminal justice system, nor the endorsement of autonomous Aboriginal justice values and institutions.

For example, the notion of greater cultural awareness and sensitivity is undoubtedly sound as a general principle of promoting social harmony. However, as a reform measure designed to address the injustice experienced by Aboriginal people when they come into contact with the criminal justice process, the approach may actually miss the point of why Aboriginal people suffer so disproportionately at the hands of social control institutions.[107]

Aboriginal consultants to the Law Reform Commission of Canada suggested that "involving more Aboriginal persons in the present system merely diverts resources, personnel and attention in the wrong direction, away from the creation of Aboriginal justice systems."[108] In many ways, this comment captures the essential inadequacies of the reform strategies which have predominated in Canada and Australia for the last two decades. As Zimmerman has observed:

> In Canada today, native people are fed up with studies such as this, which describes a deplorable situation they already know too well, cite statistics and authorities, recommend changes, but ultimately amount to nothing. To examine the criminal justice system and to recommend changes is called 'tinkering'. Most native people are past believing that tinkering with the mainstream justice system is a worthwhile pursuit. They want, they *need* a system of which they have ownership - one which they shape according to their values, traditions and beliefs. No amount of tinkering with the non-native justice system

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107. Harding has observed, in the context of a discussion of policing reform and Aboriginal justice, that "[c]ross-culturalism training was embraced as some sort of panacea which would not require any fundamental rethinking of policing, or for that matter, anything else.": note 14 *supra* at 367.

108. *LRCC Report* at 28.

will fully and finally answer that need.[109]

Ericson has observed that "[p]ushing for human rights within legal discourse is seen as the latest progression of the maturing state, the way forward for a more humane criminal justice system."[110] For many Aboriginal people, the most fundamental human right is the collective right to self-determination. In the context of criminal justice administration, this involves departing from the traditional approach of simply adjusting what is, essentially, an 'effective' process for the maintenance of social control, and recreating a justice environment which is capable of redressing the weaknesses of the current system, and satisfying the broader political aspirations of Aboriginal people for autonomy.

Between March 1991 and March 1992 five inquiries released major reports dealing with Aboriginal people and the criminal justice system. In the next two chapters, these reports will be examined with a view to determining the extent to which they represent a new direction in Aboriginal justice reform.

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109. S. Zimmerman, *"The Revolving Door of Despair": Native Involvement in the Criminal Justice System* (Ottawa: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba and the Law Reform Commission of Canada, 1991) at 2-3.

110. R.V. Ericson, "The State and Criminal Justice Reform" in R.S. Ratner & J.L. McMullan (eds), *State Control: Criminal Justice Politics in Canada* (Vancouver: University of British Columbia Press, 1987) at 24.

CHAPTER 3

THE ABORIGINAL JUSTICE INQUIRY OF MANITOBA

I. THE ORIGINS AND OPERATION OF THE INQUIRY

For Aboriginal people, the essential problem is that the Canadian system of justice is an imposed and foreign system. In order for a society to accept a justice system as part of its life and its community, it must see the system and experience it as being a positive influence working for that society. Aboriginal people do not.

- Commissioners A.C. Hamilton & C.M. Sinclair[1]

The Public Inquiry into the Administration of Justice and Aboriginal People was created by the Manitoba government on April 13, 1988. The Commissioners were asked to "investigate, report and make recommendations to the Minister of Justice on the relationship between the administration of justice and aboriginal peoples of Manitoba."[2] The Inquiry was directed to consider all aspects of the cases of J.J. Harper and Helen Betty Osborne.[3] The Inquiry's scope of general investigation was broad:

> The scope of the commission is to include all components of the justice system, that is, policing, courts and correctional services. The commission is to consider whether and the extent to which aboriginal and non-aboriginal persons are treated differently by the justice system and whether there are specific adverse effects, including possible systemic discrimination against aboriginal people, in the justice system. The commission is to consider the manner in which the justice system now operates and whether there are alternative methods of dealing with aboriginal persons involved with the law.[4]

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1. Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba. Volume 1: The Justice System and Aboriginal People* (Winnipeg: Province of Manitoba, 1991) (hereinafter "*AJI Report Vol 1*") at 252.

2. *AJI Report Vol 1* at 3.

3. The circumstances of these specific incidents which prompted the establishment of the Inquiry are summarised in *id* at 2.

4. *Ibid.*

The Inquiry employed a variety of methods in its efforts to satisfy the terms of reference, which it interpreted broadly. It held formal judicial hearings in relation to the two cases that had sparked the investigation. On the broader question of Aboriginal contact with the justice system, the Inquiry held open community hearings in 36 Aboriginal communities, seven other Manitoba communities (including several hearings in Winnipeg) and five provincial correctional institutions. The Commissioners heard from approximately 1000 presenters at these hearings.[5]

The Inquiry also embarked on several major research projects. Forty-one research papers were completed either by the Inquiry's research staff or by independent consultants.[6] Finally, the Commissioners visited several tribal courts in the United States and organized two conferences: a symposium on tribal courts, and a meeting of Aboriginal elders. During its more than three years of operation, the Inquiry accumulated an impressive collection of materials, which has since been donated to the E.K. Williams Law Library at the University of Manitoba.

In August 1991, Commissioners A.C. Hamilton and C.M. Sinclair officially presented the Aboriginal Justice Inquiry of Manitoba's final report to the Minister of Justice. It consisted of two volumes. Volume 2 deals with the specific cases of Helen Betty Osborne and John Joseph Harper.[7] Volume 1 - *The Justice System and*

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5. Listed *id* at 769-782, 783-785. It also received more than 60 submissions from people who did not appear at the hearings: listed *id* at 782-783.

6. Listed *id* at 721-722.

7. Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba. Volume 2: The Deaths of Helen Betty Osborne and John Joseph Harper* (Winnipeg: Province of Manitoba, 1991) (hereinafter "*AJI Report Vol 2*").

Aboriginal People[8] - is the culmination of the Inquiry's exhaustive analysis of the broader issue of Aboriginal contact with the criminal justice system. The report represents a major contribution to the Canadian body of Aboriginal justice literature.

II. THE DEATHS OF HELEN BETTY OSBORNE AND JOHN JOSEPH HARPER

The Commissioners made specific conclusions and recommendations in a separate report dealing with the deaths of Helen Betty Osborne and J.J. Harper.[9] Amongst these findings the Commissioners were critical of the conduct of the Royal Canadian Mounted Police (RCMP) in relation to the former incident, and, perhaps more seriously, that of the Winnipeg Police Department in relation to the latter. On a broader level, both were condemned for racist policing practices and inadequate investigation and review strategies.

In the context of its examination of the investigation of the death of Helen Betty Osborne, the Commission made a number of specific recommendations including that: supervision by senior police officers be mandatory in the investigation of serious crimes; interviews with key witnesses be carried out by lawyers in a manner consistent with guidelines that both protect the lawyer and inspire public confidence that such interviews are conducted properly; supervision by senior Crown attorneys be mandatory when serious crimes are being investigated and prosecuted;

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8. *AJI Report Vol 1.*

9. *AJI Report Vol 2.* Part I deals with "The Death of Helen Betty Osborne", and part II considers "The Death of John Joseph Harper."

policy guidelines be followed in relation to prosecutions by Crown attorneys, including the adoption of established and uniform principles in relation to the completion of agreements of immunity with Crown witnesses; and the Crown should end its practice of declining to consider further charges after an acquittal of murder.

The Inquiry's investigation in to the police shooting of J.J. Harper led it to "conclude that it was [Constable] Cross, through his unnecessary approach and inappropriate attempt to detain Harper, who set in motion the chain of events which resulted in Harper's death."[10] In relation to the subsequent internal investigation into the incident, the Commissioners reached the conclusion that

> ...the City of Winnipeg Police Department did not search actively or aggressively for the truth about the death of J.J. Harper. Their investigation was, at best, inadequate. At worst, its primary objective seems to have been to exonerate Const. Robert Cross and to vindicate the Winnipeg Police Department.[11]

On the basis of these findings, the Commissioners recommended that the Winnipeg Police Department immediately undertake a number of important changes. Several of these general recommendations will be mentioned below, but in relation to the J.J. Harper incident, the main recommendations were that "[p]roper and more independent methods of investigating officer-involved shootings must be instituted immediately...";[12] and that the *Fatality Inquiries Act*[13] be amended so as to create an inquest procedure in Manitoba that has, as its primary objective, the goal of

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10. *AJI Report Vol 2*, part II at 39.

11. *Id* at 12.

12. *Id* at 114.

13. S.M. 1989-90, c.30.

ensuring "public proceedings at which the family and community learn the material circumstances of the unexplained death."[14]

The report reveals that racism played a part in the deaths of both Helen Betty Osborne and J.J. Harper and in the events that followed both incidents. It concludes that "[i]t is clear that Betty Osborne would not have been killed if she had not been Aboriginal."[15] The Commissioners considered that this factor also contributed to the failure of members of The Pas community to come forward with information about the incident.[16] The report also raises the question whether the case would have "come more quickly to a conclusion if more Aboriginal persons were in the police...[o]r in the Crown Prosecutor's office?"[17] In relation to the shooting of J.J. Harper, it stated that "Constable Cross was motivated to confront Harper primarily because of Harper's race."[18]

III. THE JUSTICE SYSTEM AND ABORIGINAL PEOPLE

What is immediately striking about the 700 page report dealing with *The Justice System and Aboriginal People* is the breadth of issues which it considers, and the perspective on the justice system which it assumes. The volume opens with a

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14. *AJI Report Vol 2*, part II at 84.

15. *Id*, part I at 98.

16. *Id* at 96. See also L. Priest, *Conspiracy of Silence* (Toronto: McClelland & Stewart, 1989).

17. *AJI Report Vol 2*, part I at 98.

18. *Id*, part II at 93. On the basis of this interpretation of the confrontation, the Commissioners recommended that "[t]he Winnipeg Police Department cease the practice of using race as a description in police broadcasts": *id* at 95.

discussion of "Aboriginal concepts of justice",[19] thus setting the tone for the detailed investigations which follows. One of the strongest themes of the report is the incompatibility between the principles and procedures of the Canadian criminal justice system, and Aboriginal culture and law. The increasing intensity of this conflict is illustrated in an historical overview of the impact on Aboriginal people of the extension of the Canadian legal and political system, after which the report concludes:

> Manitoba's Aboriginal people have known three justice regimes. During two of those regimes, they exercised control over their lives. In the third, this control was taken from them....We deplore the injustice which was done to Aboriginal people during this regime. By treating Aboriginal people in a condescending manner, by smothering their political and cultural expressions, as well as by failing to deal in a forthright and respectful manner with legitimate Aboriginal claims, Canadian government policy has done all Canadians a disservice.[20]

From the outset then, dispossession is identified as central to the many problems faced by Aboriginal people, including their treatment by the justice system.

Against this background the report examines the current problem of Aboriginal over-representation. This section explores the social roots of crime and the socio-economic situation of Aboriginal people before addressing the specific issue of discrimination in the justice system.

> Historically, the justice system has discriminated against Aboriginal people by providing legal sanction for their oppression. This oppression of previous generations forced Aboriginal people into their current state of social and economic distress. Now, a seemingly neutral justice system discriminates against current generations of Aboriginal people by applying laws which have an adverse impact on people of lower socio-economic status. This is no less racial discrimination; it is merely "laundered" racial discrimination.[21]

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19. *AJI Report Vol 1* at 17-46.

20. *Id* at 83.

21. *Id* at 109.

The remaining chapters of the report deal with how best to alter this pattern. However, it is indicative of the fresh approach taken by the commissioners that the report does not turn immediately to the question of reforming the existing justice system, but instead undertakes a detailed examination of Aboriginal and treaty rights,[22] thereby highlighting the political and legal context for the analysis and recommendations which follow.

An examination of the problems faced by Aboriginal people as they pass through Manitoba's courts creates a vivid image of a court system which "appears to view Aboriginal people and their communities with a mixture of disdain and disregard" and which "is inefficient, insensitive and, when compared to the service provided to non-Aboriginal people, decidedly unequal."[23] The reality of the system's many flaws is most powerfully illustrated by regular use of extracts from submissions presented to the Inquiry. For example, in the section dealing with the effect of delay and court inaccessibility on Aboriginal people, a God's River band councillor described the consequences for members of his community:

> A round trip [by plane to the circuit court at God's Lake Narrows] costs $240. If a person knows they are innocent and can prove it by having a witness present it means they have to pay for the witness to go to the Narrows to testify. If the witness is employed it sometimes means they have to pay for lost wages too. So it is often easier to just plead guilty and pay a fine if the charge isn't too serious ... More often than not our people travel to the Narrows, wait all day and then are told their case is remanded. This means they have to go home, wait until the appointed time and try to save enough money to go back again. And when we go back we stand a good chance of being remanded again. This can happen many times to the same person.[24]

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22. *Id* at 115-210.

23. *Id* at 249.

24. *Id* at 239.

The Inquiry's damning assessment of the Manitoba court system, and its earlier discussion of Aboriginal rights and concepts of justice sets the scene for its support of Aboriginal justice systems. From a law reform perspective, the justification for this approach is that "[s]imply providing additional court services in Aboriginal communities or otherwise improving what is inherently a flawed approach to justice is not, in our view, the answer."[25] As the commissioners observed, a pattern of limited internal reforms has traditionally been preferred by governments, but as a solution this approach "has been unproductive for government and unacceptable to Aboriginal people."[26] The *Report of the Aboriginal Justice Inquiry of Manitoba* represents an important break from this pattern by 'factoring in' Aboriginal autonomy aspirations as a legitimate and fundamental component of the justice reform equation.

1. Creating Autonomous Justice Structures

The highlight of the report's "Strategy for Action" is its proposal that Aboriginal communities[27] be empowered to establish their own justice systems:

> Aboriginal justice systems should be established in Aboriginal communities, beginning with the establishment of Aboriginal courts. We recommend that Aboriginal communities consider doing so on a regional basis, patterned on such systems as the Northwest Intertribal Court System [in Washington, USA]... We suggest that Aboriginal courts assume jurisdiction on a gradual basis, starting with summary conviction criminal cases, small claims and child welfare matters. Ultimately, *there is no reason why Aboriginal courts and their justice systems cannot assume full jurisdiction over all matters at their*

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25. *Id* at 252.

26. *Ibid.*

27. That is, First Nations on their own geographically defined reserves and those Métis communities which can be identified as such by agreement between the Manitoba Métis Federation and the Government of Manitoba.

own pace.[28]

The Commissioners reached this position after noting that "[t]he call for separate, Aboriginally controlled justice systems was made repeatedly in our public hearings throughout Manitoba..."[29] After canvassing the arguments in favour of establishing Aboriginal justice systems, the report examines in some detail the history and current operation of Indian tribal courts in the United States.[30] It also considers the relevant Australian and New Zealand experience,[31] and the limited and disappointing history of the *Indian Act* section 107 courts in Canada.[32]

In terms of the structure of proposed Aboriginal justice systems, the Commissioners recommended a high degree of flexibility which would allow individual Aboriginal communities to develop "culturally appropriate rules and processes"[33] in a less formalistic court-room environment. The essence of the proposal is that every component of the justice system operational within an

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28. *AJI Report Vol 1* at 642 (emphasis added).

29. *Id* at 256.

30. See also R.H. Hemmingson, "Jurisdiction of Future Tribal Courts in Canada: Learning from the American Experience [1988] 2 *Canadian Native Law Reporter* 1; and B. Morse, *Indian Tribal Courts in the United States: A Model for Canada?* (Saskatoon: Native Law Centre, University of Saskatchewan, 1980).

31. For a summary of Australia's experience with special justice mechanisms for Aboriginal people, see H. McRae, G. Nettheim & L. Beacroft, *Aboriginal Legal Issues: Commentary and Materials* (Sydney: Law Book Company, 1991) at 229-237.

32. See B. Morse, "A Unique Court: s.107 Indian Act Justices of the Peace" (1982) 5(2) *Canadian Legal Aid Bulletin* 131; R.H. Debassige, *Section 107 of the Indian Act and Related Issues* (Ottawa: Department of Indian and Northern Affairs, 1979); and G. Youngman, *Section 107 and Other Alternative Justice Systems for Indian Reserves in British Columbia* (Vancouver: Department of Indian and Northern Affairs, Vancouver Region, 1978). See also the discussion in Chapter 5, part III *infra*.

33. *AJI Report Vol 1* at 315.

Aboriginal community - from police, to prosecutor, to court, to probation, to jails - must be controlled by Aboriginal people. Because of the relatively small size of many communities in Canada, a regional network is recommended, which would allow several communities to share facilities and resources including judges.[34]

The report considers a range of possible legal bases for the establishment of Aboriginal justice systems before settling on the "treaty-based" option preferred by the Assembly of Manitoba Chiefs. The establishment of Aboriginal justice systems then, would be based on:

> Federal-Indian negotiations leading to a recognition of the right of Aboriginal people to establish and maintain Aboriginal courts as an aspect of the "existing treaty and aboriginal rights of the aboriginal peoples," as recognised and affirmed by section 35 of the *Constitution Act, 1982*.[35]

This approach places the justice system proposal firmly within the context of Aboriginal self-government. The basic point of identification then, is with the immediate political aspirations of Aboriginal peoples of Canada, rather than with the policies of assimilation and paternalism that have historically informed criminal justice reform strategies.[36]

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34. The model which the Commissioners recommend should be adopted in Manitoba is based on the Northwest Intertribal Court System which provides court services to 16 tribes in one region of the state of Washington.

35. *AJI Report Vol 1* at 311.

36. The Commissioners recommended that both federal and provincial Governments specifically recognize the right of Aboriginal self-government by constitutional amendment. Developments in this area are discussed in Chapter 6.

2. Alleviating Conditions in the Existing System

Chapters 8 to 16 of the report address specific components and groups within the existing justice system. The topics addressed are court reform, juries, alternatives to incarceration, jails, parole, Aboriginal women, child welfare, young offenders, and policing.

Recommendations for reforms in these areas are made by the Inquiry on the basis that, while the establishment of Aboriginal justice systems is crucial and the key to genuine change, this strategy is not the "total answer".[37] First, not all Aboriginal people will have access to an Aboriginal justice system in their community.[38] Second, "there will be a period of transition before Aboriginal justice systems achieve the full jurisdiction that we anticipate they will assume."[39] The common element of the recommendations summarised here[40] is the need to alleviate the injustices faced by Aboriginal people in their contact with the justice system.

In terms of reforms to the court system, the Inquiry's recommendations included that: adequate facilities always be available so that all trials can be held in the community where the offence was alleged to have been committed; members of

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37. *AJI Report Vol 1* at 258. As Gordon Peters, Vice Chief of the Assembly of First Nations stated during a presentation to the Inquiry: "...we won't say that tribal courts are going to be the answer. We think it is part of the answer. We think it is one of the ways that we can deal with our own people", *ibid.*

38. This applies particularly to Aboriginal people living in urban centres such as Winnipeg. On the problems faced by such communities see J. Yarnell, *Urban Aboriginal Issues: A Literature Review* (Winnipeg: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, February 1990). See also the references listed in Chapter 1, note 27 *supra*.

39. *AJI Report Vol 1* at 339.

40. This selected outline is based on the individual chapters, the "strategy for action" described in Chapter 17, and the summary of recommendations in Appendix 1 of the report.

Aboriginal communities be employed to work as court staff; case backlogs in remote and rural Aboriginal communities be reduced by a concerted "blitz"; and Aboriginal peacemakers be appointed as officers of the court, with responsibility for seeking to divert Aboriginal accused from the formal adjudication process by attempting to facilitate a reconciliation between the victim and offender through the use of traditional Aboriginal dispute resolution techniques.

The Inquiry recommended significant changes to the jury selection process, including the elimination of standasides and peremptory challenges and the introduction of procedures designed to ensure as far as possible that the jurors are drawn from the community in which the trial is to be held, or in urban areas, from specific neighbourhoods of the town or city in which victims and accused reside.[41]

The report concludes that sentencing should be guided by the following principle:

> Incarceration should be used only as a last resort and only where a person poses a threat to another individual or to the community, or where other sanctions would not sufficiently reflect the gravity of the offence or where the offender refuses to comply with the terms of another sentence that has been imposed upon him or her.[42]

The Commissioners stressed the need to develop alternatives to incarceration which incorporate stronger community sanctions and reconciliation programs. It called on the Manitoba Court of Appeal to encourage more creativity in sentencing by trial court judges, with a view towards decreasing the use of incarceration as the 'standard

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41. See also L. Messer, *Manitoba Jury Study* (Winnipeg: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, April 1990).

42. *AJI Report Vol 1* at 647.

punishment'. It also recommended that cultural factors been given greater consideration during the determination of sentences, particularly for Aboriginal offenders, and that judges adopt the policy of inviting Aboriginal communities to express their views on any case involving a member of their community.

The Inquiry recommended that Canada's *Criminal Code* be amended both to give formal recognition to the relevance of cultural values when sentencing, and to allow judges to designate the specific place of custody for offenders. In the event that incarceration is deemed to be necessary for an Aboriginal person, the sentence should be carried out in a culturally relevant and community-based facility.[43]

Chapter 11 documents the overwhelming evidence that the prison system fails Aboriginal inmates.[44] Although the Inquiry recommends a number of improvements designed to enhance the system's effectiveness, the overwhelming conclusion reached after a detailed survey of conditions in Manitoba's jails and Youth Centre, is that "...fundamental reforms, based on a new set of principles, are required."[45] Along with the need for more community-based facilities as discussed above, the Inquiry also called for a substantial reduction in the number of Aboriginal people in jail and a reduction in the overall capacity of the jail system. It called for a change in the system's obsession with security (commonly manifested as "a maze of bars and

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43. See generally, R. Fossett Jones, *Alternatives to Incarceration: Literature Review and Selected Annotated Bibliography* (Winnipeg: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, February 1990).

44. See D. Young et al, *Manitoba Inmate Survey* (Winnipeg: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, 1991).

45. *AJI Report Vol 1* at 433.

restrained humanity..."),[46] increased capacity within institutions for Aboriginal inmates to maintain close contact with their communities, greater access to either active employment within the prison system, or training, education and counselling programs, and the adoption of a formal policy by government and prison authorities guaranteeing the right of Aboriginal people to culturally appropriate services, including access to spiritual services both within and outside the prison system.

The Inquiry recommends that the present parole system adopt "as a governing principle that all inmates should be entitled to be released after having completed the same proportion of their sentence, except for those who are considered violent or dangerous."[47] It also calls for a more culturally sensitive parole application process including the completion of parole assessments by Aboriginal people in the prisoner's community.

The report deals individually with the problems faced by Aboriginal women and young offenders on the basis that both groups face unique and serious problems. It addresses the experience of women as both victims of crime and as offenders.[48] In the former category, it recommends extensive improvements in the way Aboriginal community leaders and police forces respond to domestic disputes and incidents of women and children abuse, including the establishment of more shelters and safe homes. In relation to the sentencing of Aboriginal women, the report reaffirms the

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46. *Id* at 437.

47. *Id* at 462.

48. See Indigenous Women's Collective, *Aboriginal Women's Perspective of the Justice System in Manitoba* (Winnipeg: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, June 1990).

need for alternatives to incarceration such as greater use of open custody facilities for Aboriginal women living in isolated or rural communities, and the establishment of culturally appropriate group homes in urban areas where Aboriginal women could serve their sentence.

The Commissioners observed that "[w]e are failing to meet the needs of Aboriginal young people in the youth justice system just as surely as we are failing to meet the needs of adult Aboriginal people in the adult justice system."[49] In fact, the level of over-representation is ever greater for Aboriginal youth.[50] The report calls for greater use of pre-trial diversion, an expansion of the number of youth justice committees throughout the province, the establishment of short-term youth detention facilities in Aboriginal communities and longer term "wilderness camps", and improved coordination between the child welfare and youth justice services.[51]

Finally, the report turns to the important topic of policing. The Inquiry concluded that "the future of Aboriginal policing in Manitoba lies in the creation of Aboriginal controlled police forces for Aboriginal communities and in increasing the

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49. *AJI Report Vol 1* at 549.

50. A survey conducted in October 1990 revealed that Aboriginal youth accounted for 64 % of the inmates at the Manitoba Youth Centre and 78 % of the inmates of the Agassiz Youth Centre: *ibid.* See Animus Research Consultants, *The Manitoba Justice System and Aboriginal Young Offenders* (Ottawa: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, 1991).

51. The report includes a review of the operation of the child welfare system (chapter 14), but my emphasis here is on those recommendations which relate to the criminal justice system and so this important issue is not discussed here. See further, Animus Research Consultants, *Manitoba Child and Family Services: Report on Services to Aboriginal Children and Families* (Ottawa: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, March 1991).

numbers of Aboriginal police officers on existing forces."[52] In relation to the first objective, the Commission made the recommendation that "[a]s soon as possible, Aboriginal police forces take over from the RCMP the responsibility for providing all police services in Aboriginal communities."[53] The Commission cited the Dakota Ojibway Tribal Council (DOTC) Police Force as the model for this transfer of policing responsibilities. The Commissioners envisaged the emergence of a network of Aboriginal forces throughout Manitoba, coordinated by an Aboriginal Police Commission.

To achieve the second objective, the Commission called for the adoption of a community policing approach (particularly in Aboriginal communities), employment equity programs to increase the proportion of Aboriginal police officers to a level equivalent to the Aboriginal proportion of the total Manitoba population, an improvement in the cross-cultural education components of all police training courses, and a mechanism for screening out any police recruits displaying racist attitudes.

In relation to police investigation and interrogation procedures, the Commission's recommendations included that "[t]he courts adopt the Anunga Rules of Australia, as rules of the court governing the reception into evidence of statements to police made by Aboriginal persons",[54] that all statements taken by police officers be recorded using either audio or video equipment with the latter technology to be used

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52. *AJI Report Vol 1* at 645.

53. *Id* at 609.

54. *Id* at 608.

in cases involving death and other serious cases.

Finally, the Commission confirmed the need for a more effective and independent review procedure for the consideration of public complaints and also for the investigation of serious incidents involving the police.

IV. RESPONSES TO THE INQUIRY'S FINDINGS AND RECOMMENDATIONS

1. Aboriginal Organizations

Representatives of Aboriginal organizations in Manitoba and across the country registered their approval of the Aboriginal Justice Inquiry of Manitoba's conclusions about the impact of the justice system on Aboriginal people, and generally endorsed its plan for change.[55] For example, the report was described by Phil Fontaine, Grand Chief of the Assembly of Manitoba Chiefs as "a solid piece of work with recommendations that represent fundamental social change in this province and elsewhere."[56] Ovide Mercredi, National Chief of the Assembly of First Nations responded by calling on federal and provincial governments to "recognize that aboriginal people are entitled to a parallel system of justice."[57] The President of the

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55. This is not intended to be an exhaustive coverage of Aboriginal responses to the report. Rather, the particular responses to which reference is made are used simply to illustrate the general tone of comments by representatives from Aboriginal communities following the reports's release, as demonstrated in local media treatments and other available material.

56. A. Santin, "Findings, recommendations, exactly what natives expected", *Winnipeg Free Press*, August 30 1991, 5.

57. G. Young, "Self-rule stand 'reinforced'", *Winnipeg Free Press*, August 30 1991, 14. Mercredi stated that: "First Nations have the mandate to establish aboriginal justice systems. There are first nations which want to put their justice system into action and we encourage them to do so": "Won't wait 'forever'", *The Winnipeg Sun*, August 30 1991, 5.

Indigenous Women's Collective, Winnie Giesbrecht, expressed "relief" that the particular concerns of Aboriginal women had been addressed by the commissioners.[58]

The overwhelmingly positive response to the report appears to have been based on a belief that the justice concerns of Aboriginal people had finally been addressed in a serious and constructive manner by an independent inquiry. The mood was optimistic, as reflected in the comments of a spokesperson for the Assembly of First Nations when he concluded that if the Manitoba Government acted upon the recommendations, "it could set a precedent for the entire country."[59]

This response is indicative of a conviction that the *Report of the Aboriginal Justice Inquiry of Manitoba* endorsed a departure from the era of internal reforms and 'tinkering' within the justice system that had failed to significantly improve the system's capacity to deal successfully with Aboriginal people.[60] The strategy outlined in the report reflected a decision to move beyond the conventional pattern of choosing only from a necessarily limited pool of justice reforms, electing instead to acknowledge the fundamental connection between Aboriginal justice concerns and political aspirations.

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58. "Women react", *The Winnipeg Sun*, August 30 1991, 5.

59. Bill Wilson, British Columbia Vice-Chief of the Assembly of First Nations, note 56 *supra*.

60. For example, the National Chief of the assembly of First Nations indicated that the recommendations of the Inquiry reflected an understanding that "making small changes to the current justice system is simply not appropriate or adequate": Press Release, August 29 1991.

2. The Manitoba Government

On 28 January 1992 the provincial government released its formal response to the *Report of the Aboriginal Justice Inquiry of Manitoba*. Justice Minister Jim McCrae announced a number of reforms which would, he promised, result in a "better justice system in Manitoba for aboriginal people than anywhere in the country."[61] Proposed changes included placing more Aboriginal people in charge of decision-making within the system, institution of pre-trial diversions including more conflict resolution, mediation and 'peacemaking' approaches to disputes, a reassessment of sentencing practices so as to reduce incarceration levels, greater access to Aboriginal cultural activities in provincial jails, and an investigation of the possibility of expanding tribal policing services.[62]

However, the Manitoba Government refused to endorse the autonomous justice direction charted by the Aboriginal Justice Inquiry of Manitoba on the basis that "[s]uch key ... recommendations as an aboriginal justice system, separate criminal codes, civil codes and charters of rights for First Nations are not achievable within the current constitutional framework."[63] The Government also declined to establish a

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61. D. Campbell & T. Weber, "Province rejects separate native justice system", *Winnipeg Free Press*, January 29 1992, A1, A2.

62. *Ibid*; and D. Roberts, "Separate native justice rejected for Manitoba", *The Globe and Mail*, January 29 1992, A1.

63. Roberts, *id* at A6. Presumably in support of the Manitoba Government's refusal to endorse several of the report's key recommendations, Mr McCrae asserted that the Inquiry's final report "goes beyond its mandate": G. York, "Justice Report stirs caution: Natives fear overhaul delays", *The Globe and Mail*, August 31 1991, A1. Ironically, the Government of Nova Scotia levelled a similar criticism at the Royal Commission on the Donald Marshall, Jr., Prosecution, which eventually produced a rather more conservative report than the *Report of the Aboriginal Justice Inquiry of Manitoba*: Royal Commission on the Donald Marshall Jr., Prosecution, *Report* (Halifax: Province of Nova Scotia, 1989). See B. Wall,

commission to oversee implementation of the recommendations, opting instead for the appointment of working groups to consult in four areas: justice, native affairs, family services, and natural resources.

Aboriginal groups have roundly criticised the government's response which was described by the Grand Chief of the Assembly of First Nations as "an insult to Indian people in Manitoba."[64] After jointly considering the government's official response to the *Report of the Aboriginal Justice Inquiry of Manitoba*, the Assembly of Manitoba Chiefs, the Manitoba Métis Federation, the Indigenous Women's Collective, and the Aboriginal Council of Winnipeg registered their "profound disappointment with the limited vision and political will reflected in the Province's response."[65] Representatives of the province's Métis community expressed their disbelief at the government's failure to even acknowledge their particular concerns.[66]

These organizations indicated that they would not participate in the implementation process unless the government agreed to reconsider several key

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"Analyzing the Marshall Commission: Why It Was Established and How It Functioned" in J. Mannette (ed), *Elusive Justice: Beyond the Marshall Inquiry* (Halifax: Fernwood Publishing, 1992) 13 at 24.

64. T. Weber & D. Campbell, "McCrae, chiefs in AJI showdown", *Winnipeg Free Press*, January 30 1992, A1.

65. Assembly of Manitoba Chiefs, "Aboriginal Organizations Propose Partnership With Province in A.J.I. Implementation", News Release, February 3 1992.

66. The President of the Manitoba Métis Federation noted that the government's formal response "completely ignores the Métis" except to the extent that it "identifies areas in which the Province will not act": W. Yvon Dumont, Letter to the Premier of Manitoba, February 3, 1992. This omission is particularly disappointing given that the Aboriginal Justice Inquiry of Manitoba made a deliberate effort to address the specific concerns of Métis communities and to consult widely with them. See for example, P.L.A.H. Chartrand, *Métis People and the Justice System* (Winnipeg: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, October 1990); and Manitoba Métis Federation (eds, S.W. Corrigan & L.J. Barkwell), *The Struggle For Recognition: Canadian Justice and the Métis Nation* (Winnipeg: Pemmican Publications, 1991).

issues, including the relationship between self-government and Aboriginal jurisdiction over justice. At the heart of the dissatisfaction registered by Aboriginal organizations was their view that "[t]he same government that has accepted the recognition of the inherent right to self-government simultaneously refuses to recognize one of the most vital components of inherent jurisdiction, i.e. the right of jurisdiction over justice."[67]

V. CONCLUSION

Following the release of the report in August 1991, when hopes for the creation of Aboriginal justice systems were high, New Democratic Party spokesperson, Oscar Lathlin realistically observed that "we aren't going to wake up tomorrow morning...and find a whole new system in place."[68] Six months later, Lathlin criticised the Manitoba Government for refusing to give up the power necessary to set the wheels in motion toward a time when Aboriginal justice systems could operate throughout the province.[69]

Clearly, the *Report of the Aboriginal Justice Inquiry of Manitoba* does envisage a redistribution of power in relation to the administration of justice. Indeed, this is primarily what sets the report apart from its 'internal reform' orientated

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67. Note 65 *supra*. See also T. Weber, "Natives agree to talk on AJI", *Winnipeg Free Press*, February 4 1992, B14. The Manitoba Government was represented on a provincial task force which recommended constitutional recognition of the inherent right of Aboriginal self-government: Manitoba Constitutional Task Force (Chairperson: Professor W. Fox-Decent) *Report of the Manitoba Constitutional Task Force* (Winnipeg, October 28 1991).

68. "New system will take time", The Winnipeg Sun, August 30 1991, 7.

69. Campbell & Weber, note 97 *supra*, A2.

predeccesors. It looks beyond the existing criminal justice system for answers as to why Aboriginal people are so heavily over-represented in Canadian prisons, and it engages the same perspective in terms of formulating solutions to this particular problem.

By stretching the parameters of Aboriginal justice to incorporate the pressing political demands of Aboriginal people, the Aboriginal Justice Inquiry of Manitoba has entered largely unchartered justice reform territory. The recommendation for the establishment of Aboriginal justice systems sets the Inquiry apart from all but one of the several other reports which were added to the body of Aboriginal justice reform literature in 1991.

And yet, a consideration of recent reports from Alberta, Saskatchewan, the Law Reform Commission of Canada and Australia reveals that this particular initiative is perhaps only the most courageous component of a more general trend in favour of the alignment of justice reform policy with Aboriginal self-government aspirations.

CHAPTER 4

THE IMPACT OF RECENT ABORIGINAL JUSTICE INQUIRIES: A REVIEW OF FOUR REPORTS

I. INTRODUCTION

The shift in Aboriginal justice reform policy signalled by the *Report of the Aboriginal Justice Inquiry of Manitoba*[1] is also supported by several other recent reports of Aboriginal justice inquiries. In the Prairie region, reports from Alberta and Saskatchewan have recommended major changes to the way justice is administered in relation to Aboriginal people, albeit with substantially less emphasis on the development of autonomous justice mechanisms. The Law Reform Commission of Canada has proposed a reform strategy which, though based on the establishment of Aboriginal justice systems, does not exhibit an awareness of the relationship between this direction and the broader context of Aboriginal self-government. Finally, in Australia, the Royal Commission into Aboriginal Deaths in Custody has offered a strategy which addresses the specific problems of Aboriginal contact with the criminal justice system in terms of the need to achieve the fundamental goal of self-determination.

Each of these reports will be reviewed in this chapter with a view to aiding a more detailed understanding of the various elements of the justice reform direction which has begun to emerge.

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1. Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba. Volume 1: The Justice System and Aboriginal People* (Winnipeg: Province of Manitoba, 1991).

II. ALBERTA: TASK FORCE ON THE CRIMINAL JUSTICE SYSTEM AND ITS IMPACT ON THE INDIAN AND MÉTIS PEOPLE OF ALBERTA

1. The Process

By virtue of its relatively specific mandate,[2] the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta limited its recommendations ("with regard for present constitutional and legal frameworks in Canada and Alberta"[3]) to those which could achieve the following objective: "... to ensure that the Aboriginal people receive fair, just and equitable treatment at all stages of the criminal justice process in Alberta.[4]

In contrast to the investigations in Manitoba and Australia, the Task Force was not established as a public inquiry or royal commission. However, while it did not retain counsel, record proceedings or commission external research studies, the Task Force did visit Aboriginal communities, meet with Indian and Métis organizations, hear oral presentations, and receive some 56 written submissions.

2. The Recommendations

The Task Force made detailed recommendations dealing with each stage of the existing justice system, along with an assessment of the operation of the Native

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2. The Task Force noted that "[s]everal Indian and Métis groups felt that the Terms of Reference of the Task Force were too restrictive and did not cover the areas they considered to be essential": Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta, *Justice on Trial. Volume 1 - Main Report* (Edmonton: Province of Alberta, 1991) (hereinafter "*Alberta Task Force Vol 1*") at 1-3.

3. *Id* at 11-1.

4. *Alberta Task Force Vol 1* at 1-1.

Counselling Services of Alberta and attention to a number of general considerations such as socio-economic factors, cross-cultural training, and the problems faced by Aboriginal women and youth.

The Task Force made 116 recommendations dealing with the issue of policing alone.[5] They include recommendations that the RCMP and municipal police forces should provide Aboriginal awareness field training for all officers, accelerate efforts to recruit Aboriginals,[6] establish non-political Aboriginal advisory committees and adopt the Anunga Rules. It also called for the appointment of an Aboriginal Advocate with a mandate to "accept and advance police complaints on behalf of Aboriginal people";[7] and for federal and provincial governments and the RCMP to support Aboriginal communities which seek to assume responsibility for policing. The Task Force acknowledged the promise of initiatives such as the Louis Bull Police Force, the Blood Tribe policing program, and the proposal of the Lesser Slave Lake Regional Council for a regional policing system,[8] concluding that "the Task Force supports the development of these initiatives when and where it is practical and

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5. Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta, *Justice on Trial. Volume II - Summary Report* (Edmonton: Province of Alberta, 1991) (hereinafter "*Alberta Task Force Vol 2*") at 3-14.

6. For example, the Task Force recommended that the RCMP change the Aboriginal Constable program (described as "the most successful of the Aboriginal recruitment initiatives which have come to the attention of the Task Force") into an affirmatives action program: *id* at 7.

7. *Id* at 13. The position of Aboriginal Advocate would be established within an Aboriginal Justice Commission, discussed at text corresponding to note 15 *infra*.

8. In its submission to the Task Force the Council stated that "[o]ur recommendations [with respect to policing] are designed to offer a first step on the road to the ultimate goal of a Cree Tribal Justice System within the region of the Lesser Slave Lake Indian Regional Council": *Alberta Task Force Vol 1* at 2-62.

financially feasible to do so."[9]

The Task Force made a number of recommendations dealing with the court system based on the themes of encouraging greater Aboriginal participation in the operation of the court system, and creating a more hospitable environment for Aboriginal accused and witnesses in the existing court system. In the first category, the report calls on the Alberta Government to support a province-wide program for the training of Indian Justices of the Peace, recommends that Aboriginal people be appointed to fill all positions necessary to operate an Aboriginal Provincial Court (Criminal Division) to go on circuit and that a similar court be established in a large urban area, and recommended that the Government of Alberta establish Elder sentencing panels to assist judges in the sentencing of convicted Aboriginal persons.

In the second category, the Task Force's recommendations include the need for accessible interpretation and translation services, culturally sensitive legal representation,[10] and that all court sittings be held closer to Aboriginal communities, or on Indian Reserves and Métis Settlements where this is desired by the community. The report also recommends that "in view of their apparent lack of knowledge about Aboriginal culture, Judges, lawyers, and Prosecutors receive cross-cultural education training immediately, intensively, and on an on-going basis."[11]

The Task Force dealt in considerable detail with the issue of Aboriginal people

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9. *Alberta Task Force Vol 2* at 13.

10. The Task Force dealt specifically with the provison of legal aid to Aboriginal people, suggesting that the Legal Aid Society overhaul its policies and practices in this respect: *id* at 15-16.

11. *Id* at 21.

and corrections. In direct response to the high levels of Aboriginal incarceration, it recommended that the goal be adopted of placing all minimum security prisoners in facilities in their home community for their entire sentence, and that the criteria for release be reviewed, including a discussion of the "practical implications of these criteria with respect to Aboriginal lifestyles and culture,"[12] and the formal recognition of Aboriginal spirituality as one of the criteria. The Task Force also addressed the adequacy of programs in Alberta's correctional facilities. This section of the report includes recommendations for the establishment of alcohol and substance abuse programs at every major correctional institution in Alberta, the identification and implementation of culturally sensitive programming and programming required specifically for Aboriginal women, and the employment of full-time Aboriginal Elders in a capacity equivalent to other religious service providers.

In relation to the "special needs of Indian and Métis youth and women",[13] the Task Force's recommendations included the establishment of a sufficient number of half-way houses for Aboriginal women, use of culturally sensitive diversion programs in cases of family violence, the establishment of community-based youth emergency centres "to give the Courts an alternative to remanding youths in custody,"[14] and the provision of "urban life skills" training for Aboriginals in elementary or junior high schools.

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12. *Id* at 24.

13. *Id* at 38.

14. *Id* at 39.

The Task Force's strategy for implementation of these changes has two chief components. In the short term, it recommended that the Government of Alberta establish a Task Force Monitoring Committee to oversee the implementation process and to report within one year to Parliament. In the long term the Task Force recommended the establishment of an Aboriginal Justice Commission which would assume the responsibilities of the Monitoring Committee, act as "an informed clearing house to assist Aboriginals in directing their concerns about the criminal justice system to the appropriate government department or agency",[15] assist in the development of justice policy as it affects Indian and Métis people, and report annually to the Alberta Legislative Assembly, the Solicitor General of Canada, the Indian Association of Alberta, and the Metis Association of Alberta.

3. The Response of the Alberta Government

At a *Justice on Trial* symposium held in Edmonton in May 1992, the Chairman of the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta commented that more than twelve months after the release of the report in March 1991, the Government of Alberta had yet to issue a formal response. Justice Allan Cawsey "observe[d] sarcastically that it has taken longer for the government to respond than it did for us to draft the report."[16] Although certain of the Task Force's recommendations have been implemented, a

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15. *Id* at 42.

16. See J. Danylchuk, "Gov't reply on natives late - judge", *Edmonton Journal*, May 5 1992, 7.

comprehensive response to the report has been delayed, apparently to faciliate extensive consultation with representatives of Aboriginal organizations.

In 1989, shortly after the appointment of the Task Force, Morrow stated:

> The government of Alberta, for one, has not yet caught on that native people are entitled to their own form of justice as indicated in their treaties. While there has been a wave of similar inquiries across Canada analyzing the justice system deficiencies facing native people, there is a sense of skepticism over the validity of the Alberta probe.[17]

The Alberta Government's reluctance to offer firm support for the recommendations contained in *Justice on Trial* would appear to confirm that there was considerable justification for this pessimism.

III. SASKATCHEWAN: INDIAN AND METIS JUSTICE REVIEW COMMITTEES

1. The Process

In June 1991 the Saskatchewan Government and the Government of Canada agreed to the establishment of two parallel committees to review AboriginaL justice issues in the province. The seven person Indian Justice Review Committee consisted of federal and provincial government representatives as well as two representatives from the Federation of Saskatchewan Indian Nations. Similarly, the Métis Justice Review Committee included representatives from the Métis Society of Saskatchewan. Both committees were chaired by Judge Patricia Linn. The primary objective of the committees was:

> To make recommendations relating to the delivery of criminal justice services to Saskatchewan Indian[/Métis] people and communities and in particular, relating to the

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17. J. Morrow, "In Search of Native Justice", *Canadian Lawyer*, May 1989, 14.

> development and operation of practical, community-based initiatives intended to enhance such services.[18]

While clearly prompted by the same concerns about over-representation in the justice systems as were exhibited in the Aboriginal Justice Inquiry of Manitoba and the Alberta Task Force, the review process in Saskatchewan was "very different from the inquiries recently completed in Manitoba and Alberta."[19] The primary difference was that the committees operated only for a six month period, and their "over-riding concern was to make timely recommendations which are action-orientated."[20] Therefore, the Indian Justice Review Committee did not, for example, conduct the detailed original research that formed an important part of the process in Alberta and Manitoba, but "buil[t] upon the framework"[21] established in a 1985 study, *Reflecting Indian Concerns and Values in the Justice System.*[22] This report did not address the concerns of the Métis in Saskatchewan. The *Report of the Saskatchewan Métis Justice Review Committee* the, was considered to be, "[i]n every sense of the word, ... a beginning for the Métis..."[23]

Despite the limited period of activity of both committees, consultations were held with or submissions were received from hundreds of individuals, organizations

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18. Saskatchewan Indian Justice Review Committee, *Report* (Regina, 1992) (hereinafter "*Saskatchewan Indian Justice Report*") at 1; and Saskatchewan Métis Justice Review Committee, *Report* (Regina, 1992) (hereinafter "*Saskatchewan Métis Justice Report*") at 1.

19. *Saskatchewan Indian Justice Report* at 1.

20. *Id* at 4.

21. *Id* at 2.

22. Government of Canada, Government of Saskatchewan, Federation of Saskatchewan Indian Nations, *Reflecting Indian Concerns and Values in the Justice System* (Ottawa: Department of Justice Canada, 1985).

23. *Saskatchewan Métis Justice Report* at 2.

and communities. The committees also released interim reports in October 1991, and organized public hearings in locations throughout the province.[24]

The summary of recommendations below is based primarily on the *Report of the Saskatchewan Indian Justice Review Committee* which was released on January 31 1992. The recommendations contained in this report have been described as "almost identical" to those in the *Report of the Saskatchewan Métis Justice Review Committee* which was released on March 16 1992.

2. The Recommendations

The Indian Justice Review Committee's terms of reference specified that it could "conduct consultations and make and report recommendations in relation to any part of the criminal justice system".[25] However, reflecting the position that "this Committee does not have a mandate to consider or make recommendations in relation to Indian self-government,"[26] the report outlines a reform strategy which is relatively limited in scope. The Committee made recommendations in relation to each of the following aspects of the criminal justice system: youth justice, policing legal representation, sentencing alternatives, court services, and corrections.

A joint meeting of the Indian and Métis Justice Review Committees identified

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24. This component of the committees's process was developed in response to initial concerns about inadequate community involvement in committee meetings: D. Yanko, "Public meetings slated on aboriginal justice", *The StarPhoenix*, July 31 1991.

25. Indian Justice Review Committee Terms of Reference (Appendix 2 to Report): *Saskatchewan Indian Justice Report* at 89.

26. *Id* at 2; also *Saskatchewan Métis Justice Report* at 2.

youth justice as an "important priority",[27] an emphasis that was confirmed by many presentations before the Committees. To illustrate this concern the Indian Justice Review Committee included in its report an extract from the submission of the Saskatchewan Coalition Against Racism:

> Perhaps the saddest fact, and the best starting point for a review of Aboriginal justice, is the reality that Aboriginal youth have a better chance of going to jail tha they have of completing high school. The fact is that Aboriginal youth are routinely streamed into lives of unemployment, poverty, incarceration, and suicide.... All too often crime is used as a mechanism of escape from unbearable living conditions on reserves or in foster homes.[28]

The Committee's recommendations included the establishment of youth justice committees to assist in the disposition of cases involving aboriginal young offenders; and the implentation of employment equity and cross cultural training programs within the Young Offenders Division of Social Services.

After concluding that "current efforts to recruit and employ aboriginal officers are insufficient",[29] the Committee recommended that municipal police services, "in consultation with Indian and Métis organizations, immediately implement, or accelerate existing plans to implement, employment equity programs to achieve aboriginal participation equivalent to the aboriginal proportion of the population served."[30] The Committee further recommended that police commissions appoint representatives from aboriginal communities; all employees of Saskatchewan police forces be provided with on-going cross cultural and race relations sensitivity training,

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27. *Saskatchewan Indian Justice Report* at 13.

28. *Id* at 13.

29. *Id* at 20.

30. *Id* at 21.

including an evaluation component to assess the impact of this training; the RCMP provide officers with localized orientations prior to assignment to northern and reserve postings; Saskatchewan First Nations communities, in collaboration with the RCMP and government departments, identify community-based policing options such as tribal police, satellite detachments and auxiliary officers; the increased availability of information on procedures for the registration and investigation of complaints regarding police conduct and services; and the development of a more effective and credible complaint review mechanism.

In its consideration of the quality of legal representation available to Aboriginal people in Saskatchewan, the Committee began by calling for the re-establishment of an Aboriginal Courtworker Program on a province-wide basis. It also recommended greater Aboriginal participation and cross-cultural training within the Legal Aid Commission.

The Committee's discussion of alternatives to existing sentencing practices highlights the value of alternative dispute resolution mechanisms. It noted that several Aboriginal communities in Saskatchewan have recently initiated alternative mechanisms. These include negotiations for a community-based Victim/Offender Mediation Program in Buffalo Narrows, and a Saskatchewan Government funded diversion/mediation project in North Battleford.

On the basis of several submissions regarding these and other diversion programs throughout the country,[31] the Committee recommended the establishment

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31. *Id* at 39-42.

of mediation/diversion/reconciliation programs which are "culturally appropriate and embody a holistic approach to offender rehabilitation;"[32] the creation of community justice committees with responsibility for pre-sentence advice, crime prevention and public legal education programming, and the administration of sentencing alternatives; greater Crown flexibility to facilitate a decrease in the use of pre-trial detention and incarceration; and that "the Saskatchewan judiciary be encouraged to order pre-sentence reports in all cases where the accused is an aboriginal mother with dependant children in order to encourage consideration of alternatives to incarceration."[33]

Part 9 of the report addresses the adequacy of court services, particularly in remote Aboriginal communities. The concerns expressed here are very similar to those identified by the Aboriginal Justice Inquiry of Manitoba. Key problems include inadequate interpretation and translation services, and the inaccessiblity of court services: "Witnesses and accused persons are left to find their way as far as 110 kilometres, where there is no public transportation and few have vehicles or the resources to take taxis."[34]

In response to these issues the Committee recommended that a Community Justice Liaison program be established in Aboriginal communities, with responsibility for providing interpreter services, conducting public legal education workshops, assisting witnesses to appear in court, providing services to victims, and facilitating community

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32. *Id* at 41. The Committee defined a "holistic approach" as "an approach sensitive to the spiritual, emotional, psychological, physical and material needs of offenders."

33. *Id* at 42.

34. Submission of Judge Moxley, cited *id* at 44.

justice activities; that the Provincial Court should sit on-reserve wherever possible; and that the northern circuits of the court be reviewed, with the aim of achieving more effective proceeding, including the designation of La Ronge as a criminal circuit court point.

The Committee also considered the role of Indian Justices of the Peace. In response to a submission from the Buffalo River Dene Nation and the Meadow Lake Tribal Council, it recommended that "a 2-year pilot Indian Justice of the Peace Program be established for the 9 First Nations of the Meadow Lake Tribal Council."[35] While not in the same category as the Aboriginal Justice Inquiry's recommendation for the establishment of Aboriginal justice systems, the Commission's support for this initiative, and generally for greater use of Aboriginal justices of the peace, represents the most 'autonomous' of the Committee's recommendations in terms of Aboriginal control over the administration of justice. The Meadow Lake project envisages that "locally selected and appropriately trained justices of the peace"[36] would be cross-appointed under section 107 of the *Indian Act* and the Saskatchewan *Justice of the Peace Act*. They would be empowered to deal with a number of summary conviction offences arising from First Nation laws recognised under the *Indian Act*, identified federal or provincial summary conviction offences involving a guilty plea, and assaults and similar offences occurring within a First Nations territory. In all cases the accused would have a right of appeal to a

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35. *Id* at 46.

36. *Id* at 45.

Judge of the Provincial Court of Saskatchewan.[37]

The Committee's consideration of the problems faced by Aboriginal people in correctional facilities includes a plan for employment equity programs, sensitivity training for all staff, and greater efforts to combat racial intolerance including remedial training programs and appropriate disciplinary action.

The report addresses the specific concerns of Aboriginal women who constitute 85 percent of the female population in Saskatchewan's provincial facilities. The Committee called for improvements to female correctional facilities in terms of allowing inmates to have contact with their families and access to vocational and educational programs appropriate to aboriginal women's career needs. It further recommended that "appropriate action be taken to implement recommendations flowing from an investigation into allegations of racism at Pine Grove Correctional Centre."[38]

More generally, the Committee recommended the implementation of programming to enhance access to pre- and post-release planning services to be delivered by local aboriginal service providers; more culturally sensitive, gender appropriate and accessible programs; greater access to Aboriginal Elders and Spiritual Advisors; the adoption of a policy that prisoners should serve their sentences in a correctional facility near to their home; and a review of psychological assessment tests to ensure that they are not culturally biased.

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37. This project is discussed further in Chapter 8.

38. *Id* at 55.

The Committee applauded Correction Canada's current policy of supporting education and training, particularly in relation to Native Studies, and recommended that provincial corrections adopt similar programs. The report calls for a review of the application of existing Treaty rights to Saskatchewan prisons, improvements to the way in which parole hearings are conducted and parole conditions established, and a review of the National Parole Board's use of "gating"[39] to determine if this practice discriminates against Aboriginal persons.

The report concludes with a discussion of several "overarching concerns which impact upon the criminal justice system".[40] These include concerns about racism[41] and the impact of systemic discrimination, the importance of cross cultural and race relations sensitivity training at all stages of the system, and the problem of family violence. In response to concerns about spousal abuse and child abuse, the Committee recommended that "Saskatchewan Justice, in consultation with the judiciary and representatives of both the aboriginal and non-aboriginal communities, evaluate the need for family violence courts in the Saskatchewan context."[42]

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39. "Gating" is defined as "keeping... offenders in jail past their normal release date" for the purpose of "protecting society": *id* at 63.

40. *Id* at 64.

41. The Committee observed that "almost 70% of race-related complaints reported to the Saskatchewan Human Rights Commission in 1991 came from Aboriginal people": *id* at 65.

42. *Id* at 68.

3. Responses to the Reports

The Minister of Justice and Attorney General of Saskatchewan Robert Mitchell has indicated that "subject to operational and fiscal constraints", the Government of Saskatchewan "support[s] implementing many of the report's recommendations."[43] According to Mr Mitchell, several initiatives have been taken in response to the report:

> a review of legal aid was initiated in January 1992; a courtworker feasibility study has been initiated; cross-cultural and race relations training for justice staff is underway; changes have been made to accommodate Queen's Bench jury sittings in the northern community of La Ronge; and a directive has been issued to Crown prosecutors to ensure that the pre-sentence needs of aboriginal women with dependent children are adequately considered.[44]

In relation to the report's many other recommendations, the Government of Saskatchewan is "involved in promoting bilateral and tri-partite processes to help monitor aboriginal justice developments."[45]

Both the Federation of Saskatchewan Indian Nations and the Métis Society of Saskatchewan responded to the release of the respective reports by characterizing the recommendations as an encouraging 'first step' in the task of addressing Aboriginal justice concerns.[46] Significantly, despite the relatively conservative nature of the committees' recommendations, representatives of both organizations have indicated

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43. R.W. Mitchell, Minister of Justice and Attorney General, Letter to author, June 5 1992. Concern about the availability of funding and the question of which level of government will be financially responsible for supporting autonomy-based justice reform initiatives has been a constant feature of the otherwise encouraging response of the Saskatchewan Government. See also D. Traynor, "Métis justice changes tied to budget", *The StarPhoenix*, March 17 1992, A1; and T. Sutter, "Sask. supports Native self-government", *The StarPhoenix*, April 1 1992.

44. *Ibid.*

45. *Ibid.*

46. R. Burton, "Report seeks 'fair' justice for Natives", *The StarPhoenix*, February 1 1992, A1; and Traynor, note 43 *supra* at A1.

that they are broadly consistent with the ultimate goals of autonomous justice systems and Aboriginal self-government. Dan Bellegarde, Vice-Chief of the Saskatchewan Federation of Indian Nations decribed the review process as "part of a larger drive toward self-government [and] under self-government, our own justice system is inevitiable and will occur in the near future under a controlled and developmental process."[47]

IV. LAW REFORM COMMISSION OF CANADA

1. The Reference

In December 1991 the Law Reform Commission of Canada released its report on a reference issued by the Federal Minister of Justice on June 8 1990.[48] The Commission was asked "to study, as a matter of special priority, the *Criminal Code* and related statutes and to examine the extent to which those laws ensure that Aboriginal persons ... have equal access to justice and are treated equitably and with respect."[49]

The process adopted by the Commission included holding a number of consultation sessions with Aboriginal representatives,[50] soliciting the views of "representatives of the affected communities and recognized experts, as well as the

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47. D. Roberts, "Saskatchewan moves toward native justice", *The Globe and Mail*, February 1 1992.

48. Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice. Report No. 34* (Ottawa: Law Reform Commission of Canada, 1991) (hereinafter "*LRCC Report*").

49. *Id* at 1.

50. The consultants are listed *id* at 109.

government ministries and institutions having direct responsibilities with respect to Aboriginal people and the justice system",[51] and commissioning a series of background studies.

The Commission noted that:

> The Aboriginal representatives with whom we consulted voiced strong reservations regarding the Reference. In the Reference's focus on the *Criminal Code* and related statutes, they saw an unacceptable emphasis on "patching up" the current system. In their eyes, no new catalogue of particular deficiencies in the *Criminal Code* or in the practice of the criminal law was required.[52]

However, the Commission interpreted the reference quite broadly and considered issues quite beyond the question of proposals to amend the *Criminal Code*. Indeed, *Aboriginal Peoples and Criminal Justice* represents something of a departure from the Commission's traditional commitment to "the principles of uniformity and consistency"[53] in relation to the reform of the criminal process.[54]

2. The Recommendations

While less overtly politically supportive of Aboriginal self-government aspirations than the Aboriginal Justice Inquiry of Manitoba, the Law Reform Commission of Canada adopted a similar two-pronged reform strategy:

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51. *Id* at 3.

52. *Id* at 3.

53. *Id* at 1. The Commissioners asserted that "this Report does no violence to our work in the field of criminal law. Rather, it expresses our basic commitment to the creation of a criminal justice system that pursues the value of humanity, freedom and justice": *id* at 2.

54. For a critique of the Commission's traditional approach, see R. Hastings & R.P. Saunders, "Social Control, State Autonomy and Legal Reform: The Law Reform Commission of Canada" in R.S. Ratner & J.L. McMullan (eds), *State Control: Criminal Justice Politics in Canada* (Vancouver: University of British Columbia Press, 1987).

> One track is short-term and ameliorative but, admittedly, may not address the more fundamental issues. The other stakes out a course that ultimately arrives at a destination far removed from the present reality.[55]

The Commission's short term plan is a detailed package of reforms based on the position that "the cultural distinctiveness of Aboriginal peoples should be recognized, respected and, where appropriate, incorporated into the criminal justice system".[56] It recommended that the existing system be made more sensitive to Aboriginal needs by increasing system-wide Aboriginal representation, implementing effective cross-cultural training, increasing the availability of interpeter services and statutorily recognising "the right of Aboriginal peoples to express themselves in their own Aboriginal languages in all court proceedings,"[57] increasing community involvement with the justice system in a variety of ways including the possibility of creating a formal role for "Peacemakers" in the mediation of disputes, establishing liaison mechanisms between prosecutors and Aboriginal communities, and providing by statute for the use of community Elders as lay assessors during the sentencing of Aboriginal offenders.[58]

In terms of reforming the existing justice process the Commission's recommendations encompassed the adoption of community-based policing in Aboriginal communities, including the creation of "autonomous Aboriginal police

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55. *LRCC Report* at 3.

56. *Id* at 12.

57. *Id* at 32.

58. For a more detailed description of how this involvement might be facilitated, see *id* at 34-38.

forces wherever local communities desire them";[59] increased participation of Crown prosecutors, by way of "dispassionate and impartial" advice in relation to the police decision whether or not to lay charges;[60] greater distribution of public legal education material by provincial bar associations and legal aid societies;[61] and the adoption of special interrogation rules such as those conatined in the *Young Offenders Act*[62] or those which operate in Australia[63] governing the taking of statements from Aboriginal persons.

Proposed changes to the operation of criminal courts include the recommendations that "[c]ourtrooms serving Aboriginal communities should be physically set up in a way that is sensitive to Aboriginal culture and tradition",[64] the appointment of more Aboriginal justices of the peace with jurisdiction over "all matters conferred on justices of the peace under both the *Criminal Code* and the *Indian Act*",[65] recognition of the right of Aboriginal persons, when giving evidence, to swear a traditional oath, and an overhaul of the times and locations of court sittings, including the phasing out of fly-in courts.

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59. *Id* at 47.

60. *Id* at 51.

61. *Id* at 53. In relation to legal aid, the Commission recommended that "eligibility guidelines should be reviewed to ensure that they do not have an unequal impact on Aboriginal persons": *id* at 54.

62. Cite..

63. See *R v. Anunga* (1976) 11 ALR 412 (NTSC).

64. *Id* at 56.

65. *Id* at 57.

The Commission made several recommendations aimed directly at reducing the level of Aboriginal incarceration. These included greater use of the power to release an arrested person on an appearance notice, amendments to bail legislation to facilitate the imposition of only such conditions as are appropriate to the individual defendant, encouraging the use of alternatives to imprisonment, the enunciation of a list of factors which "in conjunction with other circumstances, would mitigate sentence where the offender is an Aboriginal person",[66] greater use of detailed pre-sentence reports, as well as expansion and more thorough evaluation of victim-offender reconciliation programs. Other recommended alternative dispositions include greater access to fine option and community service order programs for Aboriginal communities that wish to implement them, the institution of pilot projects on the use of day-fine schemes, greater availabilty of probation services, and a formulation of the criteria governing eligibility for probation that is more appropriate to the cultural differences and needs of Aboriginal offenders and communities. The Commission also recommended that "[f]urther research should be conducted into whether Aboriginal persons receive harsher sentences than non-Aboriginal persons, and, if so, the causes of that disparity."[67] Finally, the Commission recommended the adoption and adequate funding of culturally relevant correctional programs involving Aboriginal service organizations, recognition of Aboriginal spirituality and the status of Aboriginal Elders within prisons, the creation of smaller community controlled

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66. *Id* at 76.

67. *Id* at 75.

correctional facilities and improved after-care programs including alternative residential facilities for Aboriginal offenders.[68]

The Law Reform Commission of Canada's long-term plan is rather less detailed, but perhaps even more worthy of attention. The Commission recommended that:

> Aboriginal communities identified by the legitimate representatives of Aboriginal peoples as being willing and capable should have the authority to establish Aboriginal justice systems. The federal and provincial governments should enter into negotiations to transfer that authority to those Aboriginal communities.[69]

While stressing that it should be left to individual communities to determine the precise make-up of their justice system, the Commission suggested that the following features may be incorporated:[70]

> (a) relying on customary law;
> (b) traditional dispute resolution procedures with dispositional alternatives stressing mediation, arbitration and reconciliation;
> (c) the involvement of Elders and Elders' Councils;
> (d) the use of Peacemakers;
> (e) tribal courts having Aboriginal judges and Aboriginal personnel in other mainstream justice roles;
> (f) autonomous Aboriginal police forces with police commissions and other accountability mechanisms;
> (g) community-based and -controlled correctional facilities, probation and after care services; and
> (h) an Aboriginal Justice Institute.

Unlike the Aboriginal Justice Inquiry of Manitoba, the Law Reform Commission of Canada did not locate its recommendation for the creation of

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68. The Commission also called for the establishment of an Aboriginal Justice Institute to conduct research, and generally oversee the implementation of its recommendations: *id* at 87-89. After concluding that "[c]ustomary law can be just as effective a mechanism of social control as statutory law", the Commission recommended that "[t]he federal government should provide funding for research into Aboriginal customary law": *ibid.*

69. *Id* at 16.

70. *Id* at 22-23.

Aboriginal justice systems within the context of Aboriginal self-government.[71] The Commission justified its departure from the general principle that "criminal law and procedure should impose the same requirements on all members of society",[72] on the basis of "the distinct historical position of Aboriginal persons", which has given them a "different constitutional status."[73] Paradoxically, the current constitutional structure was cited by the Manitoba Government as precluding implementation of the Aboriginal Justice Inquiry of Manitoba's recommendation for the establishment of Aboriginal justice systems.[74]

V. AUSTRALIA

1. The Process

In May 1991 the Australian Minister for Aboriginal Affairs, tabled in Federal Parliament the *National Report of the Royal Commission into Aboriginal Deaths in Custody*,[75] an investigation of 99 specific cases involving the death of an Aboriginal person while in custody, as well as a comprehensive analysis of the underlying issues associated with Aboriginal contact with the criminal justice system.

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71. In fact, the Commission expressly distanced itself from the whole self-government debate: "We recognise that the call for completely separate justice systems is part of a political agenda primarily concerned with self-government. We need not enter that debate. Aboriginal-controlled justice systems have merits quite apart from political considerations": *id* at 14.

72. *Id* at 14.

73. *Id* at 14-15.

74. See discussion in Chapter 3 at text corresponding to notes 61-67 *supra*.

75. E. Johnston, *Royal Commission into Aboriginal Deaths in Custody - National Report* (Canberra: Australian Government Publishing Service, 1991) (hereinafter "*RCIADIC National Report*").

The 11 volume final report[76] of the Royal Commission into Aboriginal Deaths in Custody was released after a process lasting three years during which the Commission conducted investigations and public hearings in relation to more than 120 deaths,[77] received numerous submissions from Aboriginal and non-Aboriginal individuals and organizations, and conducted research on a range of issues relevant to Aboriginal contact with the criminal justice system.

In the *National Report of the Royal Commission into Aboriginal Deaths in Custody*, Commissioner Johnston produced 339 recommendations for adoption and ultimately, implementation by the federal, state and territory governments.[78] The breadth of these recommendations reflects the wide terms of reference which the Royal Commission was given. By Letters Patent,[79] the Commission was instructed to:

(i) inquire into all deaths considered to fall within jurisdiction and to enquire also into

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76. A twelfth summary report was later released. See E. Johnston, *Royal Commission into Aboriginal Deaths in Custody - National Report: Overview and Recommendations* (Canberra: Australian Government Publishing Service, 1991).

77. 99 of those deaths were considered to be within the jurisdiction of the Commission and were the subject of separate reports: *RCIADIC National Report Vol 5* at 147.

78. Commissioner Johnston's final report consisted of five volumes. The other six volumes are regional reports prepared by individual Commissioners, which deal with a particular state or states. For example, Commissioner Wootten completed the *Regional Report of Inquiry in New South Wales, Victoria and Tasmania - Royal Commission into Aboriginal Deaths in Custody* (Canberra: Australian Government Publishing Service, 1991); and Commissioner O'Dea was responsible for the *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia - Royal Commission into Aboriginal Deaths in Custody* (Canberra: Australian Government Publishing Service, 1991).

79. See "Consolidated Letters Patent of Commissioners": *RCIADIC National Report Vol 5* at 165 (Appendix A (III)).

"any subsequent action taken in respect of each of those deaths including ... the conduct of coronial, police and other inquiries and any other things that were not done but ought to have been done"; and

(ii) "... for the purpose of reporting on any underlying issues, associated with those deaths, you are authorised to take account of social and cultural and legal factors which, in your judgment, appear to have a bearing on those deaths".

2. The Recommendations

Chief Commissioner Elliott Johnston devoted five volumes to confronting, explaining, and mapping a chart for altering, the pattern of Aboriginal suffering at the hands of Australian police, courts and prisons. The *National Report of the Royal Commission into Aboriginal Deaths in Custody* contains a broad range of recommendations,[80] but three primary emphases can be identified:

(i) the specific issue of deaths in custody;

(ii) the frequency and circumstances of Aboriginal contact with the various agencies of the criminal justice system, from police intervention to incarceration; and

(iii) the underlying issues which, according to the Commission, may explain "what it is about the interaction of Aboriginal people with the non-Aboriginal society which so strongly predisposes Aboriginal people to arrest and imprisonment."[81]

In the first category, the Commission made recommendations dealing with

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80. See generally Johnston, note 75 *supra*.

81. *RCIADIC National Report Vol 5* - "30 March Report", at 147.

procedures for police investigations and coronial inquiries into deaths in custody, the need for uniform collection of statistics on persons in custody, and detailed recommendations relating to custodial conditions and the treatment of detainees, including the delivery of health services.

In the second category, the Commission made a number of recommendations designed to reduce both the rate and impact of Aboriginal arrest and incarceration. Police training and methods received a good deal of attention, particularly in relation to the use of para-military forces.

Several recommendations reflected the aim of diverting Aboriginals - and particularly those that are being held as a result of public drunkenness - from police custody. Specifically, it was recommended that "all Police Services should adopt and apply the principle of arrest being the sanction of last resort in dealing with offenders."[82] Legislative amendments to facilitate greater access of Aboriginals to bail were recommended. The Commission also encouraged various community policing strategies, particularly those which involve direct participation by Aboriginal people.[83] It recommended that community justice proposals receive adequate funding and that the Australian Law Reform Commission's recommendations on the recognition of customary law be implemented.[84]

In relation to the sentencing of Aboriginal offenders, the Commission made

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82. *Id* at 87.

83. One such initiative, the Julalikari Council Policing Project, is discussed in Chapter 8.

84. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws. Report No. 31* (Canberra: Australian Government Publishing Service, 1986) (hereinafter "*ALRC Report*").

several recommendations based on "the principle that imprisonment should be utilized only as a sanction of last resort."[85] These included proposals for the training of Court and Probation and Parole Service Officers in Aboriginal society, customs and traditions, the consultation of community members before determining sentence in cases where the defendant is from a discrete or remote community, and expansion of the range of non-custodial sentencing options and of pre-release and post-release support schemes, and the encouragement of Aboriginal community participation in community service programs. Other recommendations were aimed at alleviating the particularly damaging impact of imprisonment on many Aboriginals, by stressing the value of detaining prisoners in a prison close to families wherever possible, recognizing the importance of encouraging the maintenance of kinship and other family obligations, providing a more adequate and accessible complaints procedure, and increasing the availability of skills training and general educational facilities.

The third group of recommendations made by the Commission represents an attempt to confront and improve the underlying social, economic and political conditions which are seen as contributing heavily to the level of Aboriginal over-representation in the criminal justice system. The Commission made both broad policy recommendations and particular program proposals designed to improve the prospects of Aboriginal youth (both in relation to the justice system, and in the community generally), and to encourage strategies for dealing with Aboriginal health and the problems of excessive alcohol consumption and drug dependence, educational

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85. *RCIADIC National Report Vol 3* at 64.

opportunities and the state of housing and infrastructure in Aboriginal communities.

Significantly, in the context of this examination of "underlying issues", the Commission stressed the importance of Aboriginal political activity and economic management in all areas of what were formerly seen as federal or state governments' 'Aboriginal affairs'. In particular, it recommended:

> That government negotiate with appropriate Aboriginal organizations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that *the self-determination principle* is applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will particularly affect Aboriginal people.[86]

3. Responses to the Report

Aboriginal people initially expressed disappointment that the Royal Commission failed to recommend that criminal charges be laid against those individuals alleged to be responsible for the deaths of Aboriginal people.[87] Shortly after the release of the report, Helen Corbett, Chair of the National Committee to Defend Black Rights (NCDBR), stated that "[t]he Commission has failed to bring to justice those responsible for the deaths of our people in custody."[88] While feeling, in this context, that they have again been denied justice by non-Aboriginal Australia, Aboriginal people have not turned their backs on those recommendations which the Royal Commission has made. For example, NCDBR stated its intention to "initiate a

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86. *RCIADIC National Report Vol 4* at 7.

87. M. Paxman, "Suicide or Genocide?", *Vertigo*, May 1991, 10.

88. Quoted in C. Wockner, "It's a Disgrace to the Nation", *The Daily Telegraph Mirror*, May 10 1991, 10; also T. Hewett, "Royal Commission Over But Questions Remain", *The Sydney Morning Herald*, May 10 1991, 4; T. Hewett, "No Action on Cell-Death Findings", *The Sydney Morning Herald*, May 8 1991, 13.

new national and international campaign in order to ensure they are implemented."[89]

On 31 March 1992 the Government of Australia announced its decision to commit $150 million (AUS) to support its first stage response to the *Report of the Royal Commission into Aboriginal Deaths in Custody*. Consistent with the breadth of the Royal Commission's recommendations, the strategy adopted by the federal, state and territory governments targets a number of areas both within and outside the criminal justice system.[90]

Almost half of the financial support allocated will fund programs designed to address Aboriginal alcohol and substance abuse following the model established by the Central Australian Grog Strategy.[91] Funding will also be provided for a range of other initiatives including plans to: assist state and territory governments to increase Aboriginal representation in police departments and other enforcement agencies; support an annual conference of all police services throughout the country to help improve "cross-cultural awareness";[92] and to enable Aboriginal Legal Services to expand their activities into areas identified by the Royal Commission. Funding for the latter initiative has been described as "the central plank in the Government's strategy to reform the justice system and end the over-representation of Aborigines in

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89. Paxman, note 87 *supra*.

90. See Government of Australia, *Aboriginal Deaths in Custody: Overview of the Response by Governments to the Royal Commission* (Canberra: Australian Government Publishing Service, 1992) (hereinafter "*Government Response*").

91. M. Millett, "Drug-Alcohol Misery Targeted", *The Sydney Morning Herald*, April 1 1992, 4.

92. M. Millett, "$5 Million To Be Spent on Better Link With Police", *The Sydney Morning Herald*, April 1 1992, 4.

custody."[93]

An Aboriginal Social Justice Unit to be established within the Human Rights Commission will oversee the implementation process, monitor the conditions of Aborigines and Torres Strait Islanders, and release an annual report to be tabled in Federal Parliament.[94] The Minister for Aboriginal Affairs stated:

> By providing the annual State of the Nation Report ... the [Human Rights Commission] will be acting as a watchdog over the nation in its achievement of the social justice objective of the process of reconciliation over the coming nine years leading to the centenary of Federation.[95]

The federal government's Aboriginal justice strategy has been applauded for reflecting a serious commitment to implementing the recommendations of the Royal Commission. However, a Sydney Morning Herald editorial[96] questioned "whether the Federal Government has chosen the right measures" to alleviate the conditions which has tragically resulted in so many Aboriginal deaths in custody?[97] With specific reference to the government's plan for confronting alcohol abuse, the editorial states:

> Empowerment is ... the key to this and many other problems in the Aboriginal community. And, clearly, empowerment is not complete unless backed by adequate funds. But the mere provision of funds is potentially useless unless accompanied by measures that do indeed empower Aborigines to take matters into their own hands. Such measures need not in fact involve money at all, but simply give authority to Aboriginal communities through legislation, for example, to make their own rules excluding the sale

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93. S. Kirk, "Legal Aid Build-Up Central to Reform", *The Sydney Morning Herald*, April 1 1992, 4.

94. For a discussion of other monitoring arrangements, see *Government Response* at 54-58.

95. M. Millett, "Rights Body to Monitor Progress", *The Sydney Morning Herald*, April 1 1992, 4.

96. Editorial, "Aborigines: Not Just Money", *The Sydney Morning Herald*, April 1 1992, 14.

97. *Ibid.* The article states that a further 25 Aborigines have been found dead in Australian jails since the May 1989 date which bounded the Royal Commission's mandate.

and purchase of alcohol within their communities.[98]

VI. CONCLUSION

Many of the specific recommendations described above are far from novel. As was discussed in Chapter 2, reforms such as increasing the number of Aboriginal persons working within police departments and correctional facilities, greater use of cross-cultural training and the wider availability of sanctions that do not involve incarceration or are simply repetitions of the same reform proposals that have been routinely advanced over the course of last 20 years.

However, in general, the recommendations reflect a growing awareness of the value of genuine Aboriginal autonomy in the administration of justice. The most significant illustration of the legitimacy and efficacy of this direction in justice reform is the recommendation by the Aboriginal Justice Inquiry of Manitoba and the Law Reform Commission of Canada for the establishment of Aboriginal justice systems.[99] The importance of this departure from the the conventional strategies of Aboriginal justice reform will be examined in Chapter 5.

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98. *Ibid.*

99. It should be noted that the development of alternative native justice systems was earlier recommended in a Report of the Committee of the Canadian Bar Association on Imprisonment and Release in June 1988. See M. Jackson, "Locking Up Natives in Canada" (1989) 23 *University of British Columbia Law Review* 215.

CHAPTER 5

THE EMERGENCE OF AUTONOMY AS A JUSTICE SOLUTION: A NEW DIRECTION

I. INTRODUCTION

In the introduction to *Justice on Trial*, the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta commented:

> It is our opinion that, within the last five to ten years there has been a marked increase in the devolution of control of many aspects of the criminal justice and social welfare systems from the government to aboriginal people.[1]

While the extent to which the Task Force's recommendations amount to an endorsement of this direction is questionable, there can be little doubt that Aboriginal justice reform has recently entered a 'new phase'. Autonomy has emerged as the key theme of proposals designed to seriously address the current status of Aboriginal people in terms of contact with the criminal justice. More specifically, calls for the establishment of comprehensive and independent justice systems in Aboriginal communities have become the primary solution to a problem which has been widely observed since the late 1960s but ineffectively treated.

Part II of this chapter considers the extent to which the reports reviewed in Chapters 3 and 4 are illustrative of this new direction. While only the reports of the Aboriginal Justice Inquiry of Manitoba and the Law Reform Commission of Canada expressly advocate the creation of autonomous Aboriginal justice structure, reports from Alberta, Saskatchewan and Australia all confirm the value of justice policies based on Aboriginal self-determination.

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1. Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta, *Justice on Trial. Volume 1 - Main Report* (Edmonton: Province of Alberta, 1991) (hereinafter "*Alberta Task Force Vol 1*") at 1-4.

Parts III and IV consider the limited history of separate Aboriginal justice institutions in Canada and Australia respectively, which largely explains the tendency to look to other jurisdictions for illustrations of how Aboriginal autonomy in the administration of justice might operate. Indeed, in recommending the establishment of Aboriginal justice systems, the Aboriginal Justice Inquiry of Manitoba, and to a lesser extent, the Law Reform Commission of Canada, considered the operation of American Indian law[2] and, in particular, the experience of tribal courts in the United States. Part V introduces the role of tribal courts in the justice processes of the United States, on the basis that a solid understanding of the nature of these particular institutions is crucial if structures appropriate to the situations of Aboriginal communities are allowed to develop in Canada.

Finally, Part VI discusses the current prospects for the establishment of Aboriginal justice systems in Canada, including an introduction to some of the key legal, political and practical issues which need to be addressed and resolved before Aboriginal autonomy can seriously be identified as a key component of the future of justice policy in this country.

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2. See the formulation of "American Indian law" articulated by Sidney L. Harring in "Crazy Snake and the Creek Struggle for Sovereignty: The Native American Legal Culture and American Law" (1990) 34 *The American Journal of Legal History* 365, at note 1.

II. PERSPECTIVES ON ABORIGINAL JUSTICE REFORM: THE EMERGENCE OF AUTONOMY-BASED SOLUTIONS

1. The Canadian Reports

All four Canadian reports reflect a strong awareness that the recommendations which they include are part of a substantial history of reform literature dealing with the issue of Aboriginal people and the criminal justice system.[3] Indeed, their authors were all too well aware of the limited impact which previous inquiries and reports have had. For example, the Task Force on the Criminal Justice System and Its Impact on the Indian and Métis People of Alberta stated:

> Many of the recommendations made by this Task Force have been made by other Task Forces, Commissions, Inquiries or Studies. We have made these recommendations again, because in our opinion, they have not been implemented fully or appropriately and are still applicable.[4]

According to the Saskatchewan Indian Justice Review Committee:

> Although there have been numerous Canadian studies completed, and many recommendations made in recent years, implementation of recommendations is an often difficult process and meaningful change may seem slow in coming.[5]

While obviously conscious of both the disappointing history and emerging

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3. In Alberta and Saskatchewan, the terms of reference expressly requested an investigation into the extent to which earlier provincial inquires had improved the position of Aboriginal people in relation to the criminal justice system, namely: Alberta Board of Review on Provincial Courts, *Native People in the Administration of Justice in the Provincial Courts of Alberta. Report No. 4* (Chair W.J.C. Kirby) (Edmonton: Province of Alberta, 1978); and Government of Canada, Government of Saskatchewan, and Federation of Saskatchewan Indian Nations, *Reflecting Indian Concerns and Values in the Justice System* (Ottawa: Department of Justice, 1985). See respectively, Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta, *Justice on Trial. Volume III: Working Paper and Bibliography* (Edmonton: Province of Alberta, 1991), Ch.3: "Analysis of the Recommendations of the Alberta Board of Review on Provincial Court (1978) Report IV (Kirby Report)"; and Saskatchewan Indian Justice Review Committee, *Report* (Regina, 1992) (hereinafter "*Saskatchewan Indian Justice Report*"), Appendix 3: "Status Report on Reflecting Indian Concerns", at 91-105.

4. *Alberta Task Force Vol 1* at 1-5.

5. *Saskatchewan Indian Justice Report* at 1.

direction of Aboriginal justice reform, neither the Alberta Task Force nor the Saskatchewan Indian/Métis Justice Review Committees gave meaningful effect to this recognition in charting a reform strategy. Indeed, most of the recommendations resulting from these investigations can be placed generally within the familiar category of proposals which adopt the solution of sensitizing, and increasing Aboriginal participation in, the existing system, with limited support for community-based autonomy.

On the question of alternative justice structures, the Alberta Task Force recognised that several Aboriginal communities and the Indian Association of Alberta seek the development of a separate justice system. Indeed, the Task Force commended the Saddle Lake Band for its initiative in developing a draft constitution for a tribal justice system.[6] However, the report does not indicate any real commitment to such an autonomous direction in justice policy, concluding instead, that "[w]hether an Aboriginal Justice system should exist and its scope and extent, is a matter for negotiation between the Indian and Metis people and the Governments of Canada and Alberta."[7]

Similarly, the Saskatchewan Indian/Métis Justice Review Committees effectively skirted the issue of autonomous Aboriginal justice structures on the basis that:

(a) "this Committee does not have a mandate to consider or make recommendations in

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6. *Alberta Task Force Vol 1* at 11-2.

7. *Id* at 43.

relation to Indian[/Métis] self-government...";[8] and

(b) "... the Saskatchewan government has indicated that it is particularly interested in ideas that will improve the relationship between Indian and Métis people and the criminal justice system in Saskatchewan, and make the present system more sensitive to their cultural differences and the problems they encounter."[9]

The committees maintained this conventional approach to justice reform despite express recognition of the positions of the Métis Society of Saskatchewan and the Federation of Saskatchewan Indian Nations on self-determination/self-government, and on the implications of this objective for the creation of autonomous justice structures.[10]

In contrast, the Law Reform Commission of Canada included the option of Aboriginal justice systems as one of the key features of its proposed reform package. Interestingly, one of the Commission's stated justifications for supporting the establishment of Aboriginal justice systems is that rather than constituting a "radical suggestion, ... instituting distinct Aboriginal systems of justice ... can be looked on as simply a logical extension of advances that have already been made."[11]

However, only the recommendations of the Aboriginal Justice Inquiry of

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8. Saskatchewan Métis Justice Review Committee, *Report* (Regina, 1992) (hereinafter "*Saskatchewan Métis Justice Report*") at 2; and *Saskatchewan Indian Justice Report* at 2.

9. *Id* at 3.

10. See *Saskatchewan Métis Justice Report* at 2; and *Saskatchewan Indian Justice Report* at 2.

11. Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice. Report No. 34* (Ottawa: Law Reform Commission of Canada, 1991) (hereinafter "*LRCC Report*") at 17.

Manitoba are based on an explicit recognition that there is a fundamental relationship between the undeniable need for reforms to the way justice is administered in Manitoba (and indeed, the country), and the desirability of achieving meaningful Aboriginal self-government as a significant component of the Canadian federal structure.[12] It is the merging of these two key developments which signals the possibility of a new era for Aboriginal justice reform policy.

Not only are reform strategies based on the establishment of autonomous Aboriginal justice structures politically consistent with Aboriginal self-government aspirations, but they also reflect a different conception of the justice problem faced by Aboriginal people. For example, in 1990 the Vice-Chief of the Federation of Saskatchewan Indian Nations stated:

> In the matter of Indian Justice, our judicial systems have broken down. They have been replaced by a Euro-Canadian approach, which is foreign to our people. This has led to high incarceration rates, and socio-economic crises in our communities .... Indian peoples, in exerting their inherent right to self-government, wish to develop and enforce their own laws which will govern themselves.[13]

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12. The connection was also acknowledged in 1989 by The Task Force on Aboriginal Peoples in Federal Corrections:

> The move towards Aboriginal self-government will have significant implications for the corrections system because criminal justice issues, including corrections, will undoubtedly be a component of many self-government negotiations.

However, apart from emphasizing the importance of being 'aware' of the implications of self-government, there is little practical expression of Aboriginal self-government contained in the reform strategy proposed by the Task Force. It recommended that:

> The Ministry of the Solicitor General should continue to monitor the federal government's agenda for Aboriginal self-government negotiations to ensure that it is aware of, and responsive to, any corrections implications in the negotiations.

- Task Force on Aboriginal Peoples in Federal Corrections, *Final Report* (Ottawa: Solicitor General Canada, 1989) at 79.

13. Daniel Bellegarde, First Vice-Chief, Federation of Saskatchewan Indian Nations, in F. Cassidy (ed), *Aboriginal Self-Determination. Proceedings of a Conference Held September 30-October 3, 1990* (Lantzville & Halifax: Oolichan Books & The Institute for Research on Public Policy, 1991) at 77.

According to this analysis, the current conditions of Aboriginal people are a direct result of the rapid and deliberate erosion of Aboriginal justice structures since the second half of the nineteenth century.[14] Calls for the re-establishment of Aboriginal justice systems are based then, not simply on the evidence of systemic discrimination or over-representation in the current Canadian justice system, but upon the recognition that the problem is essentially one of the denial of the legitimate authority of Aboriginal peoples to maintain social order and administer justice in their communities.

2. Australia - the Royal Commission into Aboriginal Deaths in Custody

Formal recognition that self-determination is "central to the achievement of the profound change which is required in the area of Aboriginal affairs" represents, along with the emphasis on "addressing land needs", one of the most significant features of the recommendations of the *National Report of the Royal Commission into Aboriginal Deaths in Custody*.[15] The Commission's apparent acceptance that criminal justice issues cannot be dealt with in the abstract and must be considered as part of the broader problem of the relationship between Aboriginal individuals and communities on the one hand, and on the other, the wider society and the dominant institutions of the Australian state, represents a significant break with traditional policies in relation to 'Aboriginal affairs'.

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14. See Introduction, note 43 *supra*.

15. See E. Johnston, *Royal Commission into Aboriginal Deaths in Custody - National Report* (Canberra: Australian Government Publishing Service, 1991) (hereinafter "*RCIADIC National Report*") *Vol 5*, Ch 37.

The difficulty, and the Commission did not fail to recognize this problem, is that "little agreement exists as to the definition of self-determination and the processes available to implement a policy of enhanced levels of self-determination."[16] The term 'self-determination' has been used to describe a range of situations from the principle which has informed Australian government policy in relation to Aboriginal affairs, at least since the 1970s (more accurately referred to as 'self-management'),[17] through to the right of self-determination under international law, which recognises that "all peoples" have the right to "freely determine their political status and freely pursue their economic, social and cultural development."[18]

While describing self-determination as an "evolving concept", the Commission identifies a "solid core of common ground" on the basis of its consideration of a number of perspectives including a recent report of the Federal House of Representatives Standing Committee on Aboriginal Affairs[19] and submissions by the National Aboriginal and Islander Legal Services Secretariat (NAILSS),[20] and the

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16. *RCIADIC National Report Vol 4* at 5.

17. For a history of the Aboriginal affairs policy applied by successive federal governments, see *RCIADIC National Report Vol 2* at 510-541; and H. McRae, G. Nettheim and L. Beacroft, *Aboriginal Legal Issues: Commentary and Materials* (Sydney: The Law Book Company, 1991) at 9-32.

18. Article 1 of the International Covenant on Economic, Social and Cultural Rights 1966, and Article 1 of the International Covenant on Civil and Political Rights 1966. See the earlier discussion in Introduction, at text corresponding to notes 17-25 *supra*.

19. Australia, House of Representatives Standing Committee on Aboriginal Affairs, *Our Future, Our Selves: Aboriginal and Torres Strait Islander Community Control Management and Resources* (Canberra: Australian Government Publishing Service, 1990).

20. National Aboriginal and Islander Legal Services Secretariat, *Stopping the Deaths: A Spectrum of Possibilities for Self-Determination* (Submission to the Royal Commission into Aboriginal Deaths in Custody, 1991); also S. Pritchard, *Self-Determination: The Rights of Indigenous Peoples Under*

Aboriginal Law Centre, University of New South Wales.[21] According to the Commission, this common ground covers three "crucial points":[22]

a) that Aboriginal people have the control "over the decision-making process as well as control over the ultimate decisions about a wide range of matters including political status, and economic, social and cultural development";

b) that for Aboriginal people "an economic base is provided to the indigenous self-determining people"; and

c) that Aboriginal people have the right to make the choice as between the "spectrum of possibilities" in terms of political status.[23]

In its identification of a "common core of agreement" as to the meaning of Aboriginal self-determination in Australia, the Royal Commission into Aboriginal Deaths in Custody attempted to reconcile some quite divergent positions on the degree of political autonomy and capacity for self-government which the principle of self-determination provides for Aborigines. Unfortunately, where solid and specific recommendations confronting the vexed question of criminal justice administration

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International Law (Submission prepared on behalf of NAILSS for the Royal Commission into Aboriginal Deaths in Custody, 1990).

21. J. Hookey, *Aboriginal Deaths in Custody: International Law Issues* (Submission prepared on behalf of the Aboriginal Law Centre, University of New South Wales for the Royal Commission into Aboriginal Deaths in Custody, 1990).

22. *RCIADIC National Report Vol 2* at 508-509.

23. Although this is limited by the House of Representatives Standing Committee to "within the legal structure common to all Australians": note 19 *supra*. This constraint is similar to that which has been advanced in relation to constitutional recognition of the Aboriginal right of self-government in Canada. Draft amendments have generally included limiting words such as "in Canada", or "within the Canadian federation". See the discussion in Chapter 6, part III *infra*.

along these lines were needed, the Commission has instead retreated to the broad policy level.

Having courageously placed the fundamental problem of Aboriginal over-representation in the criminal justice statistics within the context of a denial of political autonomy, the Commission failed to take what has emerged in Canada as the logical 'next step'. Despite coming to a series of conclusions which are underscored by the theme that 'self-determination is the ultimate solution', the Commission refrained from endorsing any significant exercises of Aboriginal autonomy in terms of the administration of justice.

To a large extent then, the Royal Commission into Aboriginal Deaths in Custody took a similar perspective to that of the Alberta Task Force and the Saskatchewan Indian/Métis Justice Review Committees - it failed to seriously challenge the assumption that Aboriginal people *can* find fairness, justice and equitable treatment *within* the parameters of the existing justice system.

While at the broad policy level these inquiries were prepared to acknowledge that Aboriginal people are entitled to exercise a significant degree of autonomy in all areas that affect their lives, their concrete proposals in the area of criminal justice administration reflect the traditional tendency to place stifling limitations on what are erroneously referred to as policies in Aboriginal affairs based on 'self-determination'. In Australia, Aboriginal people still await such an extension of government support for autonomy from an official endorsement of self-determination at the broad policy level, to the point where Aboriginal communities truly exercise in relation to all

matters, including law and justice, the level of autonomy which they are routinely promised.

III. CANADA'S EXPERIENCE OF ABORIGINAL JUSTICE STRUCTURES

Since 1883[24] a separate court system has been mandated on Indian reserves throughout the country.[25] The legislative source of this aspect of the justice system - section 107 of the *Indian Act*[26] - currently provides:

> The Governor in Council may appoint persons to be, for the purposes of this Act, justices of the peace and those persons have and may exercise the powers and authority of two justices of the peace with regard to
> a) offences under this Act, and
> b) any offence against the provisions of the *Criminal Code* relating to cruelty to animals, common assault, breaking and entering and vagrancy, where the offence is committed by an Indian or relates to the person or property of an Indian.

Morse has concluded that "the rationale of Parliament in creating this separate judicial system was apparently to empower Indian agents to more effectively implement the purposes of the legislation and the policies of the Indian Affairs Branch of the Government of Canada."[27]

An absence of written decisions or other documentation makes it difficult to

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24. *An Act to Amend "The Indian Act, 1880"*, S.C. 1881, c.17 (44 Vict.) s.12.

25. The evolution of the *Indian Act* court is described in B.W. Morse, "A Unique Court: s.107 Indian Act Justices of the Peace" (1982) 5(2 & 3) *Canadian Legal Aid Bulletin* 131.

26. R.S.C., c.I-5.

27. Morse, note 25 *supra* at 149. Morse has described these courts as operating on a similar basis to Aboriginal community courts in Queensland, Australia (see discussion at text corresponding to notes 55-65 *infra*) and tribal courts established pursuant to the United States Code of Federal Regulation: B.W. Morse, "Indigenous Law and State Legal Systems: Conflict and Compatibility" in B.W. Morse and G.R. Woodman (eds), *Indigenous Law and the State* (Dordrecht: Foris Publications, 1988) 101 at 112-113.

determine the extent to which section 107 powers were exercised on reserves.[28] For more than a decade the Department of Indian Affairs has adopted the policy that no new courts be created under section 107 of the *Indian Act*.[29] During the 1970s a pattern of recruiting Aboriginal persons to serve as Justices of the Peace began to emerge, particularly in the Yukon and the Northwest Territories.[30] Similar initiatives have been taken in the Prairie region provinces, although with limited success.[31]

Following an analysis of the history of this particular component of the Canadian justice system, the Aboriginal Justice Inquiry of Manitoba commented:

> The section 107 court remains in the statute as a vestige of the ignominious past of federal colonization and domination of reserve life ... The restrictions that exist in the Act are such that it offers little promise for the long-term future and is unlikely to satisfy current demands from First Nations to establish their own justice system. At most, it offers a short-term interim measure and an indication that a separate court system can function readily on Indian reserves without causing grave concerns within the rest of society or the legal community.[32]

While this statement accurately reflects the inherent limitations of the section 107 framework in terms of fully satisfying Aboriginal aspirations for control over justice administration in their own communities, it also indicates that the *Indian Act* has not

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28. *AJI Report Vol 1* at 305.

29. *Id* at 308.

30. *Id* at 309. See also M. McCulloch, "Justices of the Peace in the Yukon Territory" in C.T. Griffiths (ed), *Circuit and Rural Court Justice in the North. A Resource Publication* (Burnaby: The Northern Conference and Simon Fraser University, 1984) at 2-43; and A. Whitford, "The Northwest Territories Justice of the Peace Program" in C.T. Griffiths (ed), *Circuit and Rural Court Justice in the North. A Resource Publication* (Burnaby: The Northern Conference and Simon Fraser University, 1984) at 2-45.

31. See, for example, T. Gasior, "The Saskatchewan Indian Justice of the Peace Program: A Program Evaluation" in C.T. Griffiths (ed), *Circuit and Rural Court Justice in the North. A Resource Publication* (Burnaby: The Northern Conference and Simon Fraser University, 1984) at 2-50.

32. AJI Report Vol 1 at 309.

been completely abandoned as a legislative source of jurisdiction. For example, the proposal for the establishment of a Meadow Lake Indian Justice of the Peace Program, which was endorsed by the Saskatchewan Indian Justice Review Committee, involves cross appointment of justices of the peace under section 107, and the provincial *Justice of the Peace Act.*[33]

Ultimately, this direction may be inconsistent with the wider movement towards Aboriginal self-government in Canada. As the Assembly of Manitoba Chiefs observed in a submission to the AJI of Manitoba:[34]

> The provision of the *Indian Act* could be a legislative source for the establishment of a unique Indian justice system, however, it is not likely to be utilized considering the limited role and jurisdiction of such courts. Indeed leaders of First Nations across Canada take the position that dealing with offences under the *Indian Act* or a few sections of the *Criminal Code* is not accepted. *An inferior court with limited jurisdiction is most definitely not an alternative to the establishment of an Indian court system.* Paternalistic and patronizing alternatives are both insulting and degrading to our human dignity.[35]

IV. ABORIGINAL COURTS IN AUSTRALIA

As in Canada, there has been little development of separate Aboriginal justice mechanisms in Australia. In 1986, the Australian Law Reform Commission concluded that "there is only limited scope or demand for new official local justice mechanisms in Aboriginal communities" and that "there should be no general scheme of

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33. *Saskatchewan Indian Justice Report* at 46.

34. Chief Louis Stevenson, Chair, Justice Committee of the Assembly of Manitoba Chiefs, *Presentation No. 790 to the Public Inquiry into the Administration of Justice and Aboriginal People* - Transcript of a Community Hearing, (Winnipeg, November 22, 1989) at 7770-7771.

35. Cited in *AJI Report Vol 1* at 309-310 (emphasis added).

Aboriginal courts established in Australia."[36] Those justice structures which have operated in various Aboriginal communities have failed to promote meaningful autonomy as a solution to the problem of how the criminal justice system impacts on Aboriginal people. Perhaps most significantly, they have not formed part of a wider strategy of implementing self-government in Aboriginal communities.

1. The Western Australian Aboriginal Justice of the Peace Scheme

While serving as the Magistrate at Broome during the 1970s, Terry Syddall devised an Aboriginal Justice of the Peace Scheme to operate in the Kimberley region of Western Australia.[37] In 1971 he adopted the practice of inviting local elders to sit with him in the courtroom, mainly for the purpose of facilitating community input on sentencing options for Aboriginal defendants, but also in order to explain court procedures and points of law to both defendants and advisers.[38]

In 1977 Syddall was requested by the Western Australian Government to conduct an inquiry into Aboriginal laws, and into the extent to which Aboriginal communities understood the general law. On the basis of this research, the government enacted the *Aboriginal Communities Act 1979* (WA), which according to

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36. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law. Report No 31* (Canberra: Australian Government Publishing Service, 1986) (hereinafter "*ALRC Report*") para 1009.

37. See generally, T. Syddall, "Aboriginals and the Courts I and II" in K.M. Hazlehurst (ed), *Justice Programs for Aboriginal and Other Indigenous Communities. Seminar Proceedings No. 7* (Canberra: Australian Institute of Criminology, 1985).

38. *Id* at 158. On the role of Aboriginal advisers/assessors, see M.W. Daunton-Fear & A. Freiberg, "'Gum-tree' Justice: Aborigines and the Courts" in D. Chappell & P. Wilson (eds), *The Australian Criminal Justice System* (Sydney: Butterworths, 2nd ed., 1977) at 87-89.

the preamble, was designed to "assist certain Aboriginal communities to manage and control their community lands." This objective was to be achieved via two basic strategies. The Act:

(i) authorized community councils to make and enforce by-laws covering a range of specified subject matters;[39] and

(ii) established "Aboriginal courts", consisting of Aboriginal Justices of the Peace, Bench Clerks and Probation Officers.

The scheme was initially introduced on a pilot basis at two Kimberley communities: the Bidyadanga Aboriginal Community Incorporated at La Grange, and the Bardi Aborigines Association Incorporated at One Arm Point; and was later extended to three other communities, with several other communities also applying for inclusion.[40]

Syddall has described the scheme, with particular reference to its operation in the La Grange community, as a major success. According to Syddall, this was evidenced by "a reduction in the incidence of anti-social behaviour,...a marked improvement in Aboriginal and police relations" and a trend towards "synthesis of customary law and by-laws."[41] Syddall has also placed these developments within the context of a general movement towards independence for Aboriginal communities:

> ...[N]ow that the traditional social control methods have been supplemented by the by-laws administered very largely by themselves, community autonomy in the not too

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39. Syddall, note 37 *supra* at 168-169.

40. *Id* at 169. See also *ALRC Report* para 748.

41. Syddall, note 37 *supra* at 169.

distant future is a distinct possibility.[42]

Despite Syddall's optimism, and the favourable comments of other observers,[43] doubts have been raised about the effectiveness of the Justice of the Peace Scheme. In particular, Hoddinott argued that the scheme, "whilst promising in its inception, has developed serious difficulties in application [which]...urgently need to be rectified if the scheme is to continue."[44] Hoddinott reported during the mid-1980s that it has become apparent to elders of several communities participating in the scheme that the superimposition of a second value system on top of Aboriginal values and laws raised serious difficulties. Both in relation to questions of liability for particular behaviour, and appropriate sanctions, there is a conflict between tribal law and the *Aboriginal Communities Act*.[45] As a result, Aboriginal kinship structures were being undermined. Further, instead of fostering Aboriginal autonomy, the community courts were operating in such a way that Aboriginal JPs felt themselves to be little more than advisers, even five years after the introduction of the Justices of the Peace Scheme.[46]

On the basis of her observations, Hoddinott concluded that the operation of the

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42. *Id* at 170.

43. See *ALRC Report* para 756.

44. A. Hoddinott, "Aboriginal Justices of the Peace and 'Public Law'" in K.M. Hazlehurst (ed), *Justice Programs For Aboriginal and Other Indigenous Communities. Seminar Proceedings No. 7* (Canberra: Australian Institute of Criminology, 1985).

45. *Id* at 176-177.

46. *Id* at 177.

Aboriginal Communities Act should not be expanded "without taking into account the level of community acculturation and the degree of committal a community may have to its own value system."[47]

The Australian Law Reform Commission noted in 1986 that a review of the Justices of the Peace Scheme was then being undertaken by the State Government. The Commission stressed that "careful consideration should be given to provisions which would assist local communities to achieve a more substantial degree of autonomy..."[48]

In 1986 this review was carried out by John Hedges, formerly a solicitor with the Aboriginal Legal Service.[49] He investigated the effectiveness of the Act in relation to whether:

(i) community behaviour conformed to by-laws;

(ii) communities have taken responsibility for the operation of by-laws.[50]

After consultations with each of the five Kimberley communities then participating in the Aboriginal Communities Act, Hedges made a number of

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47. *Id* at 179. For a more detailed account of Hoddinott's observations and recommendations, see A. Hoddinott, *That's Gardia Business: An Evaluation of the Aboriginal Justice of the Peace Scheme in Western Australia* (Canberra and Perth: Australian Instituite of Criminology, and the Western Australia Prison Department, 1986).

48. *ALRC Report* para 758.

49. J.B. Hedges, *Community Justice Systems and Alcohol Control: Recommendations Relating to the Aboriginal Communities Act and Dry Area Legislation in Western Australia* (Perth: Report prepared for the Minister with Special Responsibility for Aboriginal Affairs, 1986).

50. *Id* at 3.

recommendations[51] designed to improve the effectiveness of the scheme. While his impressions of the operation of the community justice system differed among communities,[52] he concluded generally that

> the practical implementation of the Community Justice System has been hindered by the absence of funding of educational programmes for court officers and the 'broader' community, and the absence of participation by the Probation and Parole Service.[53]

Hedges reported that as well as expressing a desire for greater sentencing options, Justices of the Peace indicated that they sought greater independence from visiting magistrates. These findings verified, to some extent, Hoddinott's criticisms about the absence of autonomy for Aboriginal community courts. However, Hedges did recommend that the *Aboriginal Communities Act* be extended to three further communities in the Kimberley region, and that consultations be continued with other Aboriginal communities interested in participating in the scheme.[54]

Despite this relatively optimistic evaluation, the minimal level of autonomy which characterizes the Western Australian Justices of the Peace Scheme, seriously weakens the viability of this particular scheme as a model for Aboriginal community justice. It fails to offer a genuine and constructive alternative to the 'processing' of Aboriginal offenders through the formal criminal justice system.

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51. *Id* at 43-65.

52. For example, in the Bidyadanga community the scheme was considered to have operated with "mixed success", while at One Arm Point the *Aboriginal Communities Act* was considered to be "operating successfully": *id* at 7, 10.

53. *Id* at 2.

54. *Id* at ii.

2. Queensland's Aboriginal Courts

The court system which has operated on Aboriginal reserves or "trust areas" in Queensland, originally under the *Aborigines Act 1971* (Qld) and the *Torres Strait Islanders Act 1971* (Qld), and more recently under the *Community Services (Aborigines) Act 1984* (Qld) and the *Community Services (Torres Strait) Act 1984* (Qld), has been widely criticised.[55] The major criticisms which have been made of the Queensland Aboriginal court system include:

(i) that the courts are inferior or 'second-class' institutions;

(ii) the lack of real Aboriginal influence or control;

(iii) the courts' inability, or failure, to take into account local customs and traditions; and

(iv) the courts' location within the reserve system as a whole, which has been seen as an imposition of alien structures and values.[56]

McRae, Nettheim and Beacroft have concluded that prior to the legislative changes in 1984:

> The Courts operated as an integral part of the notorious reserve regime. Oppressive by-laws...were enforced by invidiously-placed Aboriginal Justices. The courts did not reflect Aboriginal laws and aspirations. Rather, they were instruments of oppression and control wielded by the white authorities, operating without respect for basic human rights.[57]

Miller has concluded that despite the introduction of new legislation in the mid-1980s,

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55. For a critical discussion of the circumstances which existed on Queensland's Aboriginal reserves under the now-repealed *Aborigines Act 1971* (Qld), see G. Nettheim, *Out Lawed: Queensland's Aborigines and Islanders and the Rule of Law* (Sydney: Australia and New Zealand Book Company, 1973); and G. Nettheim, *Victims of the Law: Black Queenslanders Today* (Sydney: George Allen & Unwin, 1981).

56. For an elaboration of these criticisms see *ALRC Report* para 741-746.

57. McRae et al, note 17 *supra* at 229.

along with more recent reforms, the Queensland system has improved little in many of these respects.[58]

In 1991 a Legislation Review Committee completed an assessment of the legislation relating to the management of Aboriginal and Torres Strait Islander communities in Queensland.[59] The Committee recommended that

> Aboriginal and Torres Strait Islander people and their communities should have the autonomy to decide the important questions themselves, and so to be 'self-determining' about our future.[60]

The Committee explained the requisite level of autonomy as "self-government".[61]

Consistent with this approach, the Committee recommended that "the Aboriginal and Island courts remain unless individual communities agree to dismantling of the community court in their area."[62] Several areas where improvements and assistance from the Government of Queensland might be needed were identified by the Committee. It recommended that the Queensland Government should

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58. B. Miller, "Crime Prevention and Socio-Legal Reform on Aboriginal Communities in Queensland" (1991) 49 *Aboriginal Law Bulletin* 10 at 12. For a more optimistic appraisal, see J. MacDonald, "Community Service Projects on Aboriginal Communities in Queensland" in K.M. Hazlehurst (ed), *Justice Programs for Aboriginal and Other Indigenous Communities. Seminar Proceedings No.7* (Canberra: Australian Institute of Criminology, 1985).

59. Queensland, Legislation Review Committee, Inquiry into the Legislation Relating to the Management of Aboriginal and Torres Strait Islander Communities in Queensland, *Final Report* (Brisbane, November 1991).

60. *Id* at 8.

61. *Ibid.* See Queensland, Legislation Review Committee, Inquiry into the Legislation Relating to the Management of Aboriginal and Torres Strait Islander Communities in Queensland, *Towards Self-Government: A Discussion Paper* (Brisbane, 1991).

62. Note 59 *supra* at 34.

> [u]ndertake a comprehensive study of the jurisdiction, powers and procedures of the Aboriginal and Island courts. Communities need to be advised through community education programs of the conclusions of this study, in order for communities to decide what changes, if any, are required to improve the aboriginal and Island courts.[63]

The Committee further recommended that the courts be empowered to operate in a manner more consistent with Aboriginal and Islander customary law,[64] and the court structure be available to communities which seek to develop and expand community justice schemes.[65]

V. TRIBAL COURTS IN THE UNITED STATES[66]

Various tribal courts have operated as a recognised component of the United States justice system since 1883, when Courts of Indian Offenses were established by the Bureau of Indian Affairs.[67] Deloria and Lytle have described the Courts of Indian Offenses in the following terms:

> Although the ... courts were staffed by Indian judges, they served at the pleasure of the agent, not the community. The Indian agent appointed his judges as a patronage exercise, which rewarded the Indians who seemed to be assimilating while depriving the traditional people of the opportunity to participate in this vital function of the community...[I]t is difficult to determine whether they were really courts in the traditional jurisprudential sense of either the Indian or the Anglo-American culture or whether they were not simply

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63. *Ibid.*

64. *Ibid.*

65. *Id* at 34-35.

66. This section is designed to provide only a brief introduction to the system of tribal courts which operates on Indian reservations in the United States. Features of these courts which may be particularly relevant to the current debate over Aboriginal justice systems in Canada will be examined in greater detail in Part B of this thesis.

67. *AJI Report Vol 1* at 302.

> instruments of cultural oppression...[68]

The modern system of tribal courts is generally considered to have been established by the *Indian Reorganization Act* of 1934 (IRA).[69] However, Barsh and Henderson have observed that, "[n]either in conception nor enactment did the Indian Reorganization Act materially alter the condition of reservation police and courts."[70] The Act did authorise Indian tribes to enact tribal constitutions and codes,[71] a process that was overseen by the Bureau of Indian Affairs. According to Johnson:

> Enactment of the IRA in 1934 encouraged rapid growth of tribal courts based on inherent sovereignty. The trend dwindled during the termination era, but developed rapidly again after the Indian Civil Rights Act of 1968.[72]

At the present time then, there are three general categories of Indian justice structures: traditional courts, Courts of Indian Offenses and IRA Tribal Courts. The vast majority of the more than 145 justice systems which operate on Indian

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68. V. Deloria, Jr., & C.M. Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983) at 115. In *United States v. Clapox*, 35 Fed. 575 (D.C. Oregon. 1888) the Courts of Indian Offenses were described as "mere educational and disciplinary instrumentalities by which the government of the United States is endeavouring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian": cited *ibid.*

69. *Act of June 18, 1934*, Pub. L. No. 73-383, c.576, 48 Stat. 984.

70. R.L. Barsh and J.Y. Henderson, "Tribal Courts, the Model Code, and the Police Idea in American Indian Policy" (1976) 40 *Law and Contemporary Problems* 25 at 46.

71. For an indication as to the range of matters with respect to which tribal councils have enacted laws, see R.W. Johnson (ed), *Indian Tribal Codes* (Seattle: University of Washington Law School, 1988).

72. R.W. Johnson, "Fragile Gains: Two Centuries of Canadian and United States Policy Towards Indians" (1991) 66 *Washington Law Review* 643 at 708. The impact of the *Indian Civil Rights Act* is discussed in Chapter 7, part II *infra*.

reservations in the United States belong to the latter category.[73]

Tribal courts have been criticized by those opposed to "separatism" and Indian autonomy,[74] and applauded by others as "expressions of Indian self-determination" which "should be maintained and strengthened".[75] As the debate continued, tribal courts developed throughout the 1970s and 1980s into an increasingly organized and 'professional' system for the administration of justice on Indian reserves,[76] with the emergence of organizations such as the National American Indian Court Judges Association,[77] the American Indian Lawyer Training Program[78], and the National

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73. There are approximately 14 traditional courts (primarily on the Pueblos of New Mexico) and 17 Courts of Indian Offenses currently operating in the United States. See *AJI Report Vol 1* at 275; and Johnson, note 72 *supra* at 707.

74. See for example, S.J. Brakel, "American Indian Tribal Courts: Separate? 'Yes,' Equal? 'Probably Not'" (1976) 62 *American Bar Association Journal* 1002. In a 1978 report to the American Bar Foundation, Brakel concluded:

> The tribal courts do not work well, and necessary improvements would require much time and involve many difficulties. To perpetuate them at all runs counter to the evolutionary trends in the Indians' relation to the dominant culture in this country. Therefore, it would be more realistic to abandon the system altogether and to deal with Indian civil and criminal problems in the regular county and state court systems. Existing integrated arrangements appear to work well enough.

- S.J. Brakel, *American Indian Tribal Courts: The Costs of Separate Justice* (Chicago: American Bar Foundation, 1978) at 103.

75. R.B. Collins, R.W. Johnson & K.I. Perkins, "American Indian Courts and Tribal Self-Government" (1977) 63 *American Bar Association Journal* 808. For a powerful argument that "sovereignty and tribal autonomy" are key elements of native American legal culture, see Harring, note 2 *supra*.

76. The Navajo system has been perhaps the most celebrated in these respects. It has been described as "a remarkably successful model of what a tribal court should be": P. Bender, cited in M. Campbell, "Taking the law into their own hands", *The Globe and Mail*, September 13 1991, A1. See also R.H. Hemmingson, "Jurisdiction of Future Tribal Courts in Canada: Learning From the American Experience" [1988] 3 *Canadian Native Law Reporter* 1 at 9; and J.W. Zion, "The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New" (1983) 11 *American Indian Law Review* 89.

77. D. Getches (ed), *Indian Courts and the Future* (Washington: National American Indian Court Judges Association, 1978).

Indian Justice Center[79].

VI. THE PROSPECTS OF ABORIGINAL JUSTICE SYSTEMS IN CANADA

While there is strong evidence to support the statement that the establishment of Aboriginal justice systems is rapidly becoming the key solution of criminal justice reform policy in Canada, it is clear that there is still considerable opposition to this direction, and a number of key issues that need to be resolved.

Following the release of the *Report of the Aboriginal Justice Inquiry of Manitoba*, a *Winnipeg Free Press* editorial described the proposal for Aboriginal courts as "ambitious", suggesting that

> [t]here is little a Manitoba government can do about this part of the report until a native community comes forward with a plausible specific proposal for a local, native-run justice system and seeks recognition of its jurisdiction.[80]

The Globe and Mail supported the Manitoba Government's refusal to establish Aboriginal justice systems citing several 'unanswered questions' including the applicability of the Charter and the jurisdiction of any such systems.[81] The failure to

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78. See, for example, C. Small (ed), *Justice in Indian Country* (Oakland: American Indian Lawyer Training Program Inc., 1980); and American Indian Lawyer Training Prgram Inc., *Indian Self-Determination and the Role of Tribal Courts. A Survey of Tribal Courts* (Oakland: American Indian Lawyer Training Program Inc., 1982).

79. G.B. Gardner (ed), *Tribal Court Management* (Petaluma: National Indian Justice Center, 1987).

80. "A Proposal For Reform", *Winnipeg Free Press*, August 30 1991, 6. Representatives of one such initiative - the St. Theresa Point Indian Government Youth Court System - recently "came forward", not to seek "recognition of its jurisdiction" but in search of funding. This particular program will be reviewed in greater detail in Chapter 8.

81. Editorial, "Native Justice Inquiries", *The Globe and Mail*, February 3 1992, A18; also Editorial, "Aboriginal Canadians and the justice system", *The Globe and Mail*, August 31 1991, D6.

establish Aboriginal justice systems in Manitoba immediately is not the most disappointing aspect of the Manitoba Government's response to the *Report of the Aboriginal Justice Inquiry of Manitoba*. The Inquiry's prescription is couched in fairly general terms, and leaves a considerable amount of detail to be settled by negotiation between the government and interested Aboriginal communities. Similarly, the Law Reform Commission of Canada observed that "some basic issues need to be resolved to implement this recommendation",[82] and "the specific arrangements entailed by this proposal would have to be negotiated on a community-by-community basis."[83]

Fundamental issues such as the jurisdiction of Aboriginal courts, and the applicability of the *Charter of Rights and Freedoms*, are yet to be adequately addressed. Also, by drawing an explicit connection between Aboriginal demands for self-government and the justice strategy of encouraging Aboriginal control over criminal matters, the Aboriginal Justice Inquiry of Manitoba may have given greater legitimacy to the position which calls for the definition of the right to self-government before it is formally recognised. Of the powers which potentially constitute Aboriginal self-government, control over 'law and order' is likely to be one of the more keenly disputed by all levels of non-Aboriginal government. As one commentator has observed, "[t]he notion of scores of Indian bands across the country enacting their own criminal law stirs visions of anarchy in a lot of legal brains."[84] Further, there

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82. *LRCC Report* at 16.

83. *Ibid.*

84. J. Dafoe, "Manitoba's inquiry into aboriginal justice merits vastly more than wariness", *The Globe and Mail*, September 7 1991, D2.

may be legal and constitutional arguments which offer some support for such opposition.[85]

In light of these considerations, the failure of the federal government[86] and provincial governments to give a blanket endorsement to the recommendation for Aboriginal justice systems is not surprising, and indeed, may have some justification. What is more problematic about the Manitoba Government's response to the recommendations of the Aboriginal Justice Inquiry of Manitoba is the seemingly negative attitude which it demonstrates in terms of the government's commitment to criminal justice reform. By failing to even register its support for the principles behind autonomy-based initiatives such as the creation of an Aboriginal Justice Commission or autonomous Aboriginal justice systems, as a possible solution to Aboriginal over-representation in the existing system, the Manitoba Government has rejected a valuable opportunity to confirm a new direction in justice administration. To date it has failed to capitalize on the serious consideration and many hours of consultation which went into the *Report of the Aboriginal Justice Inquiry of Manitoba*.[87] Indeed, one commentator described the government's response to the

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85. This particular issue is discussed in greater detail in Chapter 6 at text corresponding to notes 150-155 *infra*.

86. The federal government's stated position is that it "does not envisage an entirely separate system of justice for aboriginal peoples, although community justice systems, for example as connected to aboriginal self-government, are both possible and desirable": Department of Justice, *Aboriginal People and Justice Administration: A Discussion Paper* (Ottawa: Department of Justice Canada, September 1991) at 20. Justice Minister Kim Campbell has stated on a number of ocassions that she "does not believe in a separate system of aboriginal justice": see "Q & A: Kim Campbell", *Canadian Lawyer*, May 1991, 14 at 15; also "Need for own justice system repeated theme at conference", *The StarPhoenix*, September 7 1991, A14.

87. See F. Russell, "Province keeps tight grip on power despite rhetoric", *Winnipeg Free Press*, February 1 1992, A7.

Inquiry's recommendations as exhibiting "the unfortunate air of foot-dragging which has dogged Manitoba history,"[88] suggesting that the government "could have committed itself more generously to a separate native justice system, and begun establishing tribal courts and a separate native-run administration within the provincial court system."[89]

It would have been unrealistic to expect an immediate adoption of all of the many recommendations for justice reform made across the Prairie region during the last eighteenth months. The experience of countless inquiries and reports during the last twenty years has taught this lesson well. Indeed, it was not until January 1992, more than two years after the release of the *Report of the Royal Commission on the Donald Marshall, Jr., Prosecution*[90] that the Government of Nova Scotia announced that a Micmac-based court would be established as a pilot project on the Indian Brook Reserve.[91] This initiative was taken in response to one of the recommendations of the report which proposed that "a community-controlled Native Criminal Court be

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88. R. Sheppard, "Native justice: let's take the plunge", *The Globe and Mail*, January 30 1992, A17. This criticism was levelled at the Filmon government by the Liberal Party and the New Democratic Party shortly after the release of the report: D. Campbell, "Opposition charges Tories dragging feet on aboriginal justice", *Winnipeg Free Press*, September 1 1991, 2.

89. *Ibid.*

90. Royal Commission on the Donald Marshall, Jr., Prosecution, *Report* (Halifax: Province of Nova Scotia, 1989). For a discussion of the Marshall Royal Commission, see H.A. Kaiser, "The Aftermath of the Marshall Commission: A Preliminary Opinion" (1990) 13 *Dalhousie Law Journal* 364; B.H. Wildsmith, "Getting at Racism: The Marshall Inquiry" (1991) 55 *Saskatchewan Law Review* 97; and the excellent articles in J. Mannette (ed), *Elusive Justice: Beyond the Marshall Inquiry* (Halifax: Fernwood Publishing, 1992).

91. "N.S. unveils first court for reserve", Winnipeg Free Press, January 23 1992, A13. The project is described in more detail in Chapter 8.

established in Nova Scotia, initially as a five-year pilot project."[92]

As this example illustrates, innovative projects in the area of justice administration do not gain government support quickly, or without careful deliberation. But the Manitoba Government's response to the *Report of the Aboriginal Justice Inquiry* has been widely considered by critics to be rather more cautious and circumspect than the current Aboriginal justice context warrants.

Ultimately, the autonomy-based justice reform direction advanced by the Aboriginal Justice Inquiry of Manitoba and the Law Reform Commission of Canada (and in a much more limited respect, by reports from Saskatchewan and Alberta) may bring the results which it is intended to achieve. However, advocates of this new direction will first have to confront the defensiveness of governments when faced with the possibility of accepting a reduced level of control over institutions of social control as fundamental as the criminal justice system.

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92. Royal Commission on the Donald Marshall, Jr., Prosecution, Digest of Findings and Recommendations (Halifax: Province of Nova Scotia, 1989) at 28. The Commissioners recommended that the court incorporate the following elements:

> (a) a Native Justice of the Peace appointed under Section 107 of the *Indian Act* with jurisdiction to hear cases involving summary conviction offences committed on a reserve;
> (b) diversion and mediation services to encourage resolution of disputes without resort to the criminal courts;
> (c) community work projects on the reserve to provide alternatives to fines and imprisonment;
> (d) aftercare services on the reserve;
> (e) community input in sentencing, where appropriate; and
> (f) court worker services.

Several justice projects including a community court were also recommended by Carol La Prairie in a report prepared for the Nova Scotia Attorney General: C. La Prairie, *If Tribal Courts Are the Solution, What Is the Problem?* (Consultation document prepared for the Department of the Attorney General, Province of Nova Scotia, 1990) at 60-71.

PART B

INTRODUCTION

In the context of a 1981 comparative study of native justice in Australia, Canada, and the United States of America, Keon-Cohen observed that "... there remains a deeply ingrained reluctance in all three countries to cut the Gordian knot and allow separate, parallel native justice systems to develop.[1] More than a decade later, if the recommendations of the Aboriginal Justice Inquiry of Manitoba and the Law Reform Commission of Canada are any indication, this situation may be about to change, at least in Canada.

These two reports are clearly a major development in the ongoing Aboriginal struggle for autonomy in relation to the administration of justice and the maintenance of 'law and order' in Aboriginal communities. In attempting to articulate a justice framework which is consistent with Aboriginal aspirations for meaningful self-government they have adopted the position that the creation of Aboriginal justice systems is a valid and justifiable direction. While there are undoubtedly strong grounds for supporting this direction, it also raises a number of important questions that will need to be addressed before Aboriginal justice systems become a reality in Aboriginal communities throughout Canada.

One such issue is the desirability of adopting the United States tribal court model. As the Aboriginal Justice Inquiry of Manitoba observed, "[t]he Indian tribal

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1. B.A. Keon-Cohen, "Native Justice in Australia, Canada, and the U.S.A.: A Comparative Analysis" (1982) 5(2 & 3) *Canadian Legal Aid Bulletin* 187 at 189.

court systems in the United States have been, to a large extent, the inspiration for Aboriginal people in Canada."[2] While the different historical experiences of the indigenous peoples of Canada and the United States, particularly in terms of the themes in government policy,[3] suggests that identical tribal justice structures may not be appropriate or desirable given the more extensive level of autonomy to which Canada's Aboriginal people currently aspire, there is clearly something to be learned from the United States experience.[4] Indeed, the Aboriginal Justice Inquiry of Manitoba took the position that:

> It is clear that the existence of fully functioning tribal court systems on a variety of Indian reservations in the United States, many of them similar in size and socio-economic status to Indian reserves in Manitoba, and the benefits which those communities derive from them, are strong evidence that separate Aboriginal justice systems are possible and practical.[5]

The second half of this thesis is an examination of some of the key issues that arise for consideration in light of the development of growing support for a major shift in the pattern of Aboriginal justice reform to strategies based on Aboriginal

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2. Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba. Volume 1: The Justice System and Aboriginal People* (Winnipeg: Province of Manitoba, 1991) (hereinafter "*AJI Report Vol 1*") at 268.

3. For a discussion of this see R.W. Johnson, "Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians" (1991) 66 *Washington Law Review* 643; M.D. Mason, "Canadian and United States Approaches to Indian Sovereignty" (1983) 21 *Osgoode Hall Law Journal* 422; and E.M. Morgan, "Self-Government and the Constitution: A Comparative Look at Native Canadians and American Indians" (1984) 12 *American Indian Law Review* 39.

4. See, for example, B.W. Morse, *Indian Tribal Courts in the United States: A Model for Canada?* (Saskatoon: Native Law Centre, University of Saskatchewan, 1980); R.H. Hemmingson, "Jurisdiction of Future Tribal Courts in Canada: Learning From the American Experience [1988] 3 *Canadian Native Law Reporter* 1; and J. Rudin & D. Russell, *Native Alternative Dispute Resolution Systems: The Canadian Future in Light of the American Past* (Toronto: Ontario Native Council on Justice, 1991).

5. *AJI Report Vol 1* at 269.

autonomy. This development must be considered in light of the current political context in Canada, and in particular, recent progress towards realization of the goals of the Aboriginal struggle for recognition of the right to self-government.

Chapter 6 considers this legal and political environment, and examines both the role which the self-government agenda has played in the emergence of support for autonomy-based solutions, and the impact which it is likely to have on the formation of Aboriginal justice structures in the near future. The issues raised by the current context of the struggle for Aboriginal self-government are several, but the guiding theme can be summarized in the following question: to what extent is it justifiable to place limits on the exercise of Aboriginal self-governing powers, particularly in relation to the operation of autonomous justice structures? Further, would such limitations seriously compromise the workability of Aboriginal justice systems, in terms of constituting a practical solution to the problem of Aboriginal contact with the dominant criminal justice system as this is currently conceived? While this question is, in essence, a question about the parameters of Aboriginal self-determination in Canada, it raises two issues that are particularly relevant in the context of Aboriginal autonomy over the administration of justice.

Chapter 7 addresses a topic which has emerged as a potentially crucial influence on the modalities of Aboriginal autonomy in Canada, both in relation to institutions of Aboriginal government generally, and Aboriginal justice systems specifically; namely, the applicability and implications of the *Charter of Rights and*

Freedoms.[6] There are several dimensions to this issue. Important questions arise regarding the compatibility with the notion of genuine Aboriginal autonomy, of compelling Aboriginal governments to protect individual due process rights. However, the Charter also expressly recognises the continuing existence and supremacy of Aboriginal rights over certain Charter protections,[7] and otherwise makes possible the legitimate derogation of such protections.[8] The extent to which these constitutional principles are likely to be extended to the domain of Aboriginal justice systems will be considered along with an analysis of the implications of two scenarios: the possibility of exempting Aboriginal governments from the obligations imposed by the Charter and the possibility of circumscribing the exercise of Aboriginal autonomy in the justice field by requiring that all existing Charter rights be respected.

Chapter 8 examines the difficulty of formulating a jurisdictional framework for Aboriginal justice systems that is administratively practical, politically feasible, and still consistent with the principles upon which this new direction in Aboriginal justice policy is based. Of particular concern is the question of the adequacy of territorial models of criminal justice jurisdiction, which though conceptually neat, may effectively exclude from the scope of future Aboriginal justice systems a large number of non-reserve Aboriginal persons in Canada. This problem will be addressed by considering the potential for alternatives forms of Aboriginal autonomy, including

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6. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the Canada Act 1982 (U.K.), 1982, c.11.

7. *Id*, section 25.

8. *Id*, section 33.

structural and philosophical changes to the existing institutions of criminal justice administration such as the incorporation of Aboriginal dispute resolution mechanisms. The extent to which proposed jurisdictional frameworks can achieve the fundamental objective of facilitating the re-definition by Aboriginal communities of notions of 'criminality' and social order, will be considered.

One of the major barriers to effective reform in this area appears to be the difficulty of bridging the gap between a broad justice policy based on Aboriginal autonomy and the creation of workable justice mechanisms in Aboriginal communities. This difficulty is addressed by considering three recent initiatives in the Prairie region and, by way of comparison, two projects in Australia, which to a greater or lesser extent, provide practical illustrations of the new direction in Aboriginal justice reform. These initiatives will be examined with a view to determining the extent to which they can be seen as capable of facilitating the evolution of a network of autonomous Aboriginal justice structures. It will be argued that this approach would be preferable to the imposition of a uniform model of Aboriginal justice systems both in practical terms, and in terms of ensuring consistency with the self-government negotiation process.

CHAPTER 6

ABORIGINAL SELF-GOVERNMENT : A CONTEXT FOR JUSTICE AUTONOMY

I. INTRODUCTION

The most significant, and possibly decisive, influence on the future direction of the topic of Aboriginal people and criminal justice law reform is likely to be the emergence of Aboriginal self-government as a major issue on the Canadian political agenda. Indeed, "[o]ver the past decade, the concept of aboriginal self-government has become the focus of constitutional discussions on aboriginal issues."[1] As Angus has observed:

> While self-government could take a multitude of forms - as many as there are nations or communities - the phrase has emerged as the single most effective way for aboriginal people to communicate their vision of a hopeful future within Confederation.[2]

The success of Canada's Aboriginal people in bringing about this profile for their aspirations[3] is part of the broader embrace by Aboriginal political organizations of the language of Aboriginal rights. This strategy has been a central component of the

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1. J. Wherrett & D. Brown, *Self-Government for Aboriginal Peoples Living in Urban Areas. A Discussion Paper Prepared for the Native Council of Canada* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1992) at 1.

2. M. Angus, ... *"And the Last Shall Be First" Native Policy in an Era of Cutbacks* (Toronto: NC Press Limited, 1991) at 31-32.

3. See *id* at 35, where Angus states:

> If the success of a lobbying effort is measured by the extent to which an issue gains acceptance on the national political agenda, the early 1980s may be looked upon as the heyday of Native rights activism in Canada in the 20th century. Not only did Native people secure a place for themselves in the new Canadian Constitution, they also succeeded in getting the First Ministers of Canada to meet with them for eight days (over four years) to discuss the details of their rights - on live, nation-wide television. For a group that constitutes three per cent of the Canadian population, this represents no small achievement.

ability of Aboriginal people to access the dominant channels of legal discourse.[4] A senior representative of the Department of Justice observed recently:

> It is apparent now that the issue is not whether there will be self-government for Canada's aboriginal peoples. With over 200 of Canada's 597 Indian bands engaged in the community self-government arrangements negotiations process with arrangements in place for the Sechelt, Cree and Naskapi communities, it is evident there will be self-government. The issue rather is what form or probably more accurately, forms, self-government will take, and whether it will be entrenched in some way in the Canadian Constitution, and this is in part what brings the issue to the fore at this time.[5]

It has become apparent over the course of the past year that the prospects for the establishment of Aboriginal justice systems along the lines recommended by the Aboriginal Justice Inquiry of Manitoba depend in large measure on the outcome of the 'Canada round' of the constitutional reform process, and specifically, the terms in which Aboriginal self-government is recognised and ultimately implemented. This chapter provides a context for exploration of the various dimensions of this relationship, and advances the argument that a meaningful and long-term shift to autonomy-based justice administration in Aboriginal communities is contingent on the prior establishment of a solid framework for the exercise of the Aboriginal right of self-government. The alternative may be a regime of Aboriginal courts based on the United States tribal court model, which will be limited in scope to an extent which will seriously undermine their capacity to address the Aboriginal justice problem as it is currently understood.

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4. For a critical examination of the implications of this embrace see M.E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" in R.F. Devlin (ed), *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery Publications, 1991) 503 at 506-517.

5. M. Dawson, Department of Justice, "Bridging the Constitutional Gap: Aboriginal Sovereignty/Canadian Sovereignty", paper presented at the Canadian Bar Association *Bridging the Constitutional Gap Conference* (Winnipeg, April 5-6 1991) at 1.

Part II of this chapter provides an account of the lead-up to the current Aboriginal self-government agenda, with emphasis on the most significant developments in this area during the 1980s. The rationale for this background analysis is that the events discussed, including the unsuccessful First Ministers' Conference process and the failed Meech Lake Accord, played a crucial role in shaping the existing constitutional reform environment within which Aboriginal peoples are pursuing their autonomy aspirations.

Part III addresses various aspects of the most recent attempt at constitutional reform, including an examination of the extent to the recognition of Aboriginal self-government originally proposed has developed, through the Multilateral Constitutional Conference (MCC) negotiation process, into a formulation which meets the demands of the major Aboriginal representative organisations.

Part IV considers the important and difficult task of identifying the content of and context for the Aboriginal right of self-government, while part V focuses more specifically on the nature of the relationship between self-government and the shift towards autonomy-based Aboriginal justice reform. It concludes that the establishment of genuinely autonomous Aboriginal justice mechanisms is contingent on the prior constitutional recognition of the Aboriginal right of self-government, and an entrenched negotiation process that is capable of achieving a meaningful redistribution of a range of powers including jurisdiction over matters currently dealt with in terms of criminal law and justice administration.

II. BACKGROUND: 1982-1990

1. Section 35 of the *Constitution Act, 1982.*

'Aboriginal rights' refers generally to a whole range of entitlements, and indeed derive from a variety of sources, including international law,[6] the treaties,[7] the Royal Proclamation of 1763,[8] and natural law.[9] Since 1982 however, the focus of Aboriginal rights-based aspirations in Canada has been on the achievement of formal recognition of the right of Aboriginal self-government in the Canadian

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6. For an introduction to the international law sources of Aboriginal rights, see M. Davies, "Aspects of Aboriginal Rights in International Law" in B.W. Morse (ed), *Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada* (Ottawa: Carleton University Press, Rev. ed., 1989); E. Anderson, "The Indigenous People of Saskatchewan: Their Rights Under International Law" (1981) 7(1) *American Indian Journal* 4, (1981) 7(2) *American Indian Journal* 2; and W.P. Stewart, *The Basis For Claims of Sovereignty by Aboriginal North Americans Lies in International and Constitutional Law, Not the Treaties* (M.A. Thesis, University of Minnesota, 1989). Recently, indigenous peoples have begun to use international forums as a mechanism for achieving recognition of their right to self-determination. See R. Thompson (ed), *The Rights of Indigenous People in International Law: Selected Essays on Self-Determination* (Saskatoon: Native Law Centre, University of Saskatchewan, 1987); G. Nettheim, "International Law and Indigenous Political Rights: Yesterday, Today and Tommorrow" - paper presented at the *Indigenous Rights in the Pacific and North America Conference* (London, 14-16 May 1991); and the discussion in Introduction, at text corresponding to notes 17-25 *supra*. Barsh has observed that one of the motivations for the Canadian government's decision to respond in the 1980s to pressure from Aboriginal groups and include Aboriginal rights in the constitutional reform agenda, was a desire to give effect to Canada's international law obligations: R.L. Barsh, "Indigenous Peoples and the Right to Self-Determination in International Law" in B.Hocking (ed), *International Law and Aboriginal Human Rights* (Sydney: The Law Book Company, 1988) 68 at 71.

7. See D. Sprague, *Canada's Treaties With Aboriginal People. Working Paper No. 3* (Winnipeg: Canadian Legal History Project, University of Manitoba, 1991).

8. R.S.C. 1985, App. II, No. 1.

9. For an articulation of this position, see D.J. Gormley, "Aboriginal Rights as Natural Rights" (1984) 4 *The Canadian Journal of Native Studies* 29. Jhappan has examined the reluctance of Canadian courts to apply principles of natural justice in relation to Aboriginal rights-based litigation: C.R. Jhappan, "Natural Rights vs. Legal Positivism: Indians, the Courts, and the New Discourse of Aboriginal Rights in Canada" (1991) 6 *British Journal of Canadian Studies* 60.

constitution,[10] building primarily on the Aboriginal rights provisions contained in section 35 of the *Constitution Act, 1982*.[11]

Section 35 of the *Constitution Act, 1982* provides:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

As Sanders has noted, prior to the enactment of these provisions "aboriginal rights as such had never been accorded a clear legal status in Canadian law."[12] The key impact of section 35 was to shift the emphasis from the question of the legal existence of Aboriginal rights to the issue of whether they had been terminated.[13]

Since 1982 the Supreme Court of Canada has issued a series of major decisions dealing with the contemporary status of Aboriginal rights.[14] Yet as Asch

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10. See generally, M. Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984); B. Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada 1982-1984* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1985); and M. Boldt & J. Long (ed), *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985).

11. For an overview of the provisions of the constitution which make specific reference to the rights of the Aboriginal peoples of Canada, see generally W.F. Pentney, *The Aboriginal Rights Provisions in the Constitution Act, 1982* (Saskatoon: Native Law Centre, University of Saskatchewan, 1987); and K. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada" in W. Tarnapolsky and G. Beaudoin (eds), *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982).

12. D. Sanders, "Pre-Existing Rights: The Aboriginal Peoples of Canada" in G.A. Beaudoin and E. Ratushny (eds), *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 2nd ed., 1989) 707 at 731; also D. Sanders, "Prior Claims: Aboriginal in the Constitution of Canada" in M. Beck and I. Bernier (eds), *Canada and the New Constitution: The Unfinished Agenda. Volume 1* (Montreal: Institute for Research in Public Policy, 1983) 227 at 241.

13. *Ibid.*

14. For an excellent examination of the history of Aboriginal rights in Canada and the Supreme Court's role in shaping their current status, see B. Slattery, "Understanding Aboriginal Rights" (1987) 66 *Canadian Bar Review* 727.

and Macklem have observed, "[n]one of these developments, however, matches the importance of the Court's judgement in *R v. Sparrow*..."[15] *Sparrow*[16] was the first occasion on which the Supreme Court of Canada directly considered the meaning of section 35(1) of the *Constitutional Act, 1982*. A detailed examination of the decision is beyond the scope of this chapter.[17] However, one aspect of the decision which has attracted considerable scrutiny is the extent to which the interpretation of section 35 which it adopts allows for the inclusion of a right to self-government.

The specific issue under consideration by the court was a right to fish asserted by the Musqueam Nation, and the question of whether this was an Aboriginal right which overrode federal regulation regarding permits and drift-net use.[18] According to the Court:

> The issue is whether Parliament's power to regulate fishing is now limited by section 35(1) of the *Constitution Act, 1982*, and, more specifically, whether the net length restriction in the licence is inconsistent with that provision.[19]

The Supreme Court of Canada found for the Musqueam Nation in the particular case on the basis of a reaffirmation of the Government's "responsibility to

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15. M. Asch & P. Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R v. Sparrow*" (1991) 29 *Alberta Law Review* 498 at 499.

16. (1990), 70 D.L.R.(4th) 385 (S.C.C.).

17. For an introduction to the literature on *Sparrow*, see Asch & Macklem, note 15 *supra*; W.I.C. Binnie, "The *Sparrow* Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 *Queen's Law Journal* 217; T. Isaac, "Understanding the *Sparrow* Decision: Just the Beginning" (1990) 15 *Queen's Law Journal* 377; and C. Bell, "Reconciling Powers and Duties: A Comment on *Horseman*, *Sioui* and *Sparrow*" (1991) 2 *Constitutional Forum* 1.

18. The facts of the case are detailed at (1990), 70 D.L.R. (4th) 385 at 389-390.

19. *Id* at 389.

act in a fiduciary capacity with respect to Aboriginal people,"[20] and a two-part analysis of Aboriginal rights claims under section 35 which considers first, whether there has been a breach of an *existing* Aboriginal right, and second, whether that breach was legally justified.[21] While the decision has been widely applauded in certain respects, serious doubts have been raised about the *Sparrow* doctrine's capacity to support a constitutional right to self-government. For example, Binnie has concluded that the decision "will undermine seriously achievement of the broader section 35 vision asserted by Native organizations - namely, achievement of self-government and an economic base."[22] Asch and Macklem come to a similar conclusion, arguing that because of its reliance on a *contingent* theory of aboriginal rights,[23] the Supreme Court of Canada "severely curtailed the possibility that s.35(1) includes an aboriginal right to sovereignty and rendered fragile s.35(1)'s embrace of a constitutional right to self-government."[24]

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20. *Id* at 408.

21. See I. Barkin, "Aboriginal Rights: A Shell Without the Filling" (1990) 15 *Queen's Law Journal* 307 at 317. The main propositions advanced by Dickson C.J. and LaForest J. are summarised in M.B. Nepon, "The Dickson Court and Native Law" (1991) 20 *Manitoba Law Journal* 412 at 418.

22. Binnie, note 17 *supra* at 217.

23. The arguments in support of an inherent theory of Aboriginal rights are addressed by Asch & Macklem, note 15 *supra* at 514-516.

24. Id at 516. Isaac argues that in relation to s.35(4) (which defines "treaty rights" so as to include rights under land claims agreements) the *Sparrow* decision effectively constitutionalizes Aboriginal self-government where such an arrangement is "contingent upon a land claims agreement", although he concedes that "this form of self-government is not the inherent right so often favoured and put forward by aboriginal groups.": note 17 *supra* at 378. Isaac has criticised the analysis advanced by Asch & Macklem, suggesting that "it lacks a sense of the political and legal reality of Canada": T. Isaac, "Discarding the Rose-Coloured Glasses: A Commentary on Asch and Macklem" (1992) 30 *Alberta Law Review* 708 at 712. He concludes that "[a]bsolute sovereignty in the forms of an inherent aboriginal right of self-government or aboriginal sovereignty is politically unfeasible and legally unsupported": *ibid.* See also T. Isaac, "The storm Over

2. The Penner Report

In 1983 the Parliamentary Standing Committee on Indian Affairs and Northern Development completed a report titled, *Indian Self-Government in Canada.*[25] Although, by virtue of a limited mandate, the Committee only considered the question of self-government for Indian reserve communities,[26] its recommendations have been described as something of a watershed in Aboriginal policy in Canada.[27] The Penner Report recommended that the Government of Canada "establish a new relationship with Indian First Nations and that an essential element of this relationship be recognition of Indian self-government."[28] In order to achieve this recognition, the Committee proposed that a three part programme be implemented:

(a) that the administration of all programs and the delivery of all services be transferred from the Department of Indian Affairs and Northern Development to Indian First Nation governments prepared to accept this responsibility;

Aboriginal Self-Government: Section 35 of the *Constitution Act, 1982* and the Redefinition of the Inherent Right of Aboriginal Self-Government" [1992] 2 *Canadian Native Law Reporter* 6.

25. House of Commons, Special Committee on Indian Self-Government (Chair: K. Penner), *Report of the Special Committee on Indian Self-Government in Canada* (Ottawa: Supply and Services Canada, 1983) (hereinafter "*Penner Report*"). The Committee's recommendations are summarised in the Special Parliamentary Committee on Indian Self-Government, "Proposals for Indian Self-Government" in J.R. Ponting (ed), *Arduous Journey: Canadian Indians and Recolonization* (Toronto: McClelland and Stewart, 1986).

26. The Committee considered that the question of self-government for the Métis, the Inuit, and non-status Indians was outside of its limited mandate.

27. B.W. Morse, *Constitutionalising Rights: Implications For Canadians, Australians and Aboriginal Peoples* (The Macquarie Canadian Lecture, Advisory Committee on Canadian Studies, Macquarie University, 1987).

28. *Penner Report* at 141.

(b) that legislation be enacted, after consultation between the government and individual Indian First Nations, acknowledging the jurisdiction of each Indian First Nations government. This legislation would have the capacity to permit Indian First Nations to assume legislative and executive power over virtually all areas of government activity;[29] and

(c) that the Canadian Constitution be amended so as to expressly recognise and entrench the right of Indian peoples to self-government.

Not surprisingly, the Committee's recommendations were immediately acceptable to neither the federal government,[30] nor the majority of provincial governments. In June 1984 the federal government introduced a draft "act relating to self-government for Indian Nations".[31] However, the bill ignored many of the Committee's recommendations, and eventually lapsed in the House.[32] Yet, the Penner Report clearly added weight to the position of the Aboriginal organizations involved in the First Ministers' Conferences,[33] and helped to ensure that self-government would be a strong focus of the various issues to be addressed during the

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29. The fields of activity expressly identified by the Committee included, "such areas as social and cultural development, including education and family relations, land and resource use, revenue-raising, economic and commercial development, and justice and law enforcement...": *id* at 144.

30. *Response of the Government to the Report of the Special Committee on Indian Self-Government* (Ottawa: Department of Indian Affairs and Northern Development, 1984).

31. Bill C-52, An Act relating to self-government for Indian nations, First reading, June 29 1984.

32. See P. Tennant, "Aboriginal Rights and the Penner Report on Indian Self-Government" in M. Boldt & J.A. Long (eds), *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 321 at 330-331.

33. See Assembly of First Nations, *Handbook of Indian Self-Government in Canada: Based on a Report of the Special Committee of the House of Commons* (Ottawa: Assembly of First Nations, 1983).

process.

3. The First Ministers Conference Process

Section 37 of the *Constitution Act, 1982*[34] established a First Ministers Conference (FMC) process for the discussion of further constitutional reforms relating to Aboriginal people including a more precise identification and definition of "aboriginal and treaty rights." At the March 1983 First Ministers' Conference section 37 was amended so as to extend the process until 1987 and to provide for at least two further conferences.[35] Following the release of the Penner Report in October 1983 the issue of Aboriginal self-government emerged as the question which would dominate the agenda throughout the remainder of the process.[36] However, following meetings in 1984 and 1985,[37] the final First Ministers Conference on Aboriginal

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34. Section 37 stated:

> (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.
>
> (2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

35. *Constitutional Act, 1982*, Part IV.1, s.37.(1).

36. K. Brock, "The Politics of Aboriginal Self-Government: A Canadian Paradox" (1991) 34 *Canadian Public Administration* 272 at 274.

37. An analysis of each of the four FMCs is not possible here. For a detailed summary and assessment of the first three conferences, see B. Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: The Institute for Research on Public Policy, 1986); also N. Zlotkin, "The 1983 and 1984 Constitutional Conferences: Only the Beginning" (1984) 3 *Canadian Native Law Reporter* 3; and D.C. Hawkes, *Negotiating Aboriginal Self-Government. Developments Surrounding the 1985 First Ministers' Conference. Background Paper Number 7* (Kingston: Institute of Intergovernmental Relation, Queen's University, 1985).

constitutional matters convened in Ottawa in March 1987, but failed to produce agreement on an acceptable constitutional amendment.[38]

While ultimately unsuccessful in terms of the objective of achieving a constitutional amendment recognising the right of Aboriginal self-government, the process played a significant role in creating the constitutional reform environment in which Aboriginal organizations now appear closer to their goal of political autonomy. Brock has argued that Canada's experience with the development of Aboriginal self-government between 1982 and 1987 is best described as "paradoxical".[39]

> In this period, the concept of aboriginal self-government matured and while the issue was not resolved in the constitutional forum, it developed significantly in other policy arenas. However, constitutional failure to entrench aboriginal self-government contributed to its success in other areas and possibly to its future development as a constitutional issue.[40]

To the extent that the process did fail, it was clearly significant that this failure was not perceived as the responsibility of the Aboriginal organizations involved.[41]

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38. The final federal draft for an Amendment to the Constitution of Canada, proposed that the following provisions be added to section 35 of the *Constitution Act, 1982*:

> 35.01.(1) The aboriginal peoples of Canada have the right to self-government within the context of the Canadian federation
>
> (2) The jurisdiction, legislative powers, proprietary rights and other powers, rights and privileges of bodies or institution exercising the right to self-government referred to in subsection (1) shall be determined and defined through agreements described in section 35.03.

For a discussion of the failure of the 1987 conference and the FMC process generally, see, "Accomplishments and Failures of the Aboriginal Constitutional Reform Process" in *Aboriginal Self-Government and Constitutional Reform: Setbacks, Opportunities, and Arctic Experiences. Proceedings of a National Conference held in Ottawa, 9-10 June 1987* (Ottawa: Canadian Arctic Resources Committee, 1988) at 11-32.

39. Brock, note 36 *supra* at 272.

40. *Id* at 273. Barkin has argued that "[t]he failure of the section 37 constitutional conferences to give content to section 35 has forced the courts to do so instead": note 21 *supra* at 321.

41. In contrast, see the discussion of the collapse of the Meech Lake accord at text corresponding to notes 60-69 *infra*.

As Andrew Bear Robe has concluded:

> The four First Ministers' Conferences dealing with our aboriginal and treaty rights held during the 1980s, were failures. Indian First Nations did not fail in the negotiations. We stated our positions firmly and clearly. The main obstacles were the ten provincial Premiers who never took the FMC process seriously. They feared that their own limited sovereignty and jurisdiction would be jeopardized if the aboriginal right to self-government ever became entrenched as constitutional law.[42]

The problem of "insufficient political will"[43] at the provincial government level,[44] was compounded, and partly based on, a more critical lack of agreement.

One of the most fundamental problems which could not be resolved during the FMC process was the task of identifying the *source* of any proposed Aboriginal power such as the enforcement of a right of self-government. In 1989 Hawkes observed that few Canadians oppose the aim of encouraging self-sufficiency and greater autonomy for Aboriginal people, but

> What is more contentious, however, is the source of these powers. Do they flow from inherent and unextinguished sovereignty, from existing treaty and aboriginal rights, or from federal and provincial governments? It was on this very question that the constitutional reform process on aboriginal rights foundered.[45]

To a significant extent, during the most recent constitutional round, the issue of Aboriginal self-government has developed beyond this particular hurdle. The

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42. A. Bear Robe, "First Nations and Aboriginal Rights" (1991) 2 *Constitutional Forum* 46 at 48.

43. R. Penner, "An Appropriate Process, An Appropriate Content", paper presented at the *Bridging the Constitutional Gap*, Canadian Bar Association (Winnipeg, April 5 & 6 1991) at 4.

44. Penner refers specifically to "insufficient organised political support for aboriginal claims in the four hold-out provinces (British Columbia, Alberta, Saskatchewan, and Newfoundland) or ... in the nation as a whole": *ibid.*

45. D.C. Hawkes, "Conclusion" in D.C. Hawkes (ed), *Aboriginal Peoples and Government Responsibility. Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1989) 359 at 365; see also D.C. Hawkes, *Aboriginal People and Constitutional Reform: What Have We Learned?* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1989).

concept of self-government as an *inherent* right, though initially controversial, has won wide acceptance as the most appropriate formulation of the autonomy entitlements of the Aboriginal people of Canada.[46] But throughout the 1980s the question of source was highly problematic. It is telling that two of the most significant examples of 'progress' in relation to self-government negotiations came in the form of provincial and federal legislation which established specific self-government arrangements for First Nations in British Columbia and Québec. However, for the majority of Aboriginal communities, statute-based self-government has been considered as simply too fragile a foundation to support their autonomy aspirations.

4. Self-Government Agreements

In 1984 the *Cree-Naskapi (of Québec) Act*[47] was enacted by the Federal Parliament. Two years later, the *Sechelt Indian Band Self-Government Act*[48] was passed. Both statutes have the general effect of granting to the identified bands powers broadly equivalent to those of municipal governments. Both have been characterised as "non-constitutional self-government arrangements",[49] although there may be

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46. See discussion in part III *infra*.

47. S.C. 1984, c.46.

48. S.C. 1986, c.27.

49. See M. Dawson, note 5 *supra* at 8. Several other recent initiatives can be placed within the category of non-constitutional Aboriginal government arrangments, although they do not involve a formal delegation of legislative authority. These include a new election process to replace the *Indian Act* system of government on the Roseau River Reserve in Manitoba (see R. Teichroeb, "Reserves proves model of democracy", *Winnipeg Free Press*, April 10 1992, B21), and a plan by the Lheit-Lit'en Nation of northeastern British Columbia to replace the existing *Indian Act* system with an elders council which will take over the functions of government on July 1 1993. In contrast to the limited powers accepted by the Sechelt, the new Lheit

grounds for arguing that the self-governing powers of the Cree and the Naskapi have now been constitutionalized by virtue of the status of the *James Bay and Northern Québec Agreement*[50] as a land claims agreement. The basis of this interpretation is section 35(3) of the *Constitution Act, 1982* which confirms that the "treaty rights" which are recognized and affirmed" by section 35(1) includes "rights that now exist by way of land claims agreements or may be so acquired."[51]

According to Theresa Jeffries, a member of the Sechelt band, "[i]n accordance with this new agreement, the Sechelt band has achieved a high degree of political and administrative autonomy. Decisions can be made without having to await a yea or nay from Ottawa."[52] However, as Taylor and Paget have observed, "while the band has an unprecedented degree of local autonomy it most emphatically is not fully

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Lit'en government plans to assume a range of powers broadly equivalent to those of a province without the support of provincial or federal enabling legislation. Significantly, the initiative includes a proposal for the establishment of a separate justice system including a "native healing and restoration centre": D. Wilson, "Natives to create new society. B.C. Band will become self-government laboratory", *The Globe and Mail*, March 13 1992, A1, A6. On the community-based self-government negotiations initiated in 1986 between the Department of Indian Affairs and Northern Development and the Swampy Cree Tribal Council in Manitoba, see: Chief Esau Turner, Swampy Cree Tribal Council, *Presentation No. 415 to the Public Inquiry into the Administration of Justice and Aboriginal People* - Transcript of a Community Hearing (The Pas, 17 January 1989) 3749-3770. Several Aboriginal autonomy-based initiatives dealing specifically with the administration of justice will be examined in Chapter 8.

50. Canada, *James Bay and Northern Québec Agreement* (Québec: Official du Québec, 1976).

51. For an elaboration of this argument see T. Isaac, "The *Constitution Act, 1982* and the Constitutionalization of Aboriginal Self-Government in Canada: *Cree-Naskapi (of Québec) Act*" [1991] 1 *Canadian Native Law Reporter* 1; also see discussion at text corresponding to notes 6-24 *supra*.

52. T.M. Jeffries, "Sechelt Women and Self-Government" in D. Jensen & C. Brooks (eds), *In Celebration of Our Survival: The First Nations of British Columbia* (Vancouver: University of British Columbia Press, 1991) 81 at 85.

autonomous."[53]

Section 14 of the *Sechelt Indian Band Self-Government Act* outlines the range of matters over which the band assumes jurisdiction. These include zoning and land use planning, education, local taxation, health services, and social and welfare services. Criminal justice jurisdiction is limited to the power to impose fines or imprisonment for summary conviction offences under band laws.[54] Essentially, the Act transfers to the Sechelt band, those powers previously exercised by the federal government under the *Indian Act* and transfers reserve lands to the band "for the use and benefit of the band and its members".[55]

In general terms, the *Cree-Naskapi Act* achieves the same purpose, replacing the *Indian Act* for the incorporated Cree and Naskapi bands.[56] Under the terms of the Act, the Cree and Naskapi bands exercise local government powers in relation to matters such as land and resource use and zoning, local taxation, and pollution control

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53. J.P. Taylor & G. Paget, "Federal/Provincial Responsibility and the Sechelt" in D.C. Hawkes (ed), *Aboriginal Peoples and Government Responsibility. Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1989) 297 at 313.

54. Section 14(1)(p). This power is stated to be subject to subsection (2) which states:

> A law made in respect of the class of matters set out in paragraph (1)(p) may specify a maximum fine or a maximum term of imprisonment or both, but the maximum fine may not exceed two thousand dollars and the maximum term of imprisonment may not exceed six months.

55. Section 25. See Taylor & Paget, note 23 *supra* at 313; also R. Bell, *The Sechelt Indian Band Self-Government Act: A Step Outside the Indian Act* (Saskatoon: College of Law, University of Saskatchewan, 1987).

56. For a detailed summary and analysis of this Act and the larger agreement of which it forms a part, see E.J. Peters, "Federal and Provincial Responsibilities for the Cree, Naskapi and Inuit Under the James Bay and Northern Québec, and Northeastern Québec Agreements" in D.C. Hawkes (ed), *Aboriginal Peoples and Government Responsibility. Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1989) 173.

and environmental protection.[57]

Isaac has concluded that the Act "was, for all intents and purposes, as close to self-government or self-determination that any piece of legislation could achieve within the constitutional framework of the country."[58] Elsewhere, he suggests that the Act "offers the Cree and Naskapi a unique and autonomous level of government within Canada and is able to satisfy the native aspirations for power and control."[59]

Without questioning the legitimacy or value of either self-government arrangement, Isaac's conclusions reveal the limitation of delegated statute-based forms of limited Aboriginal self-government in terms of accommodating the full range of autonomy aspirations, and, in particular, the justice demands of many Aboriginal communities. Aboriginal justice systems of the type recently proposed in Canada are fundamentally inconceivable without the prior recognition of Aboriginal self-government on a scale far more substantial than that which has been delegated to Aboriginal communities in Sechelt, British Columbia, and in the James Bay region of Québec. The importance of constitutional recognition of the right of Aboriginal self-government as a precondition for the realization of autonomous community-based Aboriginal justice projects will be considered in parts III and IV below.

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57. *The Cree-Naskapi (of Québec) Act - Information Sheet No. 11* (Ottawa: Communication Operations Directorate, Indian and Northern Affairs Canada, March 1988).

58. Isaac, note 51 *supra* at 2.

59. T. Isaac, *An Analysis of the Native Self-Government in Canada: The Cree-Naskapi (of Québec) Act* (M.A. Thesis, Dalhousie University, 1989), cited *ibid.*

5. The Collapse of the Meech Lake Accord

Tony Hall has observed that "[t]he disappointment felt by Native people at the end of March 1987 [when the FMC process ended] turned to outright anger one month later when they learned of the quick and sweeping agreement reached privately by the first ministers at Meech Lake."[60] Despite the inclusion of a form of non-derogation clause,[61] the accord effectively ignored the self-government aspirations of Aboriginal people and in their view failed to protect their Aboriginal rights adequately.[62] However, if as Brock has argued,[63] there were positive consequences for Aboriginal people arising out of the failed FMC process, then the collapse of the Meech Lake Accord on June 23 1990 was a major triumph for the Aboriginal people of Canada.

By refusing to offer his consent to an expedited timetable for public hearings and debate on the accord (a procedural change that required the unanimous consent of the Legislative Assembly),[64] Elijah Harper prevented the Manitoba legislature from

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60. T. Hall, "What Are We? Chopped Liver? Aboriginal Affairs in the Constitutional Politics of Canada in the 1980s" in M.D. Behiels (ed), *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord* (Ottawa: University of Ottawa Press, 1989) 423 at 434.

61. Section 16 of the Meech Lake Accord provided:

> Nothing in section 2 of the Constitution Act, 1867 [which recognized Canada's linguistic duality and Québec as a distinct society], affects Section 25 or 27 of the Canadian Charter of Rights and Freedoms, Section 35 of the Constitution Act, 1982, or Class 24 of Section 91 of the Constitution Act, 1867.

- see P.W. Hogg, *Meech Lake Constitutional Accord Annotated* (Toronto: Carswell, 1988).

62. D.J. Purich, "Treatment of Aboriginal Peoples" in L. Ingle (ed), *Meech Lake Reconsidered.* Hull: Voyageur Publishing, 1989) 47 at 48-49; also Hall, note 60 *supra* at 439-445.

63. See discussion at text corresponding to notes 39-40 *supra.*

64. P.L. Monahan, *Meech Lake: The Inside Story* (Toronto: University of Toronto Press, 1991) at 234.

passing a resolution in support of the Meech Lake package before the expiration of the three year deadline.[65] Turpel and Monture have expressed vividly the significance of this event:

> June 1990 will be remembered by Canadians and by First Nations peoples for a long time to come. It was the summer of the demise of the Meech Lake Accord, a constitutional package which was created to reshuffle federal and provincial jurisdiction in important areas and to "bring Québec into the constitution" through formal accommodation of their status as a so-called "distinct society" and a so-called co-founding Nation. It was a political death which was quickly eulogized as temporary, but it was a passing "celebrated" in Québec with a resurgence of French nationalism and the expression of a desire for greater Québec independence.
>
> The biggest wake for the passing of the accord was not in Québec but in Manitoba. It spread quickly throughout First Nations communities. It spread by moccasin telegraph, over telephone wires, and through the media. It was the celebration of the ironic, although, in our view, beautiful justice of the Meech Lake Accord's demise at the hands of the First Peoples of Canada: peoples who, while the original inhabitants of what is now Canada, have never been recognized or treated as equals with the newcomers. We embraced the death of the Accord in Manitoba wholeheartedly and joyously, although we are careful to point out, as did the person who represented us all symbolically, Elijah Harper, MLA Rupertsland, that the rejection of the Accord was not a rejection of Québec as having a distinct French culture. It was the rejection of a constitutional lie - the lie of only two founding nations in Canada.[66]

For Asch and Macklem, "the import of Elijah Harper's actions lies in the fact that they represent a reaction against a deep-rooted process of constitutional exclusion of First Nations in the definition of Canada."[67] Indeed, the role of Aboriginal people in the collapse of the Meech Lake Accord, although seemingly negative in effect, played an important part in generating the political will which had been so significantly lacking during the previous constitutional round. As Turpel has noted:

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65. The significance of the three-year time limit for ratification of the Accord is discussed in R.E. Hawkins, "Meech Lake - The Reality of the Time Limit" (1989) 35 *McGill Law Journal* 196.

66. M.E. Turpel & P.A. Monture, "Ode to Elijah: Reflections of Two First Nations Women on the Rekindling of Spirit at the Wake for the Meech Lake Accord" (1990) 15 *Queen's Law Journal* 345.

67. Note 15 *supra* at 516.

> For many people, the first time they ever got the message about First Nations peoples' struggle in Canada was when Elijah Harper said "no" in the Manitoba legislature. The message was clearer around this event than during the First Ministers Conferences on Aboriginal Rights from 1982 to 1986.[68]

Clearly then, both the 'Aboriginal round' and the 'Québec round' had a major impact on the way in which questions of Aboriginal rights would be dealt with during subsequent attempts at macro-constitutional reform in Canada. By the time the federal government was prepared to announce its most recent constitutional reform proposal, the terms of the debate over Aboriginal self-government and Aboriginal participation in the constitutional process had been altered significantly.[69]

III. ABORIGINAL SELF-GOVERNMENT AND THE 'CANADA ROUND' OF CONSTITUTIONAL REFORM[70]

1. The Federal Government's Proposal

In September 1991 the Governments of Canada presented its proposal for constitutional recognition of the right of Aboriginal self-government:

> The Government of Canada proposes an amendment to the Constitution to entrench a general justiciable right to aboriginal self-government within the Canadian federation and subject to the *Canadian Charter of Rights and Freedoms*, with the nature of the right to

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68. In Turpel & Monture, note 66 *supra* at 348; see also B.P. Elman & A.A. McLellan, "Canada After Meech" (1991) 2 *Constitutional Forum* 63.

69. The impact of other events, including the rising profile of Aboriginal justice inquiries, and, in particular, the crisis at Oka must also be considered. See, for example, D. Lavery & B. Morse, "The Incident at Oka: Canadian Aboriginal Issues Move to the Front Burner" (1991) 48 *Aboriginal Law Bulletin* 6.

70. At the time of writing (June-July 1992) it is difficult to provide an up-to-date analysis of constitutional reform developments or to predict the outcome of the process. Given these limitations, the aim of this section is to provide a broad sketch of this most recent round of constitutional reform negotiation in Canada with a view to providing a general context for analysis of the more specific issues which are raised by the prospect of creating Aboriginal justice systems as part of the inevitable, if incremental, progress towards Aboriginal self-government as a core component of the Canadian federal system.

> self-government described so as to facilitate interpretation of that right by the courts. In order to allow an opportunity for the Government of Canada, the governments of the provinces and the territories, and aboriginal peoples to come to a common understanding of the content of this right, its enforceability would be delayed for a period of up to 10 years. The Special Joint Committee should examine the broad parameters of the right to be entrenched in the Constitution and the jurisdictions that aboriginal governments would exercise.[71]

The proposal envisions that "aboriginal governments would potentially exercise a combination of jurisdictions presently exercised by the federal, provincial and municipal governments..."[72] While those areas covered would vary depending on the particular circumstances and wishes of each aboriginal community, the Government's proposals state that the:

> jurisdiction of aboriginal governments could potentially encompass a wide range of matters including land and resource use, language and culture, education, policing and administration of justice, health, social development and community infrastructure.[73]

The Government has also proposed that an ongoing constitutional process to deal with aboriginal issues be entrenched in the Constitution, thereby establishing a forum which would allow provincial governments and aboriginal leaders to "monitor the progress made in the negotiation of self-government agreements."[74] Finally, the Government has proposed "that aboriginal representation should be guaranteed in a

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71. Government of Canada, *Shaping Canada's Future Together: Proposals* (Ottawa: Supply and Services Canada, October 1991) at 10; see also Government of Canada, *Aboriginal Peoples, Self-Government, and Constitutional Reform* (Ottawa: Supply and Services Canada, 1991).

72. *Id* at 8.

73. *Ibid.*

74. *Ibid.*

reformed Senate."[75]

2. The Report of the Special Joint Committee

The Special Joint Committee on a Renewed Canada reported in February 1992 after conducting hearings throughout the country.[76] It recommended "the entrenchment in section 35 of the Constitution Act, 1982 of the inherent right of aboriginal peoples to self-government within Canada",[77] and endorsed the formula for constitutional recognition favoured by the Royal Commission on Aboriginal Peoples.[78] The Royal Commission identified six criteria for the entrenchment of the Aboriginal right to self-government:

> ... any new constitutional provision ... should indicate that the right is *inherent* in nature, *circumscribed* in extent, and *sovereign* within its sphere. The provision should be adopted with the *consent* of the aboriginal peoples, and should be consistent with the view that *section 35* may already recognize a right of self-government. Finally, it should be *justiciable immediately*.[79]

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75. *Id* at 9. I have summarized here only those proposals which relate directly to Aboriginal people. For a discussion of the proposals more generally, see, for example, the articles in "Perspectives on 'Shaping Canada's Future Together'", a special issue of *Constitutional Forum*, Volume 3(3), Winter 1992; and B. Schwartz, *Opting In: Improving the 1992 Federal Constitutional Proposals* (Hull: Voyageur Publishing, 1992).

76. Parliament of Canada, Special Joint Committee of the Senate and the House of Commons (Joint Chairmen: Gérald A. Beaudoin, Dorothy Dobbie), *A Renewed Canada: The Report of the Special Joint Committee of the Senate and the House of Commons* (Ottawa, February 28 1992) (hereinafter "*Beaudoin-Dobbie Report*").

77. *Id* at 29. The Manitoba Constitutional Task Force also recommended that Aboriginal peoples' inherent right of self-government "within the Canadian constitutional framework" be entrenched in the constitution. See Manitoba Constitutional Task Force (Chairperson: Professor W. Fox-Decent), *Report of the Manitoba Constitutional Task Force* (Winnipeg, October 28 1991) at 28.

78. Royal Commission on Aboriginal Peoples, *The Right of Aboriginal Self-Government and the Constitution: A Commentary* (Ottawa: Royal Commission on Aboriginal Peoples, February 13 1992).

79. Cited in *Beaudoin-Dobbie Report* at 29.

The Special Joint Committee's approach represents a significant advance on the amendment originally proposed by the Federal Government in *Shaping Canada's Future Together*.[80] In particular, it accepts that the right of self-government is inherent, and stresses the need for both immediate entrenchment and "rapid progress"[81] towards the negotiation and implementation of self-government agreements.

The Committee further recommended "the entrenchment of a transition process to identify the responsibilities that will be exercised by aboriginal governments and their relationship to federal, provincial and territorial governments."[82] It did not elaborate on the potential scope of powers to be exercised by Aboriginal governments, beyond those specified in the Federal Government's original proposals.

On the question of the applicability of the Charter of Rights and Freedoms the Committee's position was somewhat unclear. After recognising the possible conflict between the collective element of Aboriginal customary laws and the individual rights emphasis of the Charter, and acknowledging the position of the Native Women's Association of Canada,[83] that the Charter continue to apply, the Committee recommended that "the fundamental rights and freedoms of all Canadians, including the equality of the rights of men and women, ought to receive full constitutional

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80. Note 71 *supra*.

81. *Beaudoin-Dobbie Report* at 30.

82. *Id* at 31.

83. See discussion at text corresponding to notes 90-92 *infra*.

protection."[84]

Finally, the Committee commented on the implications of Aboriginal self-government for the future of the federal government's responsibilities under section 91(24) of the *Constitution Act, 1867*, and stressed the need to address Métis claims for a land and resource base.[85]

3. Aboriginal Organizations and the Negotiation Process

The initial response of Aboriginal organizations to the federal government's original proposals was not positive. In particular, concerns were expressed about the ten-year 'waiting period',[86] the implications of entrenching a 'justiciable' right to self-government,[87] and the failure to describe the right as inherent. Following an assessment of the proposals, Larry Chartrand observed:

> Aboriginal people have a moral and legal right under Canadian and international law to require Canada to recognise an inherent right to self-government of Aboriginal peoples as equal partners in the federation. The federal government's position is nothing short of a simple re-affirmation of colonial superiority, an attitude which has been time and time again discredited as pure racism.[88]

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84. *Beaudoin-Dobbie Report* at 31.

85. See *id* at 31. The Committee also recommended that a joint Aboriginal-federal government bureau be established to administer federal responsibilities and "the provision of fiscal transfers": *id* at 32.

86. See, for example, D. Campbell, "Indians say 10-year wait an outrage", *Winnipeg Free Press*, September 25 1991, at 10.

87. The Indigenous Bar Association registered its concerns in this respect on the basis that "Canadian courts have not been overly sympathetic or understanding of our traditions and culture": Indigenous Bar Association, Constitutional Committee, *Presentation to the Joint Committee on a Renewed Canada* (December 18 1991) at 7.

88. L. Chartrand, "Beads and Trinkets Take on New Form in Federal Constitutional Proposals for Aboriginal Peoples in Canada" (1992) 3 *Constitutional Forum* 62 at 63.

The Assembly of First Nations registered its dissatisfaction with the proposals by initially threatening to boycott constitutional negotiations. Although subsequently agreeing to participate in the process, it was not until March 1992 that the four major Aboriginal organizations - the Assembly of First Nations, the Native Council of Canada, the Métis National Council, and the Inuit Tapirisat of Canada - were formally recognised as entitled to participate fully, with the aid of federal government funding, in discussions with the federal and provincial governments designed to produce a reform package.[89]

Despite its claim that this arrangement discriminates against women, the Native Women's Association of Canada was not invited to participate in the process.[90] One of the key reasons for the Association's desire to participate in the process towards constitutional recognition of the right of Aboriginal self-government was the need to avoid entrenchment of a system of government in Aboriginal communities which would continue to exclude Aboriginal women, and fail to take account of their entitlement to participate in the exercise of autonomy. Aboriginal women have expressed doubt about the capacity or willingness of the male-dominated

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89. H. Branswell, "Natives win full role in drafting unity package", *Winnipeg Free Press*, March 13 1992, A4. At this time an agreement and timetable was produced which was designed to result in a final constitutional reform proposal by May 31 1992: S. Delacourt, R. Mackie & G. Fraser, "10-week deadline set for unity offer: Natives take part as Ottawa, provinces write timetable for constitutional process", *The Globe and Mail*, March 13 1992, A1.

90. B. Cox, "Native women's group claiming discrimination over funds disbursement", *Winnipeg Free Press*, March 19 1992, A10.

major Aboriginal organizations to adequately address such issues.[91]

The Native Women's Association of Canada has observed:

> What we want to get across to Canadians is our right as women to have a voice in deciding upon the definition of Aboriginal government powers. ... Recognizing the inherent right to self-government does not mean recognizing and blessing the patriarchy created in our communities by a foreign government.[92]

In April 1992 the First Nations Circle on the Constitution - a commission established by the Assembly of First Nations - released a report titled, *To the Source.*[93] The report is the product of a six month consultation process which included 80 community hearings[94] and four constituent assemblies which addressed the views of Elders, youth, women, and off-reserve First Nations people.[95]

The commission's recommendations included:

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91. For example, Marilyn Fontaine, a member of the Aboriginal Women's Unity Coalition, suggests that "[t]he chiefs at a national level haven't strongly supported women's rights": R. Teichroeb, "Limits sought on powers of chiefs. Past abuses raise fears of 'dictatorship' if self-government granted too quickly", *Winnipeg Free Press*, April 6 1992, B13. This article is part of an excellent four part series titled, "Democracy on the Reserve" (*Winnipeg Free Press*, April 6-10 1992) which examines the current operation of band governments on Manitoba's reserves, and surveys 'grass-roots' opinion on Aboriginal self-government.

92. Native Women's Association of Canada, *Statement on the "Canada Package"* (Ottawa: Native Women's Association, 1992) at 7. The role of Aboriginal women in traditional self-government is compared with their status under the *Indian Act* regime in D. Young, "Walking in Our Mothers' Footsteps: Aboriginal Women and Traditional Self-Government" (1992) 6(1) *Herizons* 24. See also Native Women's Association of Canada, *Matriarchy and the Canadian Charter: A Discussion Paper* (Ottawa: Native Women's Association of Canada, 1992); W. Moss, "Indigenous Self-Government in Canada and Sexual Equality Under the *Indian Act*: Resolving Conflicts Between Collective and Individual Rights" (1990) 15 *Queen's Law Journal* 279; and J. Fiske, "Native Women in Reserve Politics: Strategies and Struggles" (1990-1991) 30-31 *Journal of Legal Pluralism* 121. The position of the Native Women's Association of Canada on the important question of the application of the Charter of Rights and Freedoms to Aboriginal governments will be addressed in Chapter 7, at the text corresponding to notes 62-75 *infra.*

93. First Nations Circle on the Constitution, *To the Source. Commissioners' Report* (Ottawa: Assembly of First Nations, 1992).

94. Listed *id* at 82-93.

95. *Id* at 55-72.

> * That the Constitution recognize First Nations inherent right to self-government
> * That First Nations be recognized as separate and distinct societies
> * That First Nations self-government be implemented in a way and at a pace to be determined by each First Nation
> ...
> * That First Nations justice systems be established to apply Aboriginal principles and practices of justice to our own people, since the current application of Canadian justice to Aboriginal peoples has resulted in miscarriages of justice and the legal expression of racism.[96]

Clearly, recognition of the contribution to the constitutional reform process of the Assembly of First Nations, and the Aboriginal people which it represents, is crucial to the ultimate success of the enterprise. However, in the Prairie region alone, there are a range of other perspectives which need to be addressed in order to adequately address the issue of meaningful Aboriginal self-government.[97]

For example, for the Native Council of Canada, the question of what self-government will mean for Aboriginal people living off-reserve and in urban centres is

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96. *Id* at 23.

97. It would seem that the constitutional negotiation structure established in March has been relatively successful in creating an environment sensitive to these variations. However, for the most part, media attention was focused on the positions taken by the Assembly of First Nations, which were not always consistent with the views of the other Aboriginal organizations participating in the process. This scenario was perhaps most vividly illustrated by the tension which developed following Ovide Mercredi's submission before a constitutional conference in Toronto (R. Ferguson, "Aboriginal plea throws wrench into conference", *Winnipeg Free Press*, February 8 1992, A4) and later before the Joint Parliamentary Committee on the Constitution (B. Cox, "Mercredi refuses to veer from collision on demand for native distinct society", *Winnipeg Free Press*, February 11 1992, A4) that First Nations were entitled to the same distinct society recognition proposed for Québec. Mercredi's comments prompted an angry response from many Québec politicians (D. MacDonald, "Mercredi ruffles Québec feathers. Politicians fuming over native warning", *Winnipeg Free Press*, February 13 1992, A5). (For a discussion of some of the difficulties for Aboriginal constitutional claims which are raised by the distinct society proposal, see J. Cohen, "Aboriginals confront Québec", *Winnipeg Free Press*, March 19 1992, A7.) The Assembly of First Nations position was endorsed by a Québec representative of the Inuit Tapirisat of Canada (see W. Caragata, "Natives demand status as distinct society", *Winnipeg Free Press*, February 8 1992, A4), but was not supported by the Native Council of Canada (see G. Arnold, "Mercredi softens call for distinct native status", *Winnipeg Free Press*, February 16 1992, A4).

central.[98] Further, a major concern expressed by Métis representatives was that the uncertain constitutional status of Métis people under section 91(24) of the *Constitution Act, 1867*, would allow the passage of a form of constitutional recognition that failed to grant to Métis people rights equivalent to other Aboriginal peoples.[99]

This legitimate concern was evident in a report issued by the Métis National Council in March 1992, which stated that "... the Métis Nation supports the federal assumption of jurisdiction and responsibility for Métis under Section 91(24) of the *Constitution Act, 1867.*"[100] Like the Assembly of First Nations report, *The Métis Nation On the Move* was the product of community consultations, and "identifies, prioritizes and elaborates on the constitutional concerns of Métis people."[101]

After providing an introduction to the role of the Métis in Canada's development,[102] the report addresses specific matters including the Métis land issue and the question of constitutional entrenchment of the right of self-government. It recommended that "[t]he inherent right of Métis to a land and resource base must be

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98. Wherrett & Brown, note 1 *supra*; see also M. Dunn, *Access to Survival, A Perspective on Aboriginal Self-Government for the Constituency of the Native Council of Canada* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1987).

99. See L. Johnsrude, "Métis Look to Provinces for Constitution Help", *Winnipeg Free Press*, April 30 1992, A9; also J. Morrow, "Métis want to be dealt with as a Nation", *Windspeaker*, February 17 1992, 3.

100. Métis National Council, *The Métis Nation on the Move: Report on The Metis Nation's Constitutional Parallel Process* (Métis National Council, 1992) at 32.

101. *Id* at 1.

102. *Id* at 4-13.

recognized in the *Constitution*,"[103] and asserted that:

> The Métis Nation seeks explicit constitutional reaffirmation of the inherent right of Métis self-government in section 35 of the *Constitution Act 1982*.[104]

From the time of the formal entry of Aboriginal organizations into the constitutional negotiation process in March, progress towards a more acceptable proposal for constitutional recognition of the right of Aboriginal self-government was relatively rapid. On April 9 constitutional negotiators in Halifax reached an agreement in principle to recognise the *inherent* right of Aboriginal self-government. Commenting on the agreement, Constitutional Affairs Minister Joe Clark stated:

> All in all, quite substantial progress (has) begun on the question of aboriginal issues, including some quite fundamental agreements that I think would have been almost unthinkable a year ago.[105]

While the commitment to support the inherent right of Aboriginal self-government did not conclude the process,[106] it was clearly a major development. It allowed attention to shift to the task of drafting a constitutional amendment that could provide an appropriate mechanism for defining the right, and support a wide variety of self-government arrangements in Aboriginal communities.

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103. *Id* at 19.

104. *Id* at 27. It should be noted that the report stated that "[t]he [Métis National Council] has no objection in principle to the application of the *Charter* and further supports the development of a Métis Charter": *ibid.* See also Metis Society of Saskatchewan, *Métis Commission on the Canadian Constitution* (Regina: Métis Society of Saskatchewan, December 1991); and in relation to the particular implications of self-government for Métis settlements in Alberta, see T.C. Pocklington, *The Government and Politics of the Alberta Métis Settlements* (Regina: Canadian Plains Research Center, University of Regina, 1991) at 123-136.

105. A. Jeffers, "Native rights, Senate agreed on", *Winnipeg Free Press*, April 10 1992, A13.

106. For example, Brad Morse has pointed out that the mere insertion of the word 'inherent' does not, in itself, settle the Aboriginal self-government issue: see R. Platiel, "Natives' battle far from settled", *The Globe and Mail*, March 13 1992, A6.

On May 11, the Multilateral Meeting on the Constitution in Vancouver agreed to the following addition to the *Constitution Act, 1982*: "35.1(1) The aboriginal peoples of Canada have the inherent right to self-government."[107] Subsequently, a contextual statement in the following terms was agreed to:

> (2) The exercise of the right referred to in subsection (1) includes the legislative authority of the Aboriginal peoples
> (i) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions; and
> (ii) to develop, maintain and strengthen their relationship with lands, seas, waters, resources, and environment
> so as to determine and control their development as peoples, according to their own values and priorities and ensure the integrity of their societies.[108]

Inclusion of a statement that Aboriginal peoples constitute one of three orders of government in Canada has also received general agreement, although the precise location of such a clause has not been settled.[109]

One of the most difficult issues dealt with during the negotiation process was the creation of a structure for implementation of the right to self-government. At the MMC in Montreal on May 20 agreement was reached on a commitment to negotiate in the following terms:

> The Government of Canada, the Aboriginal peoples in the various regions and

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107. See Continuing Committee on the Constitution, Working Group III, *Rolling Draft* (June 1 1992) (hereinafter "*Rolling Draft*") at 1.

108. *Id* at 1. Agreement reached at Multilateral Meeting on the Constitution, Toronto, May 27 1992. British Columbia and Newfoundland reserved their position on the inclusion of the word "seas" in this sub-section.

109. The most widely accepted proposal is for the inclusion of a s.35.1(3) which states:

> The right referred to in subsection (1) shall be interpreted in a manner consistent with the recognition of the governments of the Aboriginal peoples as constituting one of three orders of government in Canada.

It has also been proposed that the reference be included in the Canada clause, and perhaps in section 4 of the *Constitution Act, 1867*: see *id* at 3, 5).

> communities of Canada, and the provincial governments shall negotiate in good faith the implementation of the right of self-government, including issues of
> (i) jurisdiction,
> (ii) lands and resources of the Aboriginal peoples concerned, and
> (iii) economic and fiscal arrangements,
> with the objective of concluding agreements elaborating the relationship between Aboriginal governments and the two other orders of government.[110]

It was also agreed at this time that "[a]ll the Aboriginal peoples of Canada shall have equitable access to the process of negotiations...",[111] and that the negotiations "shall have regard to the different circumstances of the various Aboriginal peoples of Canada."[112]

Negotiators agreed at the May 27 MMC that provision be made for a three year delay of the justiciability of the inherent right of self-government to facilitate the carrying out of negotiations.[113] A "Delay of Justiciability Accord" sets out the terms of the delay period.[114] In the event that no agreement could be reached prior to expiration of the three year period, the Accord would allow Aboriginal communities to seek a specific judicial definition of their right to self-government.

Agreement was also reached on a topic of particular concern to the Métis and non-status Indians. The MMC on May 30 agreed that section 91(24) of the *Constitution Act, 1867* be amended by the addition of: "For greater certainty, Section

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110. *Id* at 14.

111. *Ibid.*

112. *Id* at 18.

113. G. Arnold, "Native power process agreed. If talks fail, courts to define self-rule", *Winnipeg Free Press*, May 28 1992, A1.

114. *Rolling Draft* at Annex A.

91(24) applies to all Aboriginal peoples of Canada."[115]

Formal constitutional negotiations came to an end on June 11 without final agreement on a final package of proposed constitutional amendments. However, as Ovide Mercredi reported to First Nations Chiefs at that time, "major progress was made on Aboriginal issues during the Multilateral Meetings on the Constitution."[116] Along with the draft provision discussed above, agreement was also reached on the following issues:[117]

(a) that the Charter of Rights and Freedoms will apply to Aboriginal governments, including access to the section 33 override power;[118]

(b) the inclusion in the Charter of an expanded non-derogation clause to protect the full range of Aboriginal rights;[119]

(c) that the treaties be interpreted "in a just, broad and liberal manner taking into

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115. A number of related provisions dealing more specifically with Métis concerns and, in particular, with recogniton of a Métis Nation Accord, the operation of Métis settlements in Alberta and the issue of a land and resource base were also addressed: see *id* at 34-37. Earlier in May the federal government appointed senior minister Jake Epp to oversee negotiations designed to address issues of concern to the Métis: see "Epp to seek Métis place in Canada", *The StarPhoenix*, May 9 1992, A13; and "Action for the Métis", *Winnipeg Free Press*, May 16 1992, A6.

116. Ovide Mercredi, National Chief, Assembly of First Nations, "Memorandum to All Chiefs, Provincial and Territorial Organizations" (June 12 1992), 2.

117. For a more complete summary, see *id* at 2-4.

118. *Rolling Draft* at 9. The draft section 33.1 agreed to by the MMC, Toronto, May 30 1992, (*id* at 13) states:

> Section 33 applies, with such modifications, consistent with the purpose of section 33 requirements as are appropriate to the circumstances of the Aboriginal peoples concerned, to the legislative bodies of the Aboriginal peoples of Canada.

119. *Id* at 21.

account their spirit and intent and the context of the specific treaty negotiations";[120] and

(d) that further constitutional conferences on Aboriginal issues be convened every two years commencing no later than 1996.[121]

On June 22 the Constitutional Affairs Minister generated concerns about the fragility of these tentative gains, when he suggested that the provisional deal on Aboriginal self-government may have to be re-worked on the basis that "there may be a need for more precision." [122] He also suggested that the federal government was prepared to unilaterally prepare a final package of reforms in the event that agreement could not be reached on matters still outstanding.[123] Despite suggestions by Brad Morse, an advisor to the Native Council of Canada, that Mr Clark's comments were not a cause for concern,[124] the National Chief of the Assembly of First Nations responded by stating that "we will be resisting any amendments, all amendments, and we will be working within Canada to persuade Canadians not to support a package as

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120. MMC, Toronto, May 30 1992: *id* at 25.

121. Agreed to by the MMC, Toronto, May 26 1992: *id* at 31.

122. "Impatient Clark talks of going it alone on unity. Agreement on native rights may need to be reworked", *Winnipeg Free Press*, June 23 1992, A4.

123. *Ibid.*

124. *Ibid.*

developed by the prime minister."[125]

On June 24, the Prime Minister scheduled final meetings with Aboriginal leaders and First Ministers on 28 and 29 June respectively. He announced that Parliament will be recalled on July 15, and that if at that time no agreement had been reached, Parliament would debate and vote on the federal government's own constitutional package.[126]

However, on July 7 nine of Canada's premiers reached a tentative agreement on a complete package of constitutional reforms.[127] The package left earlier agreements on Aboriginal self-government basically intact, although the three year pre-justiciable negotiation period was increased to five years, and a provision was added requiring the creation of an independent tribunal to settle disputes that may arise during the course of self-government negotiations.[128]

The next stage in the constitutional reform process will likely depend on the

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125. C. Morris, "Mercredi worried for pact on unity. 'Backtracking' may scuttle native goals", *Winnipeg Free Press*, June 24 1992, A14. Similarly, Rosemarie Kuptawa, President of the Inuit Tapirisat of Canada stated that "[t]he aboriginal package must remain intact": J. Douglas, "Senate, natives atop agenda", *Winnipeg Free Press*, June 25 1992, A1.

126. S. Delacourt & G. Fraser, "Mulroney takes the stage. Ottawa changing the script for actors in unity drama", *The Globe and Mail*, June 25 1992, A1, A4. On June 23 legislation designed to provide the framework for a possible national referendum on constitutional reform received royal assent. The provision is most likely to be employed in the event that the provincial governments do not come to agreement and the federal government prepares its own pakage of reforms: see W. Caragata, "Referendum bill clears Senate, becomes law this week", *Winnipeg Free Press*, June 24 1992, A14.

127. S. Delacourt, "Premiers break unity logjam", *The Globe and Mail*, July 8 1992, A1.

128. *Id* at A2.

response of the Government of Québec to the 'Canada round' package,[129] and specifically, whether Premier Bourassa agrees to attend further negotiations or a First Ministers Conference.[130]

IV. THE CONTENT OF THE ABORIGINAL RIGHT OF SELF-GOVERNMENT

Whatever the ultimate outcome of the 'Canada round', general agreement on a process for defining and implementing Aboriginal self-government will likely be one of the most significant developments of the recent attempt at constitutional reform. Indeed, one of the most commonly cited reasons for opposing constitutional entrenchment of the inherent right of self-government since Aboriginal organizations first advanced this particular claim,[131] has been the absence of a widely understood

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129. "Other premiers pleased by Bourassa's response", *Winnipeg Free Press*, July 10 1992, A4. One of the several features of the package about which concerns have been expressed in Québec is the proposal for recognition of the inherent right of Aboriginal self-government. A legal opinion prepared for the Government of Québec described the proposal as an "unprecedented threat" to Québec, and suggested that it may be unconstitutional and in violation of the *Canadian Charter of Rights and Freedoms*: A. Picard, "Québec has nothing to fear from self-rule, native says. Cree official dismisses warning from 'paranoid lawyers'", *The Globe and Mail*, July 23 1992, A4.

130. W. Caragata, "Meeting likely if Bourassa agrees to come: Clark says wording getting polish", *Winnipeg Free Press*, July 24 1992, A10.

131. See, for example, Chief Gary Potts, "Statement to Meeting of Ministers, Ottawa, 20-21 March 1986 on Behalf of the Assembly of First Nations" in Assembly of First Nations, *Our Land, Our Government, Our Heritage, Our Future* (Ottawa: Assembly of First Nations, 1992) at 9:

> It has to be clear that our right to self-government is an inherent right and that we are seeking to make it explicit in the Constitution for the benefit of everybody else, not ourselves. From there, we will set out to work out the terms of co-existence between our particular peoples in particular areas of the country and the non-aboriginal people who are in that particular area of the country.

and accepted definition.[132]

However, it is not the purpose of constitutional recognition, as presently conceived, to 'settle' the question of Aboriginal self-government. As Penner has observed, such a declaration "[would] not resolve the issue of the territorial application of the right."[133] He argues that "this is not an issue with which a constitution can deal in detail given the number and diversity of aboriginal land claims and the almost intractable difficulty of territorial definition."[134]

At the same time, in the context of assessing the relationship between autonomy-based Aboriginal justice reform and the achievement of meaningful Aboriginal self-government, the question of content clearly requires some consideration. Indeed, once the issue is addressed, it becomes equally clear that, viewed in isolation, the concept of Aboriginal self-government could conceivably refer to a wide range of alternatives.

One commentator has described self-government as "any institutional arrangement designed to secure greater aboriginal participation in the public policy process."[135] While this may be an accurate enough blanket statement of the concept,

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132. See, for example, the position advanced by Ian Scott, the former Attorney-General of Ontario, in J. Simpson, "Broad, bold and breath-taking, but what does it mean?", *The Globe and Mail*, March 25 1992, A18.

133. Penner, note 43 *supra* at 15.

134. *Ibid.* For an interesting discussion of the range of non-territorial jurisdictional models upon which Aboriginal self-government might be based, see G.R. Hall, "The Quest for Native Self-Government: The Challenge of Territorial Sovereignty" (1992) 50 *University of Toronto Faculty of Law Review* 39. The significance of this approach for the creation of Aboriginal justice systems will be addressed in Chapter 8.

135. D.A. Boisvert, *Forms of Aboriginal Self-Government. Background Paper No. 2* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1985) at 5.

a more detailed explanation of Aboriginal self-government is possible, given the extent to which the issue has developed in Canada during the last decade. Ponting and Gibbins have proposed a five-part 'blackbox' for the many and varied forms which self-government might take in practice.[136] They suggest that the following features can be seen as general, non-contentious components of the concept of self-government, at least in relation to the specific situation of First Nations peoples:

> 1. Indian government will have a territorial base on the reserves, although its reach may not be restricted to that base.
> 2. Indian self-government will involve some form of administrative and political amalgamation at the supra-band level (tribal, district, or national).
> 3. Indian government will entail the transfer of certain jurisdictional responsibilities now in the hands of the federal government to Indian hands.
> 4. Indian decisions with respect to these responsibilities will not be subject to review or veto by the federal government.
> 5. Indian governments will have access to and control over sufficient fiscal resources to meet these responsibilities.[137]

As Wherrett and Brown have pointed out in a paper prepared for the Native Council of Canada,[138] governing a limited land base such as a reserve is only one of four general ways in which the inherent right of self-government could be exercised. Other possibilities include governing a traditional territory, governing members of an Aboriginal Nation off the land base, and governing members of a general Aboriginal

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136. J.R. Ponting & R. Gibbins, "Thorns in the Bed of Roses: A Socio-Political View of the Problems of Indian Government" in L. Little Bear, M. Boldt & J.A. Long (eds), *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984).

137. *Id* at 122-123. It should be emphasized that this outline merely paints a general picture of Aboriginal self-government. If the ultimate aim of genuine self-determination for Aboriginal peoples is to be achieved, it must be possible for Aboriginal communities to decide, with a higher level of specificity, which form of self-government is to be adopted in their particular case. The more specific question of models for the exercise of Aboriginal *justice* autonomy is considered in Chapter 8.

138. Note 1 *supra*.

population.[139] The particular governing structure would greatly influence the range of powers exercised by specific Aboriginal governments. Indeed, it is in relation to the category of "certain jurisdictional responsibilities" identified by Ponting and Gibbins that the greatest uncertainty and concern continues to exist.

According to the Aboriginal Justice Inquiry of Manitoba, "Aboriginal self-government means the right of Aboriginal communities to run their own affairs within their own territory."[140] Significantly, 'Aboriginal affairs' are not limited in the Inquiry's formulation, to politically uncontroversial or previously accepted heads of power, but are expressly stated to include the right of Aboriginal governments to establish their own constitutions, civil and criminal laws, and institutions of government.[141]

Despite consistently strong opposition to the idea of a pre-defined right of self-government, Aboriginal organizations have begun to articulate an increasingly detailed picture of what Aboriginal self-government would mean in practice.[142] They have, however, continued to reject the notion of a national blueprint for implementing self-

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139. *Id* at 23-26.

140. Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba. Volume 1: The Justice System and Aboriginal People* (Winnipeg: Province of Manitoba, 1991) at 641.

141. *Id* at 321-326.

142. This willingness reflects, at least in part, a recognition that progress on the formal implementation of Aboriginal self-government required that the concept be advanced "beyond the level of a 'value notion'": J.A. Long & M. Boldt, "Concepts of Indian Government Among Prairie Native Indian University Students" (1984) 19 *Journal of Canadian Studies* 166 at 167; see also S.M. Weaver, "Indian Government: A Concept in Need of a Definition" in L. Little Bear, M. Boldt & J.A. Long (eds), *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984) at 65-68.

government in individual Aboriginal communities. As the former Chief Justice of the Supreme Court of Canada observed at a constitutional conference in Ottawa in March 1992, "[t]he presence of one form of self-government should not deny other forms. There can be no single model of aboriginal self-government because there are scores of distinct aboriginal peoples in Canada."[143] Similarly, the executive director of the Grand Council of the Crees of Québec has expressed frustration with the demand for a single definition applicable to all Aboriginal people throughout Canada:

> This country is based on a number of vague concepts, so I think it's unfair to insist that aboriginal people be the only ones who have to define their own principles down to the last comma. Who can give a black-and-white definition of 'distinct society' or 'renewed federalism' or 'charter rights'?[144]

An exhaustive analysis of the various 'meanings' or possible definitions of Aboriginal self-government is beyond the scope of this thesis.[145] However, in the context of assessing the shift towards the creation of an environment for the administration of justice which includes a recognition of the value and legitimacy of Aboriginal autonomy, some exploration of the parameters of Aboriginal government would seem to be appropriate.

During the course of constitutional negotiations, the Métis National Council proposed the addition to the *Constitution Act, 1982* of a section 35.1(2) in the

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143. G. Arnold, "Natives Grilled on Visions for Self-Government", *Winnipeg Free Press*, March 15 1992, A5.

144. Bill Namagoose, quoted in A. Picard, "Kanesatake seen as symbol. Issue of self-rule highlighted at Mohawk community", *The Globe and Mail*, March 13 1992, A6.

145. For an introduction to the range of forms which self-government could take, see D.C. Hawkes, *Aboriginal Self-Government. What Does It Mean?* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1985) at 25-68.

following terms:

> For greater certainty, the Aboriginal peoples of Canada may exclusively make laws in relation to matters that include the following:
> (a) land and resources, including land and resource use;
> (b) language and culture;
> (c) education;
> (d) training and manpower;
> (e) policing and the administration of justice;
> (f) health;
> (g) social services, including family and children's services;
> (h) economic development and community infrastructure, including housing;
> (i) environmental protection;
> (j) the raising and expenditure of revenues;
> (k) customary law;
> (l) membership/citizenship; and
> (m) generally all matters of a local or private nature.[146]

While this level of detail was not included in subsequent drafts, it is illustrative of the types of powers which may be considered available to Aboriginal governments.

As Wherrett and Brown have observed, "[t]he constitutionally entrenched right to self-government *will be circumscribed at least to some degree*, either directly within the Constitution or by negotiation with other governments."[147] Either the terms of the constitution directly, or more likely, the terms of specific self-government agreements, will delimit the range of matters over which Aboriginal governments will exercise power.[148]

As was argued ealier in this thesis,[149] it is likely that jurisdiction over the

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146. *Rolling Draft* at 3. The Native Council of Canada proposed a similarly specific draft, although the version later adopted during the MMC process generally reflects the draft favoured by the Assembly of First Nations, and is rather more general in terms.

147. Note 1 *supra* at 39 (emphasis added).

148. *Ibid.*

149. See discussion in Chapter 5, at text corresponding to notes 83-85 *supra*.

administration of justice is likely to be one of the most keenly contested categories of negotiated Aboriginal self-governing powers. Aboriginal organizations and community representatives will have to contend with the possibility that there may be legal arguments which support opposition to the granting of control over the administration of justice to Aboriginal communities, without rejecting the legitimacy of the inherent right of Aboriginal self-government.

In *Native Liberty, Crown Sovereignty*,[150] Bruce Clark argues persuasively that the right of Aboriginal self-government is already recognised under section 35 of the *Constitution Act, 1982*. However, he suggests that this right does not extend to jurisdiction over criminal matters.[151] Clark bases this conclusion on the enactment of two imperial statutes in 1803[152] and 1821,[153] which had the effect of partially abrogating the Aboriginal right of self-government, by "extend[ing] the colonial governments' legal system regarding crimes and offences to the Indian territory."[154] Clark concludes that "[s]ince their promulgation the arguable scope of aboriginal self-government in Canada has been restricted to civil matters."[155]

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150. B. Clark, *Native Liberty, Crown Sovereignty. The Existing Aboriginal Right of Self-Government in Canada* (Montreal & Kingston: McGill-Queen's University Press, 1990).

151. *Id* at 124-130.

152. An Act for Extending the Jurisdiction of the Courts of Justice in the Provinces of Lower and Upper Canada, to the Trial and Punishment of Persons Guilty of Crimes and Offences within Certain Parts of North America Adjoining to the Said Provinces, 43 Geo. III, c. 138: cited *id* at 124.

153. An Act for Regulating the Fur Trade, and Establishing a Criminal and Civil Jurisdiction within Certain Parts of North America, 1 & 2 Geo. IV, c. 66: cited *ibid.*

154. *Id* at 124-125.

155. *Id* at 125.

Clearly, arguments such as these need to be analyzed in greater detail. To date, the relationship between Aboriginal self-government and proposals for autonomous Aboriginal justice structures has been inadequately explored.

V. THE RELATIONSHIP BETWEEN AUTONOMY-BASED JUSTICE REFORM AND ABORIGINAL SELF-GOVERNMENT

While, as discussed above, the Canadian dialogue on Aboriginal self-government has developed substantially in the last ten years, explorations of the relationship between Aboriginal autonomy in the field of justice administration and formal implementation of Aboriginal self-government as a component of the Canadian federal system are still at a relatively preliminary point of evolution. As suggested earlier, one of the key reasons for this 'lag' is that it is only relatively recently that criminal law and justice administration has been widely considered to come within the parameters of potential exercises of Aboriginal self-governing power.

Following the release of the Report of the Special Committee on Indian Self-Government in 1983, Stan Jolly commented that:

> It is not an easy task to determine precisely the implications of the Penner Report for the administration of justice because there is very little in the report which deals specifically with justice. The three critical areas of concern to Indian people, as identified by the Committee, are education, child welfare, and health.[156]

In the decade that has followed the release of this important report, a dramatic

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156. S. Jolly, "Implications of the Report of the Special Committee on Indian Self-Government (Penner Report) for the Creation of Autonomous Native Justice Structures" in C.T. Griffiths (ed), *Circuit and Rural Court Justice in the North. A Resource Publication* (Burnaby: The Northern Conference and Simon Fraser University, 1984) at 2-87. He did conclude, however, that ultimately, "[s]elf-government would mean that virtually the entire range of law-making policy, program delivery, law enforcement, and adjudication powers would be available to an Indian First Nation government within its territory ... Eventually, Indian law codes and courts would be put in place": *ibid.*

reshaping of the institutions of criminal justice administration has emerged as one of the major objectives of Aboriginal organizations and communities throughout Canada, an aspiration which has increasingly been expressed in terms of a valid exercise of Aboriginal autonomy rights.

Despite a specific reference in the federal government's 1991 constitutional reform proposals to "policing and administration of justice" as one of the range of matters over which Aboriginal governments might assume jurisdiction,[157] Jolly's comments on the difficulty of assessing the implications of Aboriginal self-government for the justice area are still broadly applicable.

However, during the course of the past year it has become increasingly apparent (and specific reference may be made not only to the course of negotiations during the latest constitutional round, but also to the climate generated by the release of the major Aboriginal justice reports during this period) that autonomy-based reform along the lines envisioned by the Aboriginal Justice Inquiry of Manitoba is unlikely to be realised outside of a successful and expansive Aboriginal self-government implementation process. In fact, this thesis argues, with one qualification,[158] that the establishment of comprehensive Aboriginal justice systems without the prior initiation of adequately empowered Aboriginal governments is not simply politically improbable, but is likely to prove inherently incapable of meeting the justice

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157. Note 71 *supra* at 8.

158. Discussed at text corresponding to notes 165-167 *infra*.

requirements of Aboriginal communities.[159] Further, there may be substantial legal impediments to such 'delegated' autonomy initiatives in this area.

The existing distribution of legislative authority in Canada[160] may provide a constitutional bar to the establishment of Aboriginal justice systems based on delegated authority in the event of a provincial commitment to such initiatives. Under the existing constitutional structure it is not clear whether federal or provincial government powers could independently support the creation of comprehensive Aboriginal court systems without a significant jurisdictional realignment. Key elements of this realignment may be accomplished by the broad constitutional recognition and redistribution of powers which is currently being proposed in the 'Canada round'.

According to section 92(14) of the *Constitution Act, 1867*, the following is within the exclusive powers of provincial legislatures:

> The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

Section 91(24) of the Constitution Act, 1967 gives the federal Parliament power to make laws with respect to "Indians, and Lands reserved for Indians",[161] and section 91(27) includes within federal legislative authority, "The Criminal Law, except the

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159. In this respect, the experience of tribal courts in the United States is illustrative, and will be considered in Chapter 7.

160. See generally, P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 *McGill Law Journal* 382 at 414-425.

161. Section 91(24) includes Inuit peoples (see *Reference re Term "Indians"*, [1939] S.C.R. 104). Prior to the most recent constitutional round, the term has not been interpreted so as to refer to Métis people: see discussion at text corresponding to notes 99-115 *supra*.

Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters."

It could be argued that section 92(14) empowers provincial governments to establish Aboriginal courts or other such justice mechanisms under the administration of justice power. However, such action could be construed as constituting an intrusion on federal jurisdiction. It may be, as Macklem has observed, that

> ... a province is not entitled to single out native people and treat them differently than nonnative people. Legislation to this effect would be in pith and substance legislation in relation to "Indians" and therefore *ultra vires* the province.[162]

While it is possible that this conflict could be resolved by federal-provincial agreements dealing with jurisdiction over justice administration in Aboriginal communities,[163] it is illustrative of an existing structure of government and a distribution of powers that is inadequate as a context for achieving the level of control over matters of justice and dispute resolution which Aboriginal communities are seeking.[164]

The qualification referred to above,[165] relates to the phenomenon of 'extra-

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162. Note 160 supra at 418. See, for example, the decision of the Supreme Court of Canada in *R. v. Sutherland*, [1980] 2 S.C.R. 451.

163. Alternatively, Cowie has argued that "the federal government has significant authority to delegate unencumbered jurisdiction to aboriginal communities, replacing provincial laws of general application": I. Cowie, *Future Issues of Jurisdiction and Coordination Between Aboriginal and Non-Aboriginal Governments* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1987) at ix.

164. For an interesting argument that First Nations autonomy can be promoted *within* existing constitutional arrangements by further limiting the application of provincial laws to "Indians and lands reserved for Indians", see B. Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 *McGill Law Journal* 308 at 362-380.

165. Note 158 *supra*.

legal'[166] justice initiatives in recent years which has seen a number of Aboriginal communities establish structures or processes that have been designed as *alternatives* to the dominant criminal justice system.[167] In general terms, the rationale for such initiatives is the inadequacy of the imposed non-Aboriginal system, while the justification is the entitlement of such communities to exercise control over its own members. While such programs are generally quite limited in scope, their key significance is that, at least in their genesis, they do not necessarily depend on devolutions of provincial or federal authority, but are exercises of original Aboriginal autonomy. For this reason, such initiatives must be analyzed in rather different terms than the forms of 'delegated' autonomy critiqued here.

The difficulty, as discussed above, of identifying an appropriate jurisdictional source for the establishment of comprehensive Aboriginal justice systems, was advanced as the basis for the Manitoba Government's refusal to implement the key recommendations of the Aboriginal Justice Inquiry of Manitoba.[168]

Significantly, other stated reasons included concerns about the *form* which Aboriginal justice systems would take, including the capacity of such institutions to protect individual rights and operate according to the principles of due process which underlie the dominant justice system. Indeed, the issue of the application to

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166. I use this term in the very narrow sense of being 'unsanctioned' by the existing dominant law-making processes in Canada.

167. Several initiatives of this type, including the St. Theresa Point Indian Government Youth Court System in Manitoba, will be discussed in more detail in Chapter 8.

168. See discussion in Chapter 3, at text corresponding to notes 61-67 *supra*.

Aboriginal governments of the *Charter of Rights and Freedoms* has emerged as both a symbolic and highly relevant indicator of the capacity of the Canadian federation to accommodate the autonomy demands of Aboriginal people. The extent to which this context will determine the capacity of Aboriginal justice systems to significantly redefine the social control and justice environments in Aboriginal communities will be addressed in Chapter 7.

CHAPTER 7

ABORIGINAL JUSTICE SYSTEMS AND THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

I. INTRODUCTION

The *Report of the Aboriginal Justice Inquiry of Manitoba* observed that "[o]ne of the major challenges that will confront the establishment of an Aboriginal justice system in Canada is resolving the tensions between individual and collective rights."[1] The fundamental concerns that are raised in this respect relate to the application of the *Canadian Charter of Rights and Freedoms*[2] to proposed Aboriginal justice systems. Specifically, several key questions need to be considered. Would the Charter apply to such institutions, and what are the implications of *requiring* that the Charter be applied? Aboriginal communities could, of course, elect to incorporate the Charter in part or in its entirety, but the key question is: should First Nations be 'given' the opportunity to make such an election? Is the Charter - and specifically its criminal procedure provisions - negotiable, or must it apply to all Canadian institutions? For example, what are the implications for Aboriginal aspirations to self-government within the framework of Canadian federation, and for the level of autonomy which is possible in relation to the administration of justice? Further, does the Charter as it currently stands offer a legal mechanism for exempting Aboriginal justice structures from the protections of the Charter?

In the United States the imposition of due process protections on tribal courts

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1. Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba. Volume 1: The Justice System and Aboriginal People* (Winnipeg: Province of Manitoba, 1991) (hereinafter "*AJI Report Vol 1*") at 333.

2. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11.

that country. Part II of this chapter considers the impact which the *Indian Civil Rights Act* has had on tribal courts and considers the extent to which this legislation reflects the particular framework of Indian sovereignty which operates in the United States, and, therefore, may not be equally applicable in the Canadian context. It will be argued that this presents one of the key areas in which future Aboriginal justice systems in Canada must be allowed to depart from the United States tribal court model and develop forms of autonomy in the administration of justice that are in tune with the move towards meaningful Aboriginal self-government in Canada.

Part III considers the Charter provisions which are primarily in question - the Legal Rights expressed in sections 7 to 14. It will be argued that, to a large extent, these individual rights cannot be 'detached' from the justice environment of the dominant legal and political cultures. Therefore, to require their application in the context of Aboriginal justice systems which may include traditional forms of dispute resolution which are not primarily concerned with the adversarial determination of guilt or innocence, may be inappropriate and ultimately counterproductive.

However, it may be that the Charter already contains a 'solution' to this particular dilemma. Part IV will examine the various provisions which may have the capacity to legitimate the establishment of justice mechanisms in Aboriginal communities to which the criminal procedure provisions of the Charter are inapplicable. The implications of utilizing the Aboriginal rights provisions of the Charter for this purpose will be examined, along with a consideration of the alternative strategy of recognizing the right of Aboriginal governments to rely on the

section 1 doctrine of reasonable limits or engage the section 33 override, the latter of which has emerged as the favoured approach during negotiations on Aboriginal self-government in the 'Canada round'.

Drawing on this discussion of the text of the Charter, Part V considers some of the key issues that arise for determination in relation to the role of the Charter in the context of Aboriginal justice systems. Specifically, it will address the opposition to fully autonomous Aboriginal justice systems which has been voiced from a liberal individual rights perspective, from the perspective of Aboriginal women and from the perspective of international human rights norms. While there is considerable justification for several of the concerns raised in this respect, it will be argued that to insist that the Charter be applicable may seriously jeopardise the potential effectiveness of Aboriginal justice mechanisms and would amount to a serious 'straight-jacketing' of Aboriginal governments in their efforts to give effect to their autonomy rights.

II. TRIBAL COURTS IN THE UNITED STATES: THE IMPACT OF THE *INDIAN CIVIL RIGHTS ACT*

One of the major concerns raised in relation to recent Canadian proposals for the establishment of Aboriginal justice systems - the application of the *Charter of Rights and Freedoms* - has essentially been 'settled' in the United States because of the requirements stipulated by the 1968 *Indian Civil Rights Act*.[3]

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3. 25 U.S.C.A. para 1301 et seq.

According to the *Indian Civil Rights Act* all tribal courts must incorporate the Bill of Rights and the features of due process generally. In fact, the Act "imposes on [Indian] tribes most of the Bill of Rights verbatim."[4] For example, para 1302 states in part,

> No Indian tribe in exercising powers of self-government shall -
> ... (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favour, and at his own expense to have the assistance of counsel for his defence;
> ...(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

This 'Indian Bill of Rights' applies to all Indian courts, "whether they are traditional or nontraditional, tribal courts administered by the tribe or Courts of Indian Offenses administered by the Bureau of Indian Affairs."[5]

As Canby has observed:

> From its passage the Indian Civil Rights Act has engendered controversy. Tribal governments tended to see the Act as an undue federal intrusion into tribal affairs. Some individual Indians and many non-Indians saw the Act as a valuable protection against arbitrary tribal action.[6]

The essence of tribal dissatisfaction with the provisions of the Act was that they would 'reshape' Indian justice institutions, and further distance communities from traditional methods of dispute resolution. There were also concerns about the financial implications of imposing due process requirements on the Indian justice system.

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4. W.C. Canby, *American Indian Law In A Nutshell* (St Paul: West Publishing Company, 1988) at 245.

5. K. Bellmard, "The Doctrine of Tribal Immunity and Application of the Indian Civil Rights Act to Causes of Action in Tribal Courts: Tribal Sovereignty Immunity, Sword or Shield?", paper presented at *Sovereignty Symposium IV - The Circles of Sovereignty* (Oklahoma City, June 10-12, 1991) at 608.

6. Note 4 *supra* at 246. See also R.L. Barsh & J.Y. Henderson, "Tribal Courts, the Model Code and the Police Idea in American Indian Policy" (1976) 40 *Law and Contemporary Problems* 25.

> A major source of Indian apprehension ... was the fear that the imposition of an Indian Bill of Rights on tribal court proceedings would go a long way toward transforming them into dark-skinned replicas of the non-Indian courts and would require massive expenditures of funds to ensure constitutional protections to defendants, which would bankrupt many small tribes.[7]

Perhaps the most important observation which needs to be made in the context of considering the significance for Canada of the operation of the *Indian Civil Rights Act* in United States' tribal courts, is that to a great extent, the imposition of individual rights protection is indicative of the limited nature of Indian sovereignty which took shape following the decision of the United States Supreme Court in *Worcester v. Georgia*,[8] and the decisions which this judgement followed.[9]

While the "modern era of Federal Indian law"[10] may have altered the scope of Indian tribal sovereignty,[11] Indian government in the United States represents a form of political autonomy which is considerably narrower than that to which the

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7. V. Deloria, Jr. & C.M. Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983) at 128. See also American Indian Lawyer Training Program Inc., *Indian Self-Determination and the Role of Tribal Courts. A Survey of Tribal Courts* (Oakland: American Indian Lawyer Training Program Inc., 1982) at 53-60.

8. 31 U.S. (6 Pet.) 515 (1832). The development of the concept of "domestic dependent nations" is discussed in V. Deloria, Jr. & C. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (New York: Pantheon Books, 1984) at 16-27.

9. For an account of the major Supreme Court decisions on "Indian law" handed down during the Marshall era, see M.S. Ball, "Constitution, Court, Indian Tribes" (1987) 1 *American Bar Foundation Research Journal* 3 at 23-34.

10. Wilkinson has identified the Supreme Court decision in *William v. Lee*, 358 U.S. 217 (1959) as the starting point of this era: C.F. Wilkinson, *American Indians, Time, and the Law* (New Haven: Yale University Press, 1987) at 1.

11. *Id* at 120-121; see also C. Wilkinson, "Native Sovereignty in the United States: Developments in the Modern Era" in F. Cassidy (ed), *Aboriginal Self-Determination. Proceedings of a conference held September 30 - October 3, 1990* (Lantzville & Halifax: Oolichan Books & The Institute for Research on Public Policy, 1990) 219; M.E. Price and R.N. Clinton, *Law and the American Indian: Readings, Notes and Cases* (Charlottesville: The Michie Company, 2nd ed., 1983) at 263-366; and S. O'Brien, *American Indian Tribal Governments* (Norman: University of Oklahoma Press, 1989) at 93-254.

Aboriginal people of Canada currently aspire. This basic distinction must be borne in mind when addressing the important question of the Charter's applicability to Aboriginal justice systems, and indeed, to other exercises of Aboriginal self-governing power.

The operation of the Bill of Rights in the United States contrasts strikingly in these respects with the *Canadian Charter of Rights and Freedoms* which expressly protects certain Aboriginal rights.[12] This difference, along with the wider context of the movement towards recognition of the Aboriginal right of self-government in Canada, reveals a significantly different environment in which the application of individual due process protections to Aboriginal justice structures must be considered.[13] The extent then to which the United States tribal court system has been utilized as a model for recent Canadian proposals is problematic and may actually be detrimental to the chances of practical implementation of autonomy-based reforms. Indeed, there are few reference points available that might assist in this process.

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12. See discussion at text corresponding to notes 27-35 *infra*.

13. Mendes has argued that "the jurisprudence arising from the International Covenant on Civil and Political Rights and the European Convention on Human Rights and Fundamental Freedoms may be of more relevance in interpreting the Canadian Charter of Rights than American jurisprudence arising from the American Bill of Rights". E.P. Mendes, "Interpreting the Canadian Charter of Rights and Freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights" (1982) 20 *Alberta Law Review* 383 at 392. See also the references listed at note 76 *infra*. However, such sources provide little guidance in relation to the question of how best to accommodate due process and human rights provisions in the context of Aboriginal autonomy.

III. THE CANADIAN CHARTER: CRIMINAL PROCEDURE

1. The Legal Rights Provisions

Sections 7-14 of the Charter represent the formal procedural values which have been "superimposed on Canadian law enforcement agencies."[14] They constitute the 'due process' provisions generally applicable in Canada.[15] Section 7 state the basic principle that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[16] It has been described as the "most eloquent but mysterious provision of the Canadian Charter of Rights and Freedoms."[17] The remainder of the "Legal Rights" part of the Charter expands upon this basic protection in the context of criminal procedure.[18]

Section 8 guarantees "the right to be secure against unreasonable search and

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14. M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989) at 129.

15. See generally, J. Atrens, *The Charter and Criminal Procedure: The Application of Sections 7 and 11* (Toronto: Butterworths, 1989).

16. On the meaning of "fundamental justice", see J.D. Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the Charter" (1983) 13 *Manitoba Law Journal* 455; M.L. Friedland, "Criminal Justice and the Charter" (1983) 13 *Manitoba Law Journal* 549 at 552-555; and Atrens, note 15 *supra* at 8.1-10.17.

17. E. Colvin, "Section Seven of the Canadian Charter of Rights and Freedoms" (1989) 68 *Canadian Bar Review* 560. Colvin argues that "section 7 is concerned with legal means rather than social ends, with the justice of the processes by which social objectives are pursued rather than withthe justice of the ends which are sought": *id* at 561.

18. Mandel, note 14 *supra* at 129; see generally D.C. McDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms: A Manual of Issues and Sources* (Calgary: Carswell, 1982); and D. Stuart, *Charter Justice in Canadian Criminal Law* (Toronto: Carswell, 1991).

seizure",[19] section 9 confers "the right not to be arbitrarily detained or imprisoned", while section 10 specifies a number of protections applicable during arrest or detention.[20]

Section 11 includes 9 specific rights which apply during "proceedings in criminal and penal matters". Any person charged with an offence has the right:

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) ... to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) to protection against retroactivity;

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19. The evolution and implications of this particular provision are discussed in F. McGinn, "The *Canadian Charter of Rights and Freedoms*: Its Impact on Law Enforcement" (1982) 31 *University of New Brunswick Law Journal* 177 at 185-195.

20. Section 10 states:

> Everyone has the right on arrest or detention
> (a) to be informed promptly of the reason therefore;
> (b) to retain and instruct counsel without delay and to be informed of that right; and
> (c) to have the validity of the detention determined by way of *habeus corpus* and to be released if the detention is not lawful.

The application of section 10 to suspects not yet arrested or charged is discussed in E. Ratushny, "Emerging Issues in Relation to the Legal Rights of a Suspect Under the Canadian Charter of Rights and Freedoms" (1983) 61 *Canadian Bar Review* 177. See also J. Ziskrout, "Section 10 of the Canadian Charter of Rights and Freedoms" (1982) *University of British Columbia Law Review* (Charter edition) 173.

(h) of double jeopardy; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Section 12 protects against "cruel and unusual treatment or punishment"; section 13 expresses the right against self-incrimination; and section 14 states the "right to the assistance of an interpreter" where necessary.

These provisions have spawned a sizeable body of interpretive literature and, a much larger body of judicial decisions. Mandel has observed that "[i]t sometimes seems as if the criminal law reports are being taken over by Charter cases on criminal procedure."[21] However, the prospect of determining the role of criminal procedural protections in the operation of Aboriginal courts raises a whole range of new questions.

2. Aboriginal Justice and Due Process

There is a fundamental difficulty that arises when attempting to assess the possible impact of the *Charter of Rights and Freedoms* on exercises of Aboriginal autonomy in the area of social control and justice administration. Assuming Aboriginal communities are recognised as having the authority to shape their own institutions and processes, it is impossible to determine with any sort of precision

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21. Mandel, note 14 *supra* at 130.

what form Aboriginal justice systems will take.[22] However, certain core elements have been advanced in several submissions to recent inquiries, including the Aboriginal Justice Inquiry of Manitoba. A brief survey of these features will reveal that a number of the criminal procedure protections may be irrelevant or otherwise inappropriate to the operation of autonomous Aboriginal justice mechanisms.

In a submission to the Aboriginal Justice Inquiry of Manitoba the Chief of the Dauphin River Band observed that a "lower standard of formal education accomplishment among native people", along with language difficulties, contribute to a situation in which "[n]ative people do not understand the non-native criminal justice system."[23] However, Chief Emery Stagg concluded:

> But an even more significant factor is that much of the criminal justice system, based as it is on punishment and *due process and adversarial relations*, is foreign to our way of thinking and looking at the world of which we are a part.[24]

Formulations of proposed Aboriginal justice structures are linked closely with observations such as this about the inadequacies of the present system as a justice mechanism for Aboriginal people. For example, the incompatibility between an adversarial adjudication process concerned primarily with the determination of guilt, and the cultural values of many Aboriginal communities is frequently raised as a justification for developing autonomy-based alternatives.

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22. This issue will be considered in greater detail in Chapter 8 in the context of a discussion of the efficacy of creating a 'model' for Aboriginal justice systems in Canada.

23. Chief Emery Stagg, Dauphin River Band, *Presentation No. 495 to the Public Inquiry into the Administration of Justice and Aboriginal People* - Transcript of a Community Hearing (Pineimuta Place, February 8, 1989) 4575 at 4583.

24. *Ibid* (emphasis added).

The central issue of the *purpose* of a justice process provides a vivid illustration of the possible implications of seeking to apply Charter protections to Aboriginal justice systems. For example, if an Aboriginal community elected to establish a justice system based on traditional notions of restorative justice the question of 'guilt or innocence' may, to some extent, be beside the point.[25] In such a structure, it is legitimate to question what purpose would be served by section 11(d) of the *Charter of Rights and Freedoms* which protects the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal"? Clearly, such protections cannot effectively be detached from the framework of judicial process upon which the dominant non-Aboriginal system is based. Therefore, to require that future Aboriginal justice systems respect the due process and legal rights provisions contained in the Charter is to effectively establish limiting boundaries to the justice environment in which Aboriginal communities may exercise their autonomy rights.

The application of other provisions in the Charter to Aboriginal justice systems is similarly problematic. Dan Russell has observed:

> The Charter...ensures the right of an individual to be free from having to give evidence against herself (sub-section 11(c)) or give evidence which might later be used in another proceeding against her (section 13). However *both of these guarantees run contrary to the traditions of many aboriginal peoples* who would require that an individual explain her

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25. I am acutely aware of the dangers of generalization in this area, and do not suggest that this is a universally applicable statement of one of the core elements of traditional Aboriginal dispute resolution processes. There is a relatively limited body of research literature dealing with traditional justice processes. See M. Coyle, "Traditional Indian Justice in Ontario: A Role For the Present" (1986) 24 *Osgoode Hall Law Journal* 605; Chief Rod Bushie, Assembly of Manitoba Chiefs, *Presentation No. 790 to the Public Inquiry into the Administration of Justice and Aboriginal People* - Transcript of a Community Hearing (Winnipeg, November 22 1989) at 7741-7751; and also see the discussion of Aboriginal dispute resolution mechanisms in Chapter 8, part III *infra*.

> behaviour which is under scrutiny. The values of honesty and responsibility to that community are captured in the requirement of the individual to speak on her own behalf. And yet, if the individual is permitted to rely upon the guarantees as espoused by the Charter, these community values may have to surrender to the individual's demands.[26]

IV. CAN THE CHARTER SUPPORT ABORIGINAL JUSTICE SYSTEMS BASED ON COLLECTIVE RIGHTS?

1. The Protection of Aboriginal Rights: Section 25

Sections 25 of the Charter currently states:

> 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 including
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

According to Hogg, the "class of rights to which s.25 refers appears to be somewhat wider than the class of rights to which s.35 refers: the class of rights referred to in s.25 is not qualified by the word 'existing', and it may be broader in its inclusion of 'other' rights or freedoms..."[27] However, the effect of section 25 is far from clear. As the Native Women's Association of Canada has observed, "[t]here have not yet been any cases decided by the Supreme Court of Canada on what this section really

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26. D. Russell, Canadian Human Rights Commission, "Paper for Presentation to the Canadian Bar Association Conference on Native Self-Government" - paper presented at *Bridging the Constitutional Gap* Conference, Canadian Bar Association (Winnipeg, April 5 and 6, 1991) at 13.

27. P.W. Hogg, *Canada Act 1982 Annotated* (Toronto: Carswell, 1982) at 69; see also, B. H. Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: Native Law Centre, University of Saskatchewan, 1988) at 30-31. On the relationship between sections 25 and 35, see W.F. Pentney, *The Aboriginal Rights Provisions in the Constitution Act, 1982* (Saskatoon: Native Law Centre, University of Saskatchewan, 1987) at 120-121.

means. There are several different ways to interpret it."[28]

There is wide agreement that section 25 is "exhaustive and all-inclusive in its embrace of native rights."[29] However, this scope does not translate to a limitless domain for Aboriginal self-governing powers. Wildsmith has concluded:

> It is probably the case, however, that the exercise of section 25 native rights will not be sanctioned by the courts as unlimited and without bounds; like all rights, they are likely subject to reasonable limits in their interpretation and application in particular circumstances.[30]

Pentney has advanced an even narrower characterization, suggesting that section 25 is "primarily an interpretive prism" and is "not an independently enforceable guarantee" of Aboriginal and treaty rights.[31]

Despite this considerable uncertainty as to the precise content and role of section 25, Monture and Turpel[32] have argued that section 25, in combination with section 35 of the *Constitutional Act, 1982*, provides the constitutional basis upon which Aboriginal communities, when organising a structure for the administration of justice, may choose traditional or other Aboriginal elements in preference to the "due

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28. Native Women's Association of Canada, *Native Women and the Charter: A Discussion Paper* (Ottawa: Native Women's Association of Canada, 1992) at 9; see also the discussion at text corresponding to notes 61-73 *infra*.

29. Wildsmith, note 27 *supra* at 31; also B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982) 8 *Queen's Law Journal* 232 at 237-238; and D. Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983) 61 *Canadian Bar Review* 314 at 326.

30. Wildsmith, note 27 *supra* at 2.

31. Pentney, note 27 *supra* at iii, 155-159.

32. P.A. Monture & M.E. Turpel (eds), *Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice* (Paper prepared for the Law Reform Commission of Canada, 1991), cited in Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice. Report Number 34* Ottawa: Law Reform Commission of Canada, 1991) (hereinafter "*LRCC Report*") at 20-21.

process" features which underlie the non-Aboriginal system and which have been replicated in United States tribal courts. Similarly, Hemmingson has identified in section 25, the capacity to support the operation of autonomous Aboriginal justice structures:

> The strongest protection for the function of statute-based tribal courts may come from section 25 of the Charter. If the continued existence and effectiveness of these courts is seen as one of the "other rights" sheltered from the Charter by section 25, then the application of the Charter within tribal court should not be onerous. Charter rights would have to yield at the point where they impaired the effectiveness of the tribal court system. Up to that point, however, section 25 would not seem to prevent the full application of the Charter to matters heard within the court.[33]

These arguments have been strengthened by the revised non-derogation provisions contained in the 'Canada round' constitutional reform package. During the MMC process agreement was reached on the strengthening of section 25 of the Charter with the addition of a specific reference to "any rights or freedoms relating to the exercise or protection of their language, culture or traditions."[34] Also, at the MMC in Toronto on May 30, agreement was reached on the inclusion of a further non-derogation clause within the section recognising the inherent right of self-government.[35]

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33. R.H. Hemmingson, "Jurisdiction of Future Tribal Courts in Canada: Learning From the American Experience" [1988] 2 *Canadian Native Law Reporter* 1 at 43.

34. Continuing Committee on the Constitution, Working Group III, *Rolling Draft* (June 1 1992) (hereinafter "*Rolling Draft*") at 12.

35. The proposed subsection would state: "Nothing in this section abrogates or derogates from the right contained in section 35 or 35.1 or the enforceability thereof, or makes the right contingent on the commitment to negotiate provided for in this section": *id* at 21.

2. Section 1

Section 1 of the Charter states:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such *reasonable limits* prescribed by law as can be *demonstrably justified in a free and democratic society*.[36]

Stuart has observed that "[a]n entrenched Canadian Charter of Rights and Freedoms would not have been politically attainable without the key compromise in s.1."[37] In the context of a discussion of *R v. Oakes*[38] - the leading decision of the Supreme Court of Canada[39] - Hogg has identified four criteria that must be satisfied if a law is to qualify as a reasonable limit than can be demonstrably justified in a free and democratic society:

> 1. Sufficiently important objective: The law must pursue an objective that is sufficiently important to justify limiting a Charter right.
> 2. Rational connection: The law must be rationally connected to the objective.
> 3. Least drastic means: The law must impair the right no more than is necessary to accomplish the objective.
> 4. Proportionate effect: The law must not have a disproportionately severe effect on the persons to whom it applies.[40]

It may be argued that the well-documented denial of justice to the Aboriginal

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36. Emphasis added.

37. D. Stuart, "Will Section 1 Now Save Any Charter Violation? The *Chaulk* Effectiveness Test is Improper" (1991) 2 C.R.(4th) 107.

38. [1986] 1 S.C.R. 103.

39. The Court's interpretation of s.1 has generated a large body of literature. See for example, L.E. Weinreb, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 *Supreme Court Law Review* 469; E.P. Mendes, "In Search of a Theory of Social Justice: The Supreme Court Reconceives the Oakes Test" (1990) 24 *La Revue Juridique Thémis* 1; and P.W. Hogg & R. Penner, "The Contribution of Chief Justice Dickson to an Interpretive Framework and Value System for Section 1 of *The Charter of Rights*" (1991) 20 *Manitoba Law Journal* 428.

40. P.W. Hogg. "Section 1 Revisisted" (1991) 1 *National Journal of Constitutional Law* 1.

peoples of Canada is so heavily perpetuated by the existing structure for the administration of justice (including its individual rights-based Charter protections) that limitations on the Charter's application to any Aboriginal justice systems would be "demonstrably justified". However, a number of Aboriginal commentators have questioned the authority of the *Charter of Rights and Freedoms* as an interpretive mechanism applicable to Aboriginal people.[41] Russell has specifically rejected the use of section 1 as a constitutional method of 'resolving' the problem of respecting both individual liberties and collective cultural rights in Aboriginal communities.[42] He argues that to accept the standard contained in the Charter and articulated by the Supreme Court of Canada "would be to accept the history of Eurocentric thought which is for the most part premised upon the paramountcy of the rights of an individual, often to the detriment of a collectivity...To be bound by some general theory of democratic thought is to suggest that 'one size fits all'. And clearly it does not."[43]

3. Section 33

Section 33 of the Charter provides for another 'exception' to the protections offered by the Charter. It is an approach that has received considerable attention during the most recent round of constitutional reform negotiations. The

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41. See discussion at text corresponding to notes 82-93 *infra*.

42. Russell, note 26 *supra* at 14.

43. *Id* at 14-15.

notwithstanding clause currently provides an override power whereby Federal Parliament or a provincial legislature may enact legislation, the operation of which would otherwise offend against section 2 or sections 7 to 15 of the Charter (which include each of the criminal procedure or due process provisions).[44]

The difficulty of convincing a non-Aboriginal government to take this action in relation to Aboriginal justice structures is readily apparent. However, more recently debate has centred on the question of whether Aboriginal governments should have the power to engage the override? While the political and popular will to accommodate Aboriginal demands may be at an all time high in Canada, this option would appear to raise some of the most deep-seated concerns of non-Aboriginal Canada about how 'justice' would operate in Aboriginal political cultures where individual rights are assumed to be 'subservient' to community concerns.[45] It may

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44. Section 33 currently states:

> (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate not withstanding a provision included in section 2 or sections 7 to 15 of this Charter.
> (2) An Act or a provision of an Act in respect of which a declarartion made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
> (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
> (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
> (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

45. This is clearly an extremely simplistic depiction of Aboriginal and traditional methods of government, and indeed, may be inaccurate in many cases. As Moss has observed, "[p]erhaps a lesson to be drawn from past and contemporary Indigenous cultures is the interdependence of collective and individual rights": W. Moss, "Indigenous Self-Government in Canada and Sexual Equality Under the *Indian Act*: Resolving Conflicts Between Collective and Individual Rights" (1990) 15 ***Queen's Law Journal*** 279 at 300. Despite the inadequacies of the individual/collective paradigm, it is necessary to address this dichotomy, particularly in the context of 'law and order' and justice administration, even if only to take issue with such an 'either-or' projection of society. See M.E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" in R.F. Devlin (ed), *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery Publications, 1991) 505 at 510.

also ignite dormant, but diplomatically unarticulated concerns about Aboriginal criminality and the danger of its propagation in a 'rights-less' or even 'law-less' society. Indeed, in the field of justice administration, like no other, concerns about the capacity of Aboriginal communities to govern effectively and justly are raised frequently.

The political implications of engaging the override are substantial. The Law Reform Commission of Canada recently concluded that the use of the section 33 "notwithstanding" clause "can be controversial and politically difficult" and that "[t]herefore, resort to that section should not be embarked upon lightly.[46] In fact, since 1982 the validity of section 33 as a democratic "safety valve" has been the subject of considerable debate.[47] The possibility that future Aboriginal governments may exercise a power similar to that which is currently available to "Parliament or the legislature of a province", further complicates the question of the role of section 33. For example, while the major Aboriginal organizations have argued that access to section 33 should be a component of the Aboriginal self-government framework,[48] the Native's Women's Association of Canada has recommended "[t]hat the

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46. *LRCC Report* at 21.

47. The validity of section 33 as a democratic "safety valve" has been the subject of considerable debate. See, for example, A.C. Hutchinson and A. Petter, "Going Into Override" in A.C. Hutchinson (ed), *Dwelling on the Threshold: Critical Essays on Modern Legal Thought* (Agincourt: Carswell, 1987); J.D. Whyte, "On Not Standing for Notwithstanding" (1990) 28 *Alberta Law Review* 347; P.H. Russell, "Standing Up For Notwithstanding" (1991) 29 *Alberta Law Review* 293; and T. Macklem, "Engaging the Override" (1991) 1 *National Journal of Constitutional Law* 274. Slattery has suggested that a limitation on the availability of the override clause is 'built-in' to the Charter: B. Slattery, "Canadian Charter of Rights and Freedoms - Override Clause Under Section 33 - Whether Subject to Judicial Review Under Section 1" (1983) 61 *The Canadian Bar Review* 391.

48. Joint Technical Working Group, *Proposed Joint Aboriginal Draft Amendments* (Ottawa, May 9, 1992).

government of Canada not extend section 33 rights to Aboriginal governments."[49]

IV. ADDRESSING THE CHARTER IMPLICATIONS OF ABORIGINAL AUTONOMY AND THE ADMINISTRATION OF JUSTICE

As the preceding discussion illustrates, while there may be substantial and growing support for Aboriginal control over the administration of justice in Aboriginal communities, the question of the Charter's application to Aboriginal justice systems continues to be a source of disagreement. However, to characterize this conflict as an Aboriginal/non-Aboriginal dispute over the priority of collective/individual rights would be to ignore the fact that recent debate over the Charter has revealed a number of perspectives beyond this simplistic division.

The concept of an autonomous Aboriginal justice system has concerned many observers, but the reasons for this concern differ greatly. Further, a final determination as to the Charter's applicability cannot be made in isolation from the many other issues that are raised by the possibility of autonomous Aboriginal structures as a permanent and significant component of the Canadian justice environment. For example, the question of whether the Charter should apply to Aboriginal justice systems must take into account the nature of the jurisdiction which Aboriginal institutions may exercise in the future.[50] As Hemmingson has observed if the basis of the jurisdiction is to be territorial, thus including at least some non-

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49. Native Women's Association of Canada, *Statement on the "Canada Package"* (Ottawa: Native Women's Association of Canada, 1992) at 14.

50. The question of the jurisdictional structure of proposed Aboriginal justice systems is addressed in Chapter 8.

Aboriginal persons, it is "very difficult to imagine that authority absent the protection of at least the guaranteed fundamental rights and freedoms.[51]

1. Liberalism and the Threat to Individual Rights

It is commonly assumed that traditional Aboriginal dispute resolution processes are based primarily on the collective principles of harmony restoration and thus are likely to be in conflict with the individual rights guaranteed under the dominant system of justice administration in Canada. To the extent that liberalism is concerned with the supremacy of such individual rights and the "way of life" which liberalism represents,[52] Aboriginal autonomy, including the power to derogate from traditional 'due process' rights within the field of justice administration, is opposed.

For example, after arguing against the adoption of "separatism" as the dominant theme of Aboriginal justice strategies,[53] Schwartz concludes:

> If specialized aboriginal tribunals are set up, they should be linked to the general system of courts by a system of review or appeal. The Canadian Charter of Rights and Freedoms should apply, and the "notwithstanding clause" should not be available to aboriginal governments who wish to circumvent.[54]

According to Schwartz, the adoption of a justice administration policy for Aboriginal communities which centres on the creation of autonomous justice institutions has a

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51. Hemmingson, note 33 *supra* at 44.

52. S. Newman, "Challenging the Liberal Individualist Tradition in America: 'Community' as a Critical Ideal in Recent Political Theory" in A.C. Hutchinson and L.J.M. Green (eds), *Law and the Community. The End of Individualism?* (Toronto: Carswell, 1989) 253 at 257.

53. B. Schwartz, "A Separate Aboriginal Justice System?" (1990) 19 *Manitoba Law Journal* 77.

54. *Id* at 85.

number of "drawbacks" including the possible consequence that Aboriginal communities will be 'castadrift' "fiscally, intellectually, and politically" and thus prevented from "participat[ing] fully in the politics of the larger community."[55]

Other concerns reflect more directly the liberal underpinnings of this approach: the absence of "checks and balances",[56] the difficulty of ensuring impartiality,[57] and the characterization of recent autonomy-based Aboriginal justice proposals as "granting extensive privileges to some groups or individuals that are denied to others."[58]

The Manitoba Association for Rights and Liberties (MARL) has taken a rather different position on the question of Aboriginal courts, describing such institutions as "an important component of the overall process of self-government."[59] However, this position does not translate to an endorsement of complete Aboriginal autonomy:

> While aboriginal courts functioning according to aboriginal law would be very different from regular Canadian courts, MARL believes that the procedural safeguards enshrined in the Canadian Charter of Rights and Freedoms must remain applicable in court. There must be a right against self-incrimination, a right to counsel and so on.
> The aboriginal courts would not be hermetically sealed off from Canadian legal principles. The basic principles in the Charter which in any case are universally recognized principles, drawn from international human rights instruments, would remain.[60]

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55. *Id* at 79.

56. *Id* at 79-80.

57. *Id* at 80.

58. *Id* at 78.

59. David Matas, Manitoba Association for Rights and Liberties, *Presentation No. 230 to the Public Inquiry into the Administration of Justice and Aboriginal People* - Transcript of a Community Hearing (Winnipeg, November 15, 1988) at 2001.

60. *Id* at 2004; but see *id* at 2020-21, regarding a possible conflict between this approach and section 25 of the Charter. See the discussion at text corresponding to notes 32-35 *supra*.

2. The Concerns of Aboriginal Women

As discussed in Chapter 6,[61] Aboriginal women have been amongst the most vocal opponents of any process that would support 'Charter-less' Aboriginal governments and justice systems in Canada. For example, the Native Women's Association of Canada has recommended "[t]hat the Charter of Rights and Freedoms apply to all Aboriginal governments".[62]

However, the position of Aboriginal women's organizations on the application of the Charter,[63] does not reflect an express opposition to the concept of Aboriginal autonomy in relation to the administration of justice.[64] For the most part, Aboriginal women's organizations have strongly supported the realization of meaningful autonomy, including in the area of justice. The Indigenous Women's Collective of Manitoba has stated that it "fully agrees with the creation of an aboriginal justice system which would undoubtedly better deal with the situation of aboriginal people, particularly indigenous women and the legal system."[65] However, in its submission

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61. See the discussion in Chapter 6, at text corresponding to notes 83-84 *supra*.

62. NWAC, note 49 *supra* at 14.

63. The Indigenous Women's Collective of Manitoba has supported the position of the Native Women's Association of Canada on the continued application of the *Charter of Rights and Freedoms* to Aboriginal governments: R. Teichroeb, "Limits sought on powers of chiefs. Past abuses raise fears of 'dictatorship' if self-government granted too quickly", *Winnipeg Free Press*, April 6 1992, B13.

64. The extent to which the application of the Charter is inconsistent with the establishment of autonomous Aboriginal justice systems is addressed at the text corresponding to notes 81-100 *infra*.

65. J.Courchene, Executive Director, Indigenous Women's Collective of Manitoba, *Presentation No. 789 to the Public Inquiry into the Administration of Justice and Aboriginal People* - Transcript of a Community Hearing (Winnipeg, November 22, 1989) 7712 at 7714; also see Indigenous Women's Collective, *Aboriginal Women's Perspective of the Justice System in Manitoba* (Winnipeg: Research Paper prepared for the Aboriginal Justice Inquiry of Manitoba, June 1990).

to the Aboriginal Justice Inquiry of Manitoba the Collective stressed the importance of including Aboriginal women "in all levels of decision-making and implementation,"[66] in relation to the establishment of aboriginal justice systems. Similarly, the Charter of Rights Coalition observed that without such guaranteed participation, "there is a very real danger that a justice system designed by native men to meet their needs may discriminate against native women."[67]

As these observations illustrate, the concerns of Aboriginal women will not be adequately addressed simply by ensuring the application of individual rights protections to Aboriginal governments and justice systems. This position is reinforced by evidence of the operation of individual rights protections on United States Indian reservations. Indeed, while the most commonly voiced criticism of the *Indian Civil Rights Act* is that it infringes on tribal sovereignty and reinforces the limited nature of Native American self-government in the United States, concerns have also been raised about the capacity of the Act to protect the rights of Native American women.

This issue was highlighted by the decision in *Santa Clara Pueblo v. Martinez*[68], where the United States Supreme Court denied the Indian woman plaintiff protection against gender discrimination.[69] Christofferson has concluded:

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66. S. Delaronde, Indigenous Women's Collective of Manitoba, note 65 *supra* at 7731.

67. J. Bjornson, Charter of Rights Coalition Manitoba, *Presentation No. 463 to the Public Inquiry into the Administration of Justice and Aboriginal People* - Transcript of a Community Hearing (Winnipeg, January 26, 1989) 4177 at 4181.

68. 436 U.S. 49 (1978).

69. The essence of Martinez's claim was that a membership ordinance which stated in part that "children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo," discriminated against her on the basis of sex, and therefore violated

> Although the ICRA is designed to protect individual rights from encroachment by the tribe, Native American women are powerless to enforce such rights after the *Santa Clara* decision ... Although tribes deprive women of their civil rights, the doctrine established in *Santa Clara* declines to hold the tribes accountable in federal court for their discriminatory actions.[70]

This case illustrates that the application to Aboriginal institutions of the *Canadian Charter of Rights and Freedoms* in its current form may be inadequate to ensure that Aboriginal women enjoy equally the right to exercise collective autonomy rights and indeed may sanction discrimination equivalent to that of which Martinez complained. For example, the Native Women's Association of Canada has questioned the possible effect of section 25.

> One question is whether section 25 could also be used by aboriginal governments to protect themselves from complaints made by individual aboriginal persons who feel they are being discriminated against by their aboriginal governments.
> This possibility worries many aboriginal women who fear that their own aboriginal governments may try to use section 25 of the Charter to allow them to discriminate against women by saying that the right to make rules, whether discriminatory or not, is part of their aboriginal right to govern their communities.[71]

In this context the most recently stated position of the Assembly of First Nations is significant, and represents a serious attempt to accommodate the full measure of autonomy aspirations and the legitimate concerns of Aboriginal women within a workable framework for self-government. The First Nations Circle on the Constitution has recommended:

> That women be equally represented in all decision-making processes [and] ... that the Canadian Charter of Rights and Freedoms shall not override First Nations laws, but that gender equality be formally established in formal Aboriginal Charters of Rights and

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Title 1 of the *Indian Civil Rights Act* which states that "[n]o Indian tribe in exercising powers of self-government shall...deny to any person within its jurisdiction the equal protection of its laws..."

70. C. Christofferson, "Tribal Courts Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act" (1991) 101 *The Yale Law Journal* 169 at 179.

71. NWAC, note 28 *supra* at 9-10.

Freedoms.[72]

It is also significant that the Aboriginal self-government component of the constitutional reform package currently under consideration includes a gender equality provision in the following terms:

> 35(4). Notwithstanding any other provision of this Act, the rights referred to in this Part are guaranteed equally to female and male persons.[73]

3. International Human Rights Provisions

According to Claydon,

> Canada's international human rights obligations served as not only the necessary and pervasive context in which the Charter of Rights was introduced and adopted, but also as the direct inspiration for amendments designed to strengthen the human rights protection provided.[74]

In particular, the Charter draws heavily from the International Covenant on Civil and Political Rights,[75] although there has been some debate about the extent to which the former instrument gives effect to the latter, or constitutes "a bridge between municipal

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72. First Nations Circle on the Constitution, *To the Source. Commissioners' Report* (Ottawa: Assembly of First Nations, 1992) at 78.

73. *Rolling Draft* at 30. A proposed section 35(5) states:

> For greater certainty, the application of the guarantee in subsection (4) shall be guided by traditional governmental systems and spiritual practices in which Aboriginal female and male persons have different and equally respected responsibilities.

- *Ibid.* Representatives of the Inuit Tapirisat of Canada did not support this explanatory clause and proposed the inclusion of a s.35(6) which states that "subsection (5) shall not apply to Inuit": *ibid.*

74. J. Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982) 4 *Supreme Court Law Review* 287 (footnotes omitted).

75. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (xxi) of 16 December 1966. Entered into force on 23 March 1976, in accordance with article 49.

law and international law..."[76]

In the context of international human rights norms, there would appear to be a rather serious contradiction between Aboriginal denials of the applicability of the due process provision contained in the Canadian Charter and the International Covenant,[77] and simultaneous efforts to exercise their right to self-determination under Article 1 of the same international instrument.[78] If, for example, a particular First Nation was a state party to the covenant, such selective endorsement of its provisions would be deemed unacceptable. While First Nations are clearly not parties to international human rights instruments in any such formal manner, the current level of participation of many indigenous organizations in international forums, including the United Nations Working Group on Indigenous Populations,[79] carries with it a certain responsibility to respect existing international law principles as the struggle for improved protections of indigenous rights continues.

An awareness of this context is illustrated in the constitutional amendments

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76. M. Cohen and A.F. Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983) 61 *Canadian Bar Review* 265 at 268. See also, W.S. Tarnopolsky, "A Comparison Between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights" (1983) 8 *Queen's Law Journal* 211; J. Humphrey, "The *Canadian Charter of Rights and Freedoms* and International Law" (1985) 50 *Saskatchewan Law Review* 13; and on the pratical implications of the relationship, see W.A. Schabas, *International Human Rights Law and the Canadian Charter. A Manual for the Practitioner* (Toronto: Carswell, 1991).

77. See H.N.A. Noor Muhammad, "Due Process of Law for Persons Accused of Crime" in L. Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 138.

78. For a critique of the argument that international recognition of the collective rights of 'peoples' would necessarily involve an erosion of traditional individual human rights, see G. Triggs, "The Rights of 'Peoples' and Individual Rights: Conflict or Harmony?" in J. Crawford (ed), *The Right of Peoples* (Oxford: Clarendon Press, 1988) 141.

79. See discussion in Introduction, at text corresponding to notes 17-25 *supra*.

originally proposed by the Native Council of Canada. The NCC proposed the addition of a sub-clause which states that section 33:

> applies to Aboriginal governmental bodies or institutions...however, any such body or institution that makes an express declaration pursuant to subsection (1) or re-enacts such declaration pursuant to subsection (4) *shall adhere to those international standards of human rights which include the rights of indigenous peoples.*[80]

While there is considerable validity in a position which supports the observation of international human rights norms, a blanket imposition of the *Charter of Rights and Freedoms* would amount to the laying of a blueprint firmly in the western liberal tradition.

VI. THE CONFLICT WITH ABORIGINAL AUTONOMY DEMANDS

It would seem that to *insist* that the *Charter of Rights and Freedoms* (including the criminal procedure/due process provisions in section 7-14) be applicable to the justice processes established by Aboriginal governments may seriously jeopardize the potential effectiveness of Aboriginal justice mechanisms. Indeed, such a precondition to negotiating self-government agreements would amount to a constitutional 'straight-jacketing' of Aboriginal communities in their efforts to exercise their autonomy rights in the field of social control or 'law and order'.

There would seem to be an inherent contradiction between endorsing Aboriginal autonomy on the one hand, and, on the other, stifling the potential

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80. Continuing Committee on the Constitution, Working Group III, *Overview and Commentary on Aboriginal Drafts*. Document 840-638/009 (Saint John, May 5-7, 1992) at 8 (emphasis added). See also Native Women's Association of Canada, *Native Women and Self-Government: A Discussion Paper* (Ottawa: Native Women's Association of Canada, 1992) at 10-12.

exercise of that autonomy by imposing rights-based limitations in the form of the Charter. That is not to say that concerns such as those expressed by the Native Women's Association of Canada[81] about 'Charter-less' Aboriginal justice systems and Aboriginal governments are not legitimate. But from the perspective of bringing about a meaningful change in the way justice operates for Aboriginal people in this country, to require that Aboriginal justice mechanisms be constructed around the framework of the Charter will reduce significantly the range of options available to Aboriginal communities, and may seriously hamper the development of truly autonomous Aboriginal alternatives to the current institutions of the criminal justice system.

This approach is supported by criticisms such as those expressed by Turpel,[82] and Boldt and Long.[83] Mary Ellen Turpel has called into question "the cultural authority of the Canadian Charter of Rights and Freedoms", in terms of its application to Aboriginal peoples.[84] She argues that the assumption inherent in Aboriginal participation within Charter discourse and the rights paradigm generally - that cultural differences *can* be reconciled through appropriate interpretation and application of constitutional principles - is "more theoretical than actual in the case of Aboriginal

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81. NWAC, note 28 *supra*.

82. Turpel, note 45 *supra*.

83. M. Boldt and J.A. Long, "Tribal Philosophies and the Canadian Charter of Rights and Freedoms" (1984) 7 *Ethnic and Racial Studies* 478.

84. Note 45 *supra* at 503. Turpel defines "cultural authority" as "the authority which one culture is seen to possess to create law and legal language to resolve disputes involving other cultures and the manner in which it explains (or fails to explain) and sustains its authority over different peoples" : *ibid.*

peoples",[85] and actually serves to perpetuate the extent to which Aboriginal people are dominated in Canada.[86] Reliance on the *Canadian Charter of Rights and Freedoms* by Aboriginal people carries a high risk.[87]

> It is troubling that Aboriginal peoples have few choices but to advance their differences as rights claims under the Charter in order to avoid ethnocidal government action. Even where an action is brought by an Aboriginal group pursuant to the Charter, the results, given cultural predisposition of the Charter, are unlikely to be favourable.[88]

Boldt and Long have also questioned the cultural relevance of the Charter, arguing that "the western-liberal tradition embodied in the Canadian Charter of Rights and Freedoms, which conceives of human rights in terms of the individual, poses yet another serious threat to the cultural identity of Native Indians in Canada."[89] Like Turpel they have expressed doubts about the efficacy of Aboriginal peoples embracing the rights paradigm,[90] and of participating within the Canadian constitutional framework in the struggle for meaningful autonomy.[91] For example, Boldt and Long observed in 1988:

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85. *Id* at 510.

86. *Id* at 510-11.

87. See *id* at 525.

88. *Id* at 516-517 (footnotes omitted).

89. Note 83 *supra* at 478.

90. Boldt and Long have argued that a doctrine of "human dignity" could provide an alternative to the rights-based approach illustrated by the Charter of Rights and Freedoms and international human rights instruments, that would "grow out of Indian culture, politics and goals" and be more consistent within the collective emphasis of many Aboriginal cultures: see *id* at 486-88.

91. From a significantly different perspective, Green has also questioned the value of Charter protections for Aboriginal people and of seeking further constitutional recognition of Aboriginal rights: L.C. Green, "Aboriginal Peoples, International Law and the Canadian Charter of Rights and Freedoms" (1983) 61 *Canadian Bar Review* 339.

> If Indians want meaningful self-government, we suggest they redirect their energies from participating in the Canadian constitutional process to unilaterally developing constitutions at the local level.[92]

It would probably be premature to conclude on the basis of the apparent gains made by Aboriginal peoples during the most recent constitutional round that this participation has been profitable or constructive, and thus that the 'grass roots' approach[93] advocated by Boldt and Long was misguided. Indeed this strategy for the realization of the autonomy aspirations of Aboriginal peoples in Canada has implications for the future direction of initiatives *within* the Charter/constitutional rights paradigm.

Perhaps the greatest injustice of *requiring* that the Charter apply to Aboriginal justice systems and governments generally, is that such a position effectively assumes that Aboriginal cultures are inherently deficient in the capacity to resolve collective versus individual rights conflicts.[94] Russell has criticized this assumption, arguing that there are several elements of "traditional thought"[95] which are capable of addressing such conflicts.[96]

Ultimately, resolution of this particular issue must be consistent with the broader context of recognising and giving effect to Aboriginal autonomy rights. As

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92. M. Boldt and J.A. Long, "Native Indian Self-Government: Instrument of Autonomy or Assimilation?" in J.A. Long, M. Boldt and L. Little Bear (eds), *Governments in Conflict? Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988) 38 at 56.

93. *Id* at 50-56.

94. See discussion at note 45 *infra*.

95. Russell, note 26 *supra* at 15.

96. See also Turpel, note 45 *supra* at 510.

Russell concludes: "The alternatives are many and they are perhaps choices that only the respective aboriginal communities are entitled to make."[97] In this respect, recommendations for the creation of an 'Aboriginal Charter'[98] or a "First Nations human rights and responsibilities" code,[99] represent a significant effort to achieve a more acceptable fusion of Aboriginal cultures and the rights paradigm within which the ultimate goal of autonomy is currently being pursued. Success in this endeavour may be crucial to the establishment of Aboriginal justice structures which do more than simply constitute 'indigenized' versions of the existing justice system, and, in fact, constitute innovative and effective exercises of the self-governing powers of Aboriginal communities in the fields of justice and social control.

In a narrow sense these difficulties may have already been 'resolved' by the terms of the 'Canada round' constitutional reform package. Provisions dealing with recognition of the Aboriginal right of self-government assert that the Charter will apply "to all legislative bodies and governments of the Aboriginal peoples of Canada

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97. *Ibid.*

98. See First Nations Circle on the Constitution, note 73 *supra* at 78. The Aboriginal Justice Inquiry of Manitoba recommended that "First Nation governments draft a charter of rights and freedoms which reflects Aboriginal customs and values": *AJI Report Vol 1* at 336. The Native Women's Association of Canada has taken the position that:

> If First Nations wish to establish Aboriginal Charters, we would not object as long as the Aboriginal Charters do not replace the Canadian Charter of Rights and Freedoms which we feel must apply to Aboriginal governments under self-government."

- NWAC, note 80 *supra* at 13. The proposal for creating Aboriginal Charters has been criticised by the head of the Canadian Human Rights Commission: see J. McKay, "Don't scrap Charter, Yalden tells natives", *Winnipeg Free Press*, April 23 1992, B21.

99. See for example, Native Women's Association of Canada, *A First Nations Human Citizenship Code* (Ottawa: Native Women's Association of Canada, 1986); discussed in Turpel, note 45 *supra* at 526.

with respect to all matters within their authority."[100] A constitutional amendment in these terms would have major implications for autonomy-based justice reform in Aboriginal communities. Ultimately, creative applications of section 33 and the non-derogation provisions may provide the answer to the task of attempting to reconcile legitimate Aboriginal autonomy with the requirements of the *Canadian Charter of Rights and Freedoms*.

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100. Section 32(c), *Rolling Draft* at 9. See also discussion in Chapter 6, at text corresponding to notes 105-130 *infra*.

CHAPTER 8

SETTING THE 'LIMITS' OF AUTONOMY: DEVELOPING A FRAMEWORK FOR THE CREATION OF ABORIGINAL JUSTICE SYSTEMS

I. INTRODUCTION

The task of translating an endorsement of autonomy-based criminal justice reform at the broad policy level into viable programs within Aboriginal communities will necessarily involve the formulation of an appropriate 'framework', particularly as the number and scope of such initiatives increases. As the discussion of the *Charter of Rights and Freedoms* in the previous chapter illustrates, one of the primary dangers of pre-defining the 'limits' of potential exercises of Aboriginal autonomy in the field of justice administration is that the result may be a stifling of legitimate autonomy-based alternatives to the existing system. At the same time, it is clear that certain 'boundary' issues need to be addressed. Of these, the question of jurisdiction is perhaps the most fundamental.

In the context of Aboriginal justice systems, jurisdiction refers to a range of issues including: the sphere in which autonomous institutions would operate; the matters that would be dealt with and the 'laws' or principles that would apply; and the way in which institutions would interact with each other, and with the non-Aboriginal criminal justice system. As was argued in Chapter 6, many of these issues can only be adequately addressed in relation to the broader context of Aboriginal self-government.

Assuming that responsibility for the administration of justice and maintenance of social harmony/order in Aboriginal communities will be determined to be a

component of the Aboriginal right of self-government,[1] many of the jurisdictional issues relating to the operation of Aboriginal justice systems will likely be settled by the terms of particular negotiated self-government agreements. However, it would be impractical, and, ultimately detrimental, to fail to address these basic issues prior to the commencement of the negotiation process. A greater understanding of the possible jurisdictional models for Aboriginal justice systems in Canada can only increase the likelihood of effective implementation of this direction in Aboriginal justice reform. Further, to delay such analysis would be to ignore the current existence of several community-based autonomous justice initiatives in Aboriginal communities. Indeed, while a uniform model of Aboriginal justice systems similar to that which operates in the United States would be fundamentally inconsistent with the trend towards recognition of meaningful Aboriginal autonomy in Canada, it may be argued that existing programs and proposals have the potential for prompting the evolution of a broadly applicable 'model' which would be sufficiently flexible for adaption to the circumstances and objectives of specific Aboriginal communities.

Part II of this chapter begins with a brief consideration of the jurisdiction of tribal courts as they operate on Indian reservations in the United States. The serious limitations which this jurisdictional framework has placed on potential exercises of Indian autonomy will be analyzed as a paradigm against which jurisdictional models recently proposed in Canada can be examined and evaluated. The most commonly

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1. As was suggested in Chapter 6, this particular aspect of the 'content' debate may figure prominently during the justiciability stage of the Aboriginal self-government negotiation process. See Chapter 6, part V *supra*.

advanced model - based on territorial jurisdiction - will then be examined with a view to highlighting the limitations of this approach in terms of its capacity to address the justice concerns of Aboriginal people in Canada.

Part III considers the difficult task of accommodating the full range of Aboriginal autonomy entitlements within proposed jurisdictional frameworks. In particular, it considers the importance of facilitating the shaping of justice mechanisms by members of Aboriginal communities in relation to such matters as the 'definition' of crime and social order, and the application of appropriate dispute resolution processes and sanctions. It is submitted that the emphasis in this respect must be on developing a framework that is capable of achieving sensitivity to these objectives.

Both in Canada and Australia, several initiatives (both proposed and implemented) in recent years provide an indication as to how many of these questions can be addressed at the practical level. Part IV of this chapter will briefly summarise a selection of recent initiatives from the prairie region in Canada, and, for comparative purposes, from Australia.

In part V it will be argued that rather than seeking to impose a pre-established uniform model of Aboriginal justice systems, a flexible framework which draws from a number of existing programs might become an effective tool during the process of negotiating self-government agreements between federal and provincial governments and the representatives of Aboriginal communities.

II. THE JURISDICTIONAL BASIS OF ABORIGINAL JUSTICE SYSTEMS

1. The Jurisdiction of Tribal Courts in the United States

Earlier chapters in this thesis have dealt briefly with the general system of tribal courts in the United States,[2] and more specifically with the effect on the sovereignty of Indian governments of the imposition of individual rights-based due process protections in the form of the *Indian Civil Rights Act*.[3]

Another aspect of the environment of limited autonomy in which tribal courts operate in the United States is the encroachment of state and federal governments on the criminal jurisdiction of tribal courts. Following a brief summary of the jurisdiction exercised by tribal courts, the significance of this intrusion will be considered.

Numerous commentators have discussed the complicated and sometimes uncertain nature of the jurisdiction of tribal courts in the United States. Clinton has observed that "[t]he criminal jurisdiction of the tribal courts is even more unclear than their legal status."[4] Deloria and Lytle have also referred to "[t]he jurisdictional maze that has clouded the Indian system of justice..."[5] As Keon-Cohen has concluded,

> one major continuing problem facing Indian courts is uncertainty and dispute concerning the extent of their jurisdiction and continuing efforts by federal and state legislative and

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2. See Chapter 5, part V *supra*.

3. See Chapter 7, part II *supra*.

4. R.N. Clinton, "Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze" (1976) 18 *Arizona Law Review* 503 at 557.

5. V. Deloria, Jr. & C.M. Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983) at 178; see also K.B. Adams, "Order in the Courts: Resolution of Tribal/State Criminal Jurisdiction Disputes" (1988) 24 *Tulsa Law Journal* 89.

judicial authorities to curtail it.[6]

While recognising that there is considerable variation across the country, a general summary of jurisdiction in "Indian country"[7] will be attempted here.[8]

In theory, tribal governments have exclusive jurisdiction over crimes by Indians against the person or property of Indians within Indian country, except for fourteen serious offences which, as a result of the *Major Crimes Act*,[9] are within federal authority.[10] This generalization does not apply in states where Public Law 280[11] operates. According to the *Report of the Aboriginal Justice Inquiry of Manitoba*,

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6. B.A. Keon-Cohen, "Native Justice in Australia, Canada, and the U.S.A.: A Comparative Analysis" (1982) 5(2 & 3) *Canadian Legal Aid Bulletin* 187 at 243.

7. According to Hemmingson, "[t]he American term 'Indian country' delineates the geographic jurisdiction of tribal courts and includes not only Indian trust land, comparable to reserve land in Canada, but also land held by non-Indians in fee simple ... or by non-Indian lessees which is within the external boundaries of a reservation...": R.H. Hemmingson, "Jurisdiction of Future Tribal Courts in Canada: Learning From the American Experience" [1988] 2 *Canadian Native Law Reporter* 1 at 11.

8. An excellent summary is contained in Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba. Volume 1: The Justice System and Aboriginal People* (Winnipeg: Province of Manitoba, 1991) (hereinafter "*AJI Report Vol 1*") at 276-283. See also R.B. Flowers, *Criminal Jurisdiction Allocation in Indian Country* (Port Washington: Associated Faculty Press, 1983); and C. Small (ed), *Justice in Indian Country. A Summary and Analysis of Investigative Hearings on the Administration of Justice in Indian Country, January 1980* (Oakland: American Indian Lawyer Training Program, 1980) at 31-38.

9. 18 U.S.C. ss. 1153, 3242. This legislation was enacted in response to the decision of the United States Supreme Court in *Ex parte Crow Dog*, 109 U.S. 556 (1883). See *AJI Report Vol 1* at 282; also S.L. Harring, "Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty" (1986) 14 *American Indian Law Review* 191.

10. See American Indian Lawyer Training Program Inc., *Indian Self-Determination and the Role of Tribal Courts. A Survey of Tribal Courts* (Oakland: American Indian Lawyer Training Program Inc., 1982) at 43; and Clinton, note 4 *supra* at 536-545.

11. *Act of August 15, 1953*, c.505, 67 Stat.588, as amended 18 U.S.C. s.1162 and U.S.C. s.1360.

> The effect of the law was that in those states to which the law applied, most tribal courts have disappeared because of the prevailing and overriding jurisdiction given to state courts by the law.[12]

Further, the *Indian Civil Rights Act*[13] limits the penalty which can be imposed by tribal courts, presently to a maximum of one year's imprisonment or a fine of $5,000.[14]

The vulnerability of the criminal jurisdiction of tribal courts in the United States was perhaps most vividly illustrated by the decision in *Oliphant v. Suquamish Indian Tribe*.[15] The United States Supreme Court held that Indian tribal courts do not have criminal jurisdiction in relation to offences committed on reserves by non-Indians on reserves.[16]

The reasoning applied by the court to exclude non-Indians from the jurisdiction of tribal courts is fundamentally inconsistent with the rationale behind the enactment of the *Indian Civil Rights Act*. While the Act was clearly designed to have a 'Westernizing' effect on Indian justice institutions, Rehnquist J. concluded that the alien nature of these institutions supported a presumption against their application to

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12. *AJI Report Vol 1* at 274.

13. 25 U.S.C.A. para 1301 et seq.

14. See *AJI Report Vol 1* at 283.

15. 435 U.S. 191 (1978).

16. The Court reversed a decision of the Ninth Circuit Court of Appeals which upheld the power of the Suquamish Tribe to arrest and try two non-Indians under the Suquamish Tribal Code for assault, resisting arrest, and reckless driving.

non-Indians.[17]

The decision has been described by Barsh and Henderson in the following terms:

> *Oliphant* is a betrayal of tribes that have struggled to Westernize their legal systems. Since Congress gave its blessing to Western-style constitutional tribal government in 1934, tribes have largely abandoned traditional procedures, persuaded that adaption and "modernization" of their courts would enhance their legitimacy in non-Indian eyes, and hence their vulnerability to federal and state interference. Congress encouraged and subsidized this transformation by means of the Indian Civil Rights Act and its model tribal criminal codes, special grant and technical assistance programs within the Bureau of Indian Affairs and the Law Enforcement Assistance Administration, and support of various Indian Law Institutes and organizations such as the National American Indian Tribal Court Judges Association. The tribes, in turn, have been rewarded for their efforts with a Supreme Court decision that has stripped them of a sizeable share of their jurisdiction.[18]

While such criticisms of the decision in *Oliphant* are clearly warranted,[19] it is clearly not the source of the problems associated with tribal sovereignty and criminal jurisdiction in the United States. Rather, it is illustrative of the political and legal environments in which tribal governments operate. Further, as Hemmingson has observed, the complicated jurisdictional framework which operates in Indian country is based, at least in part, "on the inherent conflict within the notion of 'domestic nationhood' between tribal sovereignty on the one hand and plenary federal authority

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17. See R.L. Barsh & J. Youngblood Henderson, "The Betrayal: *Oliphant v. Suquamish Indian Tribe* and the Hunting of the Snark" (1979) 63 *Minnesota Law Review* 609 at 634.

18. *Id* at 636.

19. See, further, R.B. Collins, "Implied Limitations on the Jurisidiction of Indian Tribes" (1979) 54 *Washington Law Review* 479 at 486-508; C. Baker Stetson, "Decriminalizing Tribal Codes: A Response to *Oliphant*" (1981) 9 *American Indian Law Review* 51; and S.M Johnson, "Jurisdiction: Criminal Jurisdiction and Enforcement Problems on Indian Reservations in the Wake of *Oliphant*" (1979) 7 *American Indian Law Review* 291.

and legitimate state interests on the other."[20]

The limited, fragmented and relatively fragile jurisdiction exercised by tribal courts in the United States is one of the major reasons why this particular model of autonomy in the administration of justice may be inappropriate to meet the justice requirements of Aboriginal communities in Canada.

2. Proposed Jurisdictional Models in Canada

During the course of the last decade, proposals for the creation of 'Aboriginal courts' or related institutions have been made with increasing frequency in Canada. For the most part, these proposals have failed to conceive of ways of administering justice in Aboriginal communities that are substantially diffferent to the dominant 'Western' adjudication process, and indeed have tended to perpetuate approaches based on exercising jurisdiction within a specified geographic area.

Aboriginal justice systems with a territorial jurisdiction base are inadequate to meet the justice aspirations of a large number of Canada's Aboriginal peoples. Proposals based on this approach suffer from a failure to reflect an accurate conception of the nature of the justice 'problem' in many Aboriginal communities.[21] Further, they have generally been seen as dependent on several other contentious issues such as the settlement of land claims, and the whole question of status under the *Indian Act*. They assume that the situation of First Nation reserve communities is

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20. Hemmingson, note 7 *supra* at 24.

21. See generally, Chapter 1 *supra*.

the 'norm' in Canada, and fail to recogize the legitimate autonomy rights of all of Canada's Aboriginal people.

The extent to which proposed models in Canada have been limited to territorial and semi-autonomous approaches reflects, at least in part, the tendency to rely on the United States system of tribal courts as a guide to possible developments in Canada. In 1980, Morse considered the viability of the tribal court system in the United States as a model adaptable to the situation of Aboriginal people in Canada, and suggested that "it would appear appropriate for us in Canada to consider seriously the implementation of a similar institutional framework."[22] More recently, Hemmingson has undertaken a more detailed analysis of the jurisdiction of tribal courts in the United States, on the basis of which he has made a series of recommendations as to the jurisdictional structure of such courts.[23]

Neither analysis seriously questioned the relevance of the United States model, given the particular needs and aspirations of Canada's Aboriginal peoples.[24] Specifically, they fail to recognise that the purpose for which tribal courts were originally established in the United States, and the reasons for which they are being endorsed now in Canada, are substantially different. Although there have been several

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22. B.W. Morse, *Indian Tribal Courts in the United States: A Model for Canada?* (Saskatoon: Native Law Centre, University of Saskatchewan, 1980) at 1.

23. Hemmingson, note 7 *supra* at 24-30.

24. More recently, this issue has attracted greater attention. See for example, Osnaburgh-Windigo Tribal Council Justice Review Committee, *Taw Bway Win: Truth, Justice and First Nations* (report prepared for the Ontario Attorney General and Solicitor General, 1990) at 37; and J. Rudin & D. Russell, *Native Alternative Dispute Resolution Systems: The Canadian Future in Light of the American Past* (Toronto: Ontario Native Council on Justice, 1991) at chapter 5.

efforts in recent years to reshape and expand tribal courts in line with renewed assertions of sovereignty,[25] the legacy of the original rationale for the establishment of such courts during the 1880s[26] - to 'contain' Indians on allotments of land or reservations,[27] by application of the "police idea"[28] - remains in the limited and fragile jurisdiction exercised by tribal courts today.[29]

In Canada, proposals for the establishment of Aboriginal justices have emerged in an entirely different context and from a completely different perspective. However, comprehensive models consistent with these differences have been slow to develop.

At first glance the recommendations of the *Report of the Aboriginal Justice Inquiry of Manitoba* appear to belong to the category of significant, but ultimately inadequate conceptualizations of how Aboriginal autonomy rights can be given effect in relation to matters currently dealt with by the non-Aboriginal criminal justice process. It proposes that:

> All people, Aboriginal and non-Aboriginal, *within the geographical boundaries of a reserve or Aboriginal community*, be subject to the jurisdiction of the Aboriginal justice

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25. For example, in September 1991 the Indian Tribal Courts Act (S.1752) was introduced into the United States Senate. The bill is designed to establish a national Tribal Justice Conference to administer increased federal funding for tribal courts: see "Indian Tribal Courts Act Introduced", *The Tribal Court Record*, Volume 5(1), Winter 1992, 5. See also American Indian Lawyer Training Progran Inc., note 10 *supra*.

26. See the discussion in Chapter 5, at text corresponding to notes 66-71 *supra*.

27. The emergence of allotments as a core element of national Indian policy is outlined by Deloria & Lytle, note 5 *supra* at 8-12.

28. R.L. Barsh & J.Y. Henderson, "Tribal Courts, the Model Code, and the Police Idea in American Indian Policy" (1976) 40 *Law and Contemporary Problems* 25 at 38.

29. See K. Kickingbird, "'In our Image ..., After Our Likeness:' The Drive for the Assimilation of Indian Court Systems" (1976) 13 *The American Criminal Law Review* 675.

system in place within that community.[30]

As suggested above, apart from its apparent limitations, the immediate difficulty which is raised by this approach is that of defining an Aboriginal community and its physical boundaries. For the Commissioners, a partial resolution of this problem is found by determining that "it is not necessary, in our opinion, for Aboriginal communities to 'own' or have a valid legal claim to the land they occupy in order to be identified as Aboriginal communities for purposes of establishing Aboriginal justice systems."[31]

With limited exceptions,[32] the scheme of comprehensive Aboriginal justice systems proposed by the Commissioners would operate only within the boundaries of the community, where "Aboriginal courts must have exclusive, original jurisdiction..."[33] In relation to specific communities, proposals for territorial Aboriginal justice systems are clearly appropriate. For example, the authors of the report, *Justice for the Cree*[34] have recommended that an autonomous system should operate within the established boundaries of Cree lands in the James Bay region, and that "any person perpetrating an offence on Cree territory should answer to the Cree

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30. *AJI Report Vol 1* at 321 (emphasis added).

31. *Id* at 318.

32. See *id* at 326.

33. *Id* at 327.

34. J-P. Brodeur, C. La Prairie & R. McDonnell, *Justice for the Cree: Final Report* (Nemaska: Grand Council of the Crees (of Québec) and the Cree Regional Authority, 1991).

system of justice for his or her behaviour."[35]

However, to create a generally applicable model of territorial Aboriginal justice systems is to ignore the fact that one of the primary motivations for the establishment of autonomous Aboriginal justice structures in Canada is the inadequacy of the non-Aboriginal system in dealing justly and effectively with Aboriginal offenders (including the substantial numbers living in urban centres and other predominantly non-Aboriginal communities), and the manner in which it has denied the inherent autonomy rights of Aboriginal peoples.

The recommendations for the establishment of Aboriginal justice systems contained in the *Report of the Aboriginal Justice Inquiry of Manitoba*[36] represent a significant advance on conventional approaches to Aboriginal justice autonomy including the question of jurisdiction, and the capacity to apply traditional or other Aboriginal dispute resolution mechanisms. In relation to Aboriginal persons living outside of distinct Aboriginal communities, the report proposes that the autonomy-based approach could include "alternative dispute resolution mechanisms and alternative measures attached to the existing court system, which take into account, or are based upon, the cultures of Aboriginal people."[37]

The Law Reform Commission of Canada has also made a significant contribution to the development of a more flexible understanding of Aboriginal justice

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35. J-P. Brodeur with Y. Leguerrier, *Justice for the Cree: Policing and Alternative Dispute Resolution* (Nemaska: Grand Council of the Crees (of Québec) and Cree Regional Authority, 1991) at 130.

36. See discussion in Chapter 3, at text corresponding to notes 27-36 *supra*.

37. *Id* at 327.

systems. Most importantly, the Commission conceives of territoriality as only one of several possible bases for the exercise of jurisidiction by Aboriginal justice structures:

> Jurisdiction could be based on the offender, the offence or the location of the offence: any one of these criteria might be appropriate. An Aboriginal justice system might automatically acquire jurisdiction where the offender is an Aboriginal person, or jurisdiction might be optional in that case.... Jurisdiction might also be simply divided on the basis that any offence committed on a reserve or designated territory (or perhaps by an Aboriginal person on a reserve) will be dealt with by a local Aboriginal justice system. Thus, although we have not devised precise jurisdictional rules - and it would be inappropriate for us to do so - it is clear to us that a workable formula can be achieved through the process of negotiation that is contemplated by our proposal.[38]

Ultimately, the jurisdiction of Aboriginal justice systems must be compatible with, and indeed based on, the jurisdictional structure of Aboriginal governments. The whole shape of Aboriginal justice systems must be allowed to develop in terms consistent with the broader movement towards realization of the inherent right of Aboriginal self-government. Frameworks such as those articulated by the Aboriginal Justice Inquiry of Manitoba and the Law Reform Commission represent an attempt to conceive of 'justice' in terms which may be fundamentally different from the principles which underlay the existing Canadian system of criminal law and criminal justice administration. This approach has implications beyond the jurisdictional structure of Aboriginal justice systems. It is becoming increasingly apparent that Aboriginal autonomy in the field of justice is not simply a matter of establishing Aboriginal courts, no matter how comprehensive. Meaningful autonomy must include the right to 'define' justice, and to adopt and apply laws and processes consistent with this definition.

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38. Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice. Report No. 34* (Ottawa: Law Reform Commission of Canada, 1991) at 22.

III. ABORIGINAL JUSTICE AND DISPUTE RESOLUTION

Perhaps the most challenging aspect of the task of reconciling Aboriginal autonomy and justice reform is that of formulating a framework for the creation of Aboriginal justice systems that is not simply flexible in jurisdictional terms, but also capable of achieving objectives which are critically different from those of the dominant system. As the *Report of the Aboriginal Justice Inquiry of Manitoba* noted

> At the most basic level of understanding, justice is understood differently by Aboriginal people.... The purpose of a justice system in an Aboriginal society 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. This is a primary difference. It is a difference that significantly challenges the appropriateness of the present legal and justice system for Aboriginal people in the resolution of conflict, the reconciliation and the maintenance of community harmony and good order.[39]

When applied to the task of creating a framework for the creation of Aboriginal justice systems, recognition of this difference must translate into support for the right of Aboriginal communities to shape key elements of their justice environment. For example, this must include the power to define 'crime' or social disorder in terms relevant to the community. In this respect, the approach taken by the Aboriginal Justice Inquiry of Manitoba is central. The Commissioners recommended 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. If they wish they should also have the right to adopt any federal or provincial law and to apply or enforce that as well.[40]

While recommending that "Aboriginal traditions and customs be the basis upon

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39. *AJI Report Vol 1* at 22.

40. *Id* at 323.

which Aboriginal laws and Aboriginal justice systems are built",[41] it is significant that the Commissioners do not conceive of customary law as "fixed in some static sense".[42] Rather, "Aboriginal customary law" is seen as having "continued to evolve slowly to meet the changing needs, values and circumstances present within Aboriginal communities", and thus somewhat equivalent to common law.[43] Given the distinctive nature of Aboriginal concepts of justice,[44] simply giving Aboriginal communities a certain amount of control over justice institutions is inadequate. As Mary Ellen Turpel has commented in relation to the recommendations of the Royal Commission on the Donald Marshall Jr., Prosecution,[45]

> ...[W]hen the Commissioners recommend the establishment of a pilot-project, summary-conviction Native Criminal Court on a Mi'kmaq reserve, enforcing exclusively Canadian law (not Mi'kmaq or tribal law), they fail to realise that this just makes the sense of injustice seem closer to home. What is required is something more respectful of Mi'kmaq norms.[46]

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41. *Ibid.*

42. *Ibid.*

43. *Ibid.* See also B.W. Morse, "Indigenous Law and State Legal Systems: Conflict and Compatibility" in B.W. Morse & G.R. Woodman (eds), *Indigenous Law and the State* (Dordrecht: Foris Publications, 1988) 101 at 115; and S. Clark, *Aboriginal Customary Law: Literature Review* (Ottawa: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, 1990).

44. For an excellent introduction to aspects of Aboriginal cultures which are particularly relevant in the context of 'justice', see *AJI Report Vol 1* at 17-46; also J. Dumont, *Justice and Aboriginal People* (Sudbury: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, September 1990).

45. See Royal Commission on the Donald Marshall, Jr., Prosecution, *Report* (Halifax: Province of Nova Scotia, 1989). See also discussion in Chapter 5 at the text corresponding to notes 89-91 *supra.*

46. M.E. Turpel, "Further Travails of Canada's Human Rights Record: The Marshall Case" in J. Mannette (ed), *Elusive Justice: Beyond the Marshall Inquiry* (Halifax: Fernwood Publishing, 1992) 79 at 98. The Government of Nova Scotia has recently acted on this recommendation. However, according to a preliminary outline from the Nova Scotia Department of Attorney General, the pilot project to be established on the Indian Brook Reserve is most accurately described as an "Adult Diversion Pilot Program" rather than an Aboriginal or Mi'kmaq court:

> Fundamentally, this pilot project is intended to divert eligible native people from the existing Court and criminal justice system to the Mi'kmaq community and to allow the community to deal with

A corollary of this law-making capacity proposed by the Aboriginal Justice Inquiry of Manitoba is the right to employ dispute resolution mechanisms and decision-making processes that are equally consistent with Aboriginal cultures. As an Anishinabe presenter asserted during hearings conducted by the Aboriginal Justice Inquiry of Manitoba:

> Our communities have resolved disputes for centuries with various mechanisms such as the Council Fire where heads of families would meet to adopt widows and children or extend friendships and alliances. Our people would seek advice from Elders, and from medicine men and women who could conduct ceremonies such as the shaking tent. From them we would learn the teachings and gain knowledge that would assist us in mending relationships, setting our lives straight along the path again. *We can use these traditional dispute resolution mechanisms in designing structures and approaches that will work today.*[47]

Justice initiatives based on respect for Aboriginal cultures must also reflect the broader context of Aboriginal autonomy. As Hazlehurst has observed in relation to similar developments in Australia:

> If alternative dispute resolution mechanisms are to be established in Aboriginal communities as a means of diverting relatively minor problems away from the formal justice system and into the hands of the community itself, the principle of self-determination and dispute ownership must be embedded in the structure of such

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the matter in a way consistent with norms of conduct and Mi'kmaq concepts of criminal behavior.

- Peter Spurway, Communication Officer, Nova Scotia Department of Attorney General, Letter to author, February 24 1992. There are, however, significant limitations on the community-based nature of the project. For example, the decision to divert will be made by the Crown Attorney (with, of course, the consent of the defendant), and the scheme applies only to property related and summary conviction offences. During the diversion hearing, at least, the matter is 'controlled' by the community, and specifically, by a three person justice panel appointed by the Chief and Council of the Shubenacadie band. Following submissions from all involved parties, including an admission of responsibility and an explanation from the offender, the panel will determine an appropriate disposition and prepare a diversion agreement. It is not yet clear to what extent traditional or other alternative dispositions will be available to the justice panel: *ibid.*

47. Peter Kelly-Kinew, *Presentation No. 121 to the Public Inquiry into the Administration of Justice and Aboriginal People* - Transcript of a Community Hearing (Winnipeg, October 19 1988) 1211 at 1216 (emphasis added).

initiatives.[48]

While a comprehensive survey of Aboriginal dispute resolution mechanisms is beyond the scope of this thesis,[49] it is worth noting that the development of alternative dispute resolution processes in the context of justice administration is supportable not only in terms of exercising Aboriginal autonomy and adopting aspects of Aboriginal cultures. As the authors of a study prepared for the Aboriginal Justice Inquiry of Manitoba concluded:

> The most recurring theme within the A.D.R. literature is that non-adversarial based approaches to justice are more appropriate for resolving a wide variety of conflict situations than litigation through the courts.[50]

As this example illustrates, the creation of Aboriginal justice systems need not be seen as a development which is in competition with the general reform direction of the wider criminal justice system. Indeed, support for alternative dispute resolution mechanisms is likely to be one of the most important elements of the interface

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48. K.M. Hazlehurst, "Resolving Conflict: Dispute Settlement Mechanisms for Aboriginal Communities and Neighbourhoods?" (1988) 23 *Australian Journal of Social Issues* 309 at 311. There are strong grounds for asserting in Canada, a wider scope for community justice programs than the "relatively minor problems" to which Hazlehurst refers. However, her identification of the importance of "dispute ownership" and of building into the structure of justice projects the principle of Aboriginal autonomy is equally applicable across the spectrum of community-based initiatives.

49. Examples of Aboriginal methods of dealing with matters which would otherwise be dealt with by the dominant criminal justice system are discussed in part IV *infra*. Also see generally, M. Jackson, *In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities* (A paper prepared for the Law Reform Commission of Canada, 1991); and A.R.A. Consultants, *Feasibility Study of Alternative Dispute Mechanisms for Aboriginal People in Manitoba* (Winnipeg: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, February 1990) at 28-37.

50. A.R.A., *id* at 59.

between the two systems.[51] Further, a flexible approach to achieving 'justice' in Aboriginal communities is not likely to result in systems which seriously threaten the principles of justice upon which the dominant system is based.

As discussed in chapters 6 and 7, both the terms in which self-government is negotiated by particular Aboriginal communities, and the application of the *Charter of Rights and Freedoms*, will contribute to determing the shape of Aboriginal justice systems. It is crucial, if respect for Aboriginal autonomy is to be genuine, that non-Aboriginal notions of 'what justice looks like' not be permitted to infringe on legitimate forms of justice administration so completely so as to render meaningless the characterization of Aboriginal justice systems as autonomous. As Coyle has observed, in the context of identifying traditional justice processes in First Nations societies,

> ... [I]f we require permanent and specialized institutions wielding absolute judicial or executive power before we recognize a justice system, if we cannot imagine justice without police, bailiffs, and prisons, we will be doomed to disappointment in our search for traditional Indian justice methods by the narrowness of our perspective.[52]

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51. This is an example of one of the many areas in which the non-Aboriginal justice system might be 'improved' by incorporating certain Aboriginal processes and norms. For an articulation of this perspective, see R. Ross, *Dancing With a Ghost: Exploring Indian Reality* (Markham: Octopus Publishing Group, 1992).

52. M. Coyle, "Traditional Indian Justice in Ontario: A Role for the Present?" (1986) 24 *Osgoode Hall Law Journal* 605 at 615; see also Native Counselling Services of Alberta, "Native Folklaw & the Modern System", *Resource News*, February 1984, 7. For a discussion of this issue in the United States, see J.W. Zion, "The Meeting of Traditional Justice Structures and 'Western' Justice Systems in the United States" in C.T. Griffiths (ed), *Circuit and Rural Court Justice in the North. A Resource Publication* (Burnaby: The Northern Conference and Simon Fraser University, 1984) at 2-75; and M. Galanter, "Indigenous Law and Official Law in the Contemporary United States" in A. Allot & G.R. Woodman (eds), *Peoples' Law and State Law: The Belagio Papers* (Dordrecht: Foris Publications, 1985).

IV. A SELECTED SURVEY OF AUTONOMY-BASED ABORIGINAL JUSTICE INITIATIVES

In recent years, the number of autonomy-based proposals and initiatives in the area of criminal justice has increased dramatically in Canada. It is difficult to determine the extent to which programs are "community-based", "autonomous" or "Aboriginal-controlled", and thus consistent with the development of self-government processes in Aboriginal communities. As Harding and Spence have observed, "the discussion of Aboriginal-controlled justice systems is still very much at a conceptual stage."[53] However, the emergence of such programs has clearly had a significant impact on the trend towards an endorsement in broader terms, of "autonomy" as the foundation of future Aboriginal justice reform strategies.

This phenomenon has been a nation-wide occurrence with promising community-based justice initiatives operating in a number of communities across the country.[54] A full survey is not possible here,[55] but in line with the emphasis

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53. J. Harding with B. Spence, *An Annotated Bibliography of Aboriginal-Controlled Justice Programs* (Regina: Prairie Justice Research, University of Regina, 1991) at 3.

54. For example, in Québec, the Cree Regional Authority has proposed the establishment of a justice system to operate on Cree territory. The system would be based on a mediation panel, but would also incorporate a formal court system including a "Nation Court" which would act as both an appeal court in relation to minor matters and a court of first instance for more serious offences. The system would operate within the context of the wider Canadian legal structure, so that, for example, decisions of the Cree Nation Court could be appealed before the Québec Court of Appeal and the Supreme Court of Canada. See Cree Regional Authority on Justice, *A Cree System of Justice* (Nemaska: Cree Regional Authority, 1989). For a brief analysis of the project, see Brodeur, note 35 *supra* at 126-129. In British Columbia, Aboriginal justice intiatives based on the adoption of traditional dispute resolution processes have been developed by the First Nations of South Vancouver Island Tribal Council, and by the Gitksan and Wet'suwet'en peoples of the northwest of the province. Both projects are discussed in Jackson, note 49 *supra* at 93-139. See also Gitksan-Wet'suwet'en Education Society, Smithers Indian Friendship Centre, Upper Skeena Counselling and Legal Assistance Society, *Unlocking Aboriginal Justice: Alternative Dispute Resolution for the Gitksan and Wet'suwet'en People* (Hazleton: A submission to the British Columbia Ministry of the Attorney General, 1989).

established in part A of this thesis, three programs from the Prairie region (one each from Alberta, Saskatchewan, and Manitoba) will be reviewed.

In Australia, Aboriginal-controlled justice projects, while at a rather more preliminary stage than in Canada, have emerged as an important component of the criminal justice reform environment.[56] One of the most promising proposals, as well as a community-based policing project will be examined.

1. The Prairie Region

(a) Saddle Lake Tribal Justice Committee - Draft Constitution

Since the early 1980s the Saddle Lake Tribal Justice Centre on the Saddle Lake Reserve in Alberta has produced a number of documents dealing with the establishment of Aboriginal-controlled justice institutions in Aboriginal communities. These include a *Tribal Justice Manual*[57] and a "Justice Committee Model Constitution".[58]

The manual is essentially a guide to the Saddle Lake Band's proposed self-

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55. For a guide to the range of programs which have been developed by Aboriginal communities across the country, see Harding & Spence, note 53 supra; *National Inventory of Aboriginal Justice Programs. Projects and Research* (Ottawa: Ministry of Supply and Services, 1990); and C. La Prairie, *If Tribal Courts are the Solution, What Is the Problem?* (Consultation document prepared for the Department of the Attorney General, Province of Nova Scotia, 1990) at 50-55.

56. See generally K.M. Hazlehurst (ed), *Justice Programs for Aboriginal and Other Indigenous Peoples. Seminar Proceedings No. 7* (Canberra: Australian Institute of Criminology, 1985).

57. Saddle Lake Tribal Justice Centre, *Tribal Justice Manual. Volume 1* (Saddle Lake: Saddle Lake Tribal Justice Centre) cited in Harding & Spence, note 53 *supra* at 19.

58. Saddle Lake Tribal Justice Centre, "Justice Committee Model Constitution" (unpublished).

government structure,[59] and deals only in general terms with the development of autonomous justice structures. It recommends that "the Saddle Lake Tribe claim total function/jurisdiction over criminal and civil matters upon the territory of the tribe, exercising criminal jurisdiction where applicable..."[60] Despite its generality, the manual has been described as presenting "a viable way for a band to run its own justice affairs as part of its self-government."[61]

The Model Constitution is more detailed in nature, describing the structure for an autonomous Aboriginal justice committee. According to the Saddle Lake Tribal Justice Centre's prescription, the committee would be based on an exercise of an Aboriginal community's inherent right of self-government.[62] The committee would provide services to young and adult offenders and would operate under the authority of the Chief and Council.[63]

The objectives of the committee would include:

> 4.01 To reduce the number of persons involved in the formal court process and to reduce the frequency of re-involvement.
> ...
> 4.04 To develop a range of consequences for the offenders which will reflect the community's concerns for the offenders reformation and restitution to the victim, based on the principles of least interference with the offender and accountability to the community.
> 4.05 To recognize the spiritual and cultural dimension of the offender and to develop consequences which address the physical, psychological and spiritual needs of the offender and the restoration of the relationship between the offender and the victim and the community as a whole.

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59. Harding and Spence, note 53 *supra* at 19.

60. Cited *id* at 20.

61. *Id* at 21.

62. Note 58 *supra*, article 2.01.

63. *Id*, article 2.03.

The committee would consist of no fewer than seven members of the community.[64] Each member would be required to take an oath of confidentiality,[65] and follow conflict of interest guidelines.[66] Proceedings would commence by way of a referral, which would only be accepted from "authorized referring agencies as set out in the Constitution", and could also be rejected by the committee.[67] Upon acceptance of a referral the committee would interview the offender and determine the circumstances of the offence. The outcome of this process would be the preparation of a Diversion agreement within six weeks of the referral. According to Article 12.05 of the Model Constitution:

> The Committee shall prepare a Diversion Agreement in consultation with the offender which shall be reasonable and fair in relation to the gravity of the offence. The elements of a successful Diversion Agreement may include a written apology, restitution in the form of money or work, community work, a requirement for attendance at an alcohol or drug rehabilitation program, or such other reasonable orders or requirements that the Committee may impose. The Committee may impose terms and conditions that are consistent with past tradition and native culture.

Although it dealt only in passing with autonomous Aboriginal justice structures, the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta,[68] applauded the Saddle Lake initiative and called for further consideration of the possibility of implementing the system on a pilot

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64. *Id*, article 6.03.

65. *Id*, article 6.07.

66. *Id*, article 11.01.

67. *Id*, article 4.03, 5.04.

68. Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta, *Justice on Trial. Volume 1: Main Report* (Edmonton: Province of Alberta, 1991).

project basis.[69] The project was also the subject of discussion during the hearings of the Aboriginal Justice Inquiry of Manitoba.[70]

However, to date, the model has not been implemented on the Saddle Lake Reserve, nor indeed, in any other Aboriginal community in Alberta or the prairie region, primarily because of an absence of funding for the project.[71]

(b) Meadow Lake Tribal Council Indian Justice of the Peace Project

In a submission to the Saskatchewan Indian Justice Review Committee,[72] the Buffalo River Dene Nation and the Meadow Lake Tribal Council proposed the establishment of an Indian Justice of the Peace pilot project for the nine First Nations of the Meadow Lake Tribal Council. The main objective of the project would be for locally selected and trained justices of the peace, cross-appointed under section 107 of the *Indian Act*[73] and the provincial *Justice of the Peace Act*,[74] to deal with summary

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69. *Id* at 11-2. The Task Force's failure to formally recommend the establishment of such a project appears to have been based on concerns about the application of the *Charter of Rights and Freedoms* to the proposed system, the right of community members to opt out of the tribal justice process, and the availability of appeals to the non-Aboriginal court system: *ibid.*

70. Support for the Saddle Lake initiative was particularly evident in several submissions from representatives of the Mennonite community, where the mediation and "restorative justice" elements of the model were emphasised: see, for example, Melita Rempel, Mennonite Central Committee Open Circle, *Presentation No. 464 to the Public Inquiry into the Administration of Justice and Aboriginal People* - Transcript of a Community Hearing (Winnipeg, January 26 1989) 4192-4193.

71. *Ibid.* See also J. Sawatsky, John Howard Society, *Presentation No. 453 to the Public Inquiry into the Administration of Justice and Aboriginal People* - Transcript of a Community Hearing (Winnipeg, January 25 1989) 4074.

72. Discussed in Saskatchewan Indian Justice Review Committee, *Report* (Regina, 1992) (hereinafter "*Saskatchewan Indian Justice Report*") at 45-46.

73. R.S.C., c.I-5. The limited capacity of the section 107 regime to support autonomous Aboriginal justice structures was discussed in Chapter 5, at the text corresponding to notes 23-34 *supra.*

conviction offences under First Nations laws, and guilty pleas on certain summary offences under provincial or federal statutes. In both cases, defendants would have a right of appeal to a judge of the Provincial Court of Saskatchewan.

The basic philosophy of the project would be to require the offender to make restitution to the specific victim and/or the community generally, as opposed to being sanctioned by the non-Aboriginal provincial system, with no benefit to the community.[75]

The Committee recommended that the program be implemented on a two year pilot project basis. However, it observed that

> the use of aboriginal justices of the peace will depend on the level of community support for such a program, the ability to recruit people within the community to undertake such a responsibility, and the practical advantages to the criminal justice system of using justices of the peace in place of provincial court judges.[76]

The Chief of the Buffalo River Reserve has registered his community's willingness to be a 'test case' for what would be Saskatchewan's first Aboriginal justice project of this type. In February 1992 Chief Gordon Billette stated: "We'd like to adopt a system on our reserve, where our people would be responsible to our own people."[77]

To date, the project has not been implemented, although negotiations between

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74. *The Justices of the Peace Act, 1988*, S.S. 1988, c.J-5.1.

75. See D. McConachie, "Chief offers community for Native justice project", *The StarPhoenix*, January 17 1992, A1 at A2.

76. *Saskatchewan Indian Justice Report* at 46.

77. McConachie, note 75 *supra* at A1.

the Meadow Lake Tribal Council and the Saskatchewan Department of Justice are underway.[78]

(c) St Theresa Point Youth Court System

In the early 1980s growing concern about the incidence of juvenile crime and solvent abuse prompted the community at the Saint Theresa Point Reserve in Island Lake region of Manitoba to seek alternative methods for dealing with these particular problems. Consultations involving the Band Council, community members, the RCMP, Band Constables, the Awasis Agency, teachers and Northern Native Alcohol and Drug Program (NNADP) workers resulted in the identification of the following concerns relating to the administration of justice in the community:

> (a) Community Needs
> * need for the community to take ownership of and address crime related problems
> * need for youth to develop a sense of direction and respect for community institutions through an educational approach
> * need to provide education and prevention in accordance with native traditional values and philosophies
>
> (b) Justice Issues
> * need to develop a system where the offender would be held responsible for his/her actions
> * need for dealing with young offenders according to community standards and traditions
> * need to provide an approach that intervenes at an early stage that is not provided by the traditional justice system
> * need to provide on-going follow-up with measures appropriate to the community[79]

Based on these principles and criteria, the Indian Government Youth Court

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78. Robert W. Mitchell, Saskatchewan Minister of Justice and Attorney General, Letter to author, June 5 1992.

79. G. Lewis, *St Therese Point Indian Government Youth Court System: Preliminary Assessment* (Winnipeg: Manitoba Department of Justice, 1989) at 4.

System commenced operation in 1984.[80] The system employs a five-stage process which is based on the principle of resolving the perceived problem within the community, and which attempts to use the non-Aboriginal juvenile court system only as a last resort, or in relation to serious matters with which the community is not prepared to deal. The program has been accurately described by the Aboriginal Justice Inquiry of Manitoba as a "true diversion program".[81]

Following a referral to the Program Co-ordinator - a referral can be made by any person or agency in the community - the youth and his/her parents are contacted before the matter is reviewed by a Case Conference Team consisting of the Indian Youth Court Judge and Magistrate, the Program Co-ordinator, Band Constables, and two appointed Elders, youths and adults. The team determines whether the matter should be referred to:

(i) the Alternative Measures program;[82] or

(ii) the Indian Government Youth Court; or

(iii) (with the consent of the Chief and Band Council) the Provincial Youth Court.

The Indian Government Youth Court will only hear a case following an admission of responsibility for the offence/incident. After the Program Co-ordinator

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80. The program summary provided here is based on the assessment report completed by Lewis: *ibid.*

81. *AJI Report Vol 1* at 577.

82. Established according to s.4(1) of the *Young Offenders Act*, S.C. 1980-81-82-83. c.110, which provides that "Alternative measures may be used to deal with a young person alleged to have committed an offence instead of judicial proceedings under this Act." See also N. Bala, J.P. Hornick & K. O'Brien, *Alternative Measures Programs for Native Youth: A Review and Recommendations* (Winnipeg: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, January 1990) at 11-35.

has presented all the evidence along with the Case Conference Team's recommendations, the Judge may make any of a number of orders including:

> * that the young offender be dismissed with only a warning.
> * that the young offender be placed on probation ... for a fixed period of time.
> ...
> * that the young offender be given a fine or community work (e.g. serving Elders, restitution to the victim etc.).
> * that the young offender be placed under the supervision of an Elder for traditional activities such as working on the trap line and learning about traditional ways of survival and teachings.[83]

The jurisdiction exercised by the Indian Government Youth Court is based on the decision-making authority of the Chief and Council. The program deals with a range of matters including minor offences under the *Criminal Code*,[84] various driving offences under *The Highway Traffic Act*,[85] and breaches of Band by-laws.[86] There has been no formal devolution of jurisdiction from the provincial government. As Robert Wood, the Program Co-ordinator has stated: "We were not concerned about jurisdiction and whose toes we might step on, we simply moved ahead."[87] Wood confirmed before the Aboriginal Justice Inquiry of Manitoba that the jurisdiction of the Indian Government Youth Court has been respected by the RCMP and Crown prosecutors.[88]

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83. Lewis, note 79 *supra* at 11.

84. R.S.C. 1985, c.C-46.

85. S.M. 1966, c.29.

86. See Lewis, note 79 *supra* at 5.

87. See B. Lowery, "Natives struggle for court funding", *Winnipeg Free Press*, January 30 1992, B17.

88. R. Wood, *Presentation No. 313 to the Public Inquiry into the Administration of Justice and Aboriginal People* - Transcript of a Community Hearing (St. Theresa Point, December 8 1988) at 2659; also Lewis,

In terms of reducing both the level of contact between youth and the criminal justice system, and the number of young offender crimes in the community, the program has achieved considerable success. Following a preliminary assessment of the program for the Manitoba Department of Justice in 1989, Lewis concluded that:

> The St. Therese Point Indian Government Youth Court System represents an established and progressive justice initiative. The program is based on a sound program model that combines a community based and integrated approach to addressing youth crime. This model is well in place and is the subject of intense interest on provincial and national levels.... [It] is characterized by a number of sound administrative structures which distinguish it from other Aboriginal justice programs in Canada.... It is clear that the major problem confronting this initiative is the absence of a secure funding base.[89]

During its first several years of operation, the program relied heavily on volunteer workers, and also received limited financial support from the Band Council's bingo proceeds.[90] Since June 1989 the program has received funding from the Manitoba Law Foundation.[91] Three years after a recommendation that the Department of Justice fund the program, the Manitoba Government agreed in January 1992 to provide sufficient funding to ensure that the St Theresa Point Indian Government Youth Court continued to function, [92] although it is not clear whether the level of commitment would allow the program to expand,[93] or substantially

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note 79 *supra* at 5.

89. Lewis, *id* at 22.

90. Wood, note 88 *supra* at 2663.

91. Lewis, note 79 *supra* at 2.

92. See T. Weber, "Native youth court saved", *Winnipeg Free Press*, January 31 1992, B24.

93. For example, administrators of the program have expressed interest in widening the program's scope so as to include adult offenders within the court's jurisdiction. See Wood, note 88 *supra* at 2990.

reduce the extent of reliance on volunteers.[94]

2. Australia

(a) The Yirrkala Scheme

Originally developed during the late 1970s, the Yirrkala model of community-based justice has become a symbol of non-Aboriginal Australia's refusal to recognise the value of Aboriginal autonomy in relation to matters otherwise dealt with by the dominant criminal justice system. Though widely applauded as a viable and promising initiative, it has, like the Saddle Lake Model Justice Committee, not been implemented.

The scheme was developed over a number of years by a group of elders at Yirrkala, in the Northern Territory. The proposal was considered in detail by the Australian Law Reform Commission in relation to its reference on *The Recognition of Aboriginal Customary Law.*[95] It has been described by one of the scheme's main advocates, H.C. Coombs, as "a contemporary Aboriginal reaction to over 100 years of social control by outsiders."[96] According to Coombs, the aim of these proposals was to work towards

> defining a place for Aboriginal customary law within the Australian legal system... They

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94. Weber, note 92 *supra.*

95. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law. Report No. 31* (Canberra: Australian Government Publishing Service, 1986) (hereinafter "*ALRC Report*") para 819-832.

96. H.C. Coombs, "The Yirrkala Proposals for the Control of Law and Order" in K.M. Hazlehurst (ed), *Justice Programs For Aboriginal and Other Indigenous Communities. Seminar Proceedings No. 7* (Canberra: Australian Institute of Criminology, 1985) 201 at 205.

> are essentially modifications of traditional Aboriginal processes of organised social pressure to conform to accepted norms of behaviour and of dispute settlement.[97]

The structure of this form of community justice is based on using local councils, and in particular, a "Law Council" to exercise the primary responsibility for local justice.[98] The Law Council, which would consist of senior leaders from each constituent clan, would select the appropriate community members to deal with the particular dispute or breach of community rules which arises for resolution.[99] These people would constitute the "community court" in individual cases.[100]

Under the Yirrkala scheme the Law Council and the community court would operate as an independent entity. However, there would be a "considerable degree of interaction with the general legal system."[101] For example, in a submission to the Australian Law Reform Commission,[102] Coombs proposed that where a Yirrkala community member came before a judge or magistrate, the latter should authorise the Law Council to set up a community court for the purposes of seeking to resolve the matter via a form of "preliminary hearing" or intervention. Alternatively, it was proposed that community representatives could sit with the magistrate or judge to

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97. *Id* at 201.

98. *ALRC Report* para 821.

99. N.M. Williams, "Local Autonomy and the Viability of Community Justice Mechanisms" in K.M. Hazlehurst (ed), *Ivory Scales: Black Australia and the Law* (Kensington: New South Wales University Press, 1987) 227 at 234.

100. *ALRC Report* para 822.

101. *Id* para 823.

102. H.C. Coombs, Submission 262, cited *ibid.*

offer advice on a range of issues on which local knowledge would be helpful.

Significantly, under the Yirrkala proposals, the Council would exercise a level of involvement in all matters ranging from simple disputes or public order offences, to serious crimes.[103] This jurisdiction would include both federal and territorial laws of general application, as well as rules formulated by the community based on customary laws and current concerns amongst the community about social order and the regulation of unacceptable behaviour.[104] The community court would have the power to impose a range of sanctions, with emphasis on the provision of compensation. Other possible punishments would include compulsory residence at a homeland centre, temporary banishment, or even overnight imprisonment in a 'lock-up' situated at the community.[105]

After considering numerous submissions made on behalf of the clan leaders at Yirrkala, in 1986 the Australian Law Reform Commission made the following recommendations:

> 1. That the Northern Territory authorities investigate through local discussion and consultation whether the Yirrkala community seeks implementation of the scheme;
> 2. If so, that the scheme be implemented, with appropriate legislative backing, for a sufficient trial period (at least three years); and
> 3. That the Yirrkala people be given independent advice and such other support as they may require in carrying out the scheme.[106]

Given the generally modest nature of the recommendations contained in the Australian

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103. *ALRC Report* para 824. In the case of serious offences, it was anticipated that the general law and procedure would be more likely to be involved: Coombs, note 96 *supra* at 215.

104. See Coombs, *id* at 210-211.

105. *ALRC Report* para 826; Coombs, note 96 *supra* at 213.

106. *ALRC Report* para 832.

Law Reform Commission's report,[107] the Commission's endorsement of this particular initiative was an encouraging sign that a constructive change in direction in relation to problems encountered by Aborigines in the criminal justice system might be possible. As Williams concluded in 1987, the proposed Yirrkala community justice system "is most likely to succeed in enabling effective social control because it embodies Aboriginal mechanisms of authority and dispute settlement, and supports rather than impedes their operation."[108]

Unfortunately, the Yirrkala scheme has suffered the fate of almost all of the Law Reform Commission's recommendations. In the *National Report of the Royal Commission into Aboriginal Deaths in Custody*, Commissioner Johnston noted that a submission by H.C. Coombs revealed that the community justice scheme had failed to gain the support of the Northern Territory Government, and therefore, had not been effectively implemented.[109]

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107. For an interesting discussion of the approach taken by the Law Reform Commission, see R. Chisholm, "Aboriginal Law in Australia: The Law Reform Commission's Proposals for Recognition" (1988) 10 *University of Hawaii Law Review* 47 at 63-79.

108. Note 99 *supra* at 237.

109. E. Johnston, *Royal Commission into Aboriginal Deaths in Custody - National Report* (Canberra: Australian Government Publishing Service, 1991) (hereinafter "*RCIADIC National Report*") *Vol 4* at 94. With considerable justification, Hazlehurst has challenged "the tardiness and conservatism of governments in developing community justice options for Aboriginals throughout Australia": note 48 *supra* at 309. Given the overwhelming evidence which shows that the formal criminal justice system is routinely inadequate in dealing with Aboriginal people, the failure to support constructive alternatives such as the Yirrkala proposal is difficult to comprehend.

(b) The Julalikari Council Policing Project

The system which has been developed by the Julalikari Council in Tennant Creek includes a a program of council patrols and a commitment to Aboriginal-police cooperation. An Aboriginal Issues Unit report to the Royal Commission into Aboriginal Deaths in Custody described the Julalikari Council program in the following way:

> The Aboriginal community at Tennant Creek has attempted to overcome a number of problems with police and policing by establishing council patrols which attend disturbances in the camps at night and which attempt to resolve conflicts at morning meetings in the camps. The Julalikari Council insists that people should bring their complaints to the Councillors on patrol, rather than the police, and that the police should not attend at disturbances without the presence of Councillors to explain the problem to them.
> ... They are attempting to resolve conflicts in an Aboriginal way rather than having the police simply arrest a person or persons, sometimes the wrong person, without solving the problem. Councillors are able to speak to Aboriginal people and reprimand them with success.[110]

While clearly not as comprehensive as the Aboriginal justice mechanisms which are currently under consideration in Canada, this project illustrates the value of initiatives which challenge the generally subordinate position of Aboriginal people in relation to law enforcement strategies,[111] and which assert community ownership of and responsibility for disputes.

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110. *RCIADIC National Report Vol 4* at 91-92.

111. See M. Edmunds, "The Role of Aboriginal Organisations in Improving Aboriginal-Police Relations" (1991) 49 *Aboriginal Law Bulletin* 13. Other positive initiatives include the work of the Tangentyere Council in Alice Springs, and the Community Justice Panels which operate in Echuca, Victoria. All three programs are discussed by Commissioner Johnston: *RCIADIC National Report Vol 4* at 85-108.

V. AN EVOLUTIONARY FRAMEWORK FOR ABORIGINAL JUSTICE SYSTEMS

In 1988 the Canadian Bar Association Committee on Imprisonment and Release concluded:

> We believe there is a sound constitutional basis for the development of parallel native justice systems. We have, however, refrained from endorsing any particular model, because the particular model will be linked with an Indian nation's or native community's view of its path towards self-determination and ultimately it is for them to choose. It is not unrealistic to anticipate that models of aboriginal justice systems can be worked out in a Canadian context, which, cognizant of the experience of other jurisdictions, can reflect the accumulated wisdom of both aboriginal law ways and the common law.[112]

The capacity for considerable variation in terms of the type of justice system desired by various Aboriginal communities in Canada highlights the difficulty of creating a generally applicable model for the operation of Aboriginal justice systems in Canada. At the same time this potential diversity provides a persuasive argument in favour of some form of framework that could faciliate the establishment of autonomous justice mechanisms within whichever limits are ultimately set.[113] Without such a 'skeleton', including a blueprint for the interface of Aboriginal justice systems with the non-Aboriginal justice system, autonomy-based initiatives are unlikely to develop beyond the stages of small scale programs, each dependent on federal and/or provincial government approval and special funding. In this way, promising initiatives may be prevented from fully meeting the justice requirements of Aboriginal communities.

As discussed above, the major difficulty is to strike an acceptable balance

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112. M. Jackson, *Locking Up Natives in Canada: A Report of the Canadian Bar Association Committee on Imprisonment and Release* (Canadian Bar Association, 1988) at 107.

113. For example, the Canadian Bar Association's support for Aboriginal justice systems was offered in the context of an endorsement of "the importance of legal pluralism within Canadian Confederation...": *ibid.*

between providing reasonable guidelines for giving effect to Aboriginal autonomy in relation to justice issues, and imposing a system that is insufficiently flexible, and essentially incompatible with the right of Aboriginal peoples to be self-governing. An Aboriginal justice system which was not developed or otherwise endorsed by the community which it was designed to serve would be both unacceptable in terms of the principles of autonomy-based justice reform, and also likely to be unsuccessful in terms of adressing the community's experience and understanding of the justice 'problem'.

The *Report of the Saskatchewan Indian Justice Review Committee* observed that two important points must be borne in mind in the context of implementing criminal justice reform in Aboriginal communities:

> 1) that meaningful changes can only come about when the Indian community is actively involved in deciding what changes are to be made, how they are to happen, and shares responsibility for the changes; and
> 2) that because each Indian community is at a different stage of development, they are also at different stages of readiness for change. A project or initiative that may be right for one community may not be right for another. The unique and special circumstances of each community must be recognized.[114]

Based on these observations, there would appear to be considerable merit in supporting an adaptable framework which sets, in very general terms, the possible limits of Aboriginal justice systems. Such a framework need not be in conflict with Aboriginal self-government, but should simply reflect the reality that jurisdiction over a range of matters inlcuding those currently dealt with by the criminal justice system must be developed within the context of Canadian federalism. Ensuring the

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114. *Saskatchewan Indian Justice Report* at 3.

applicability of the *Charter of Rights and Freedoms* would, in many respects, serve this purpose, although its impact on the shape of Aboriginal justice systems may be determined by the availability to Aboriginal governments of the section 33 override.[115] Other more appropriate guidelines might deal more specifically with the process for *establishing* Aboriginal justice systems, and set certain requirements such as the need for extensive community consultations.

Ultimately, an acceptable framework is most likely to emerge from serious consideration of existing autonomy-based justice initiatives, and the many that are likely to be developed by Aboriginal communities in the near future. None of the five initiatives reviewed earlier was developed as part of a wider scheme of autonomy-based Aboriginal justice reform. However, given the growing acceptance in Canada of the value of locally conceived and implemented autonomous Aboriginal strategies, projects in Manitoba, Saskatchewan, and Alberta, and indeed, in Aboriginal communities throughout the country, may provide the groundwork for the evolution of a comprehensive network of Aboriginal justice systems which would ultimately be shaped by the extent to which Aboriginal self-government becomes a reality during the course of the next decade and into the next decade.

While recognizing that the establishment of a comprehensive Cree justice system in Québec[116] is effectively a "long-term" reform, Brodeur has observed that "there is nothing that would prevent the situation from progressively evolving toward

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115. See discussion in Chapter 7, at text corresponding to notes 81-100 *supra*.

116. See note 54 *supra*.

the kind of autonomous structures envisaged in the [Cree Regional Authority on Justice] project."[117] Clearly, there is a danger in placing Aboriginal justice systems within the distant and inaccessible realm of "long-term". But there may be a case to be made for supporting local and distinctive initiatives in the context of a broader justice policy, which has as a primary objective, the creation of a comprehensive network of Aboriginal justice systems which would interact in various capacities with the existing Canadian justice system.

In the context of a discussion of alternatives to territorial sovereignty, Hall has observed :

> Perhaps the most useful role that non-natives can play in the effort to achieve native self-government is *not to design regimes of self-government* but rather to demonstrate methods by which non-native legal and governmental structures can coexist with native sovereignty.[118]

This approach can be applied in the context of criminal justice reform, and specifically, in relation to the adoption of a strategy which supports the development of autonomous mechanisms. The initial aim of this direction should not be the creation of a generally applicable uniform regime of Aboriginal justice systems, but rather, endorsement of a justice administration policy which is designed to support rather than shape a range of community-based initiatives along the lines reviewed above.[119] This approach would be compatible with the self-government negotiation

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117. Brodeur, note 35 *supra* at 129.

118. G.R. Hall, "The Quest for Native Self-Government: The Challenge of Territorial Sovereignty" (1992) 50 *University of Toronto Faculty of Law Review* 39 at 41 (emphasis added).

119. See part IV *supra*.

process contained in the 'Canada round' constitutional package.[120] Ultimately, it may be capable of facilitating the evolution of a fundamentally restructured framework for the administration of justice in Canada.

Implementation of the inherent right of Aboriginal self-government during the next decade will result in an unprecedented, and possibly unrecognizable form of federalism in this country. Commensurate with this future, there is no legitimate reason why a network of Aboriginal justice systems should not be allowed to evolve in a form consistent with the right of Aboriginal peoples in Canada to shape the principles, rules and institutions which foster and maintain social order in their communities.

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120. See the discussion in Chapter 6, at text corresponding to notes 110-114 *supra*.

CONCLUSION

The future of proposals for the creation of Aboriginal justice systems in Canada is anything but clear. To a great extent, implementation of recommendations such as those made during the past year by the Aboriginal Justice Inquiry of Manitoba and the Law Reform Commission of Canada will be contingent on the outcome of the 'Canada round' of constitutional reform and, in particular, the terms in which the Aboriginal right of self-government is recognized, defined, and eventually put into practice.

The critical issue of the role of the *Charter of Rights and Freedoms*, while apparently 'settled' in the general sense of whether it will apply to Aboriginal governments and institutions (the short answer being an equivocal 'yes' according to the terms of the 'Canada round' package of proposed constitutional reforms), is likely to be the subject of serious and ongoing scrutiny. This attention is warranted because the Charter may have the single most significant impact on the outcome of the current shift towards an autonomy-based Aboriginal justice strategy.

Effective resolution of several basic jurisdictional matters will also need to be achieved before it can realistically be anticipated that systems of the scope envisioned by the Aboriginal Justice Inquiry of Manitoba can develop in Aboriginal communities. While it is likely that certain limiting principles will be established, it is important that a framework be created that can satisfy the objective of facilitating the evolution of effective community-based systems, without involving the imposition of a uniform (and likely, often inappropriate) model of Aboriginal courts which fails to reflect the

essential element of Aboriginal autonomy, and simply continues the conventional pattern of perpetuating an imposed law and order regime, albeit with certain localized dimensions.

While there may be certain impediments to the alignment of justice reform with the broader autonomy aspirations of Canada's Aboriginal peoples, this arrangement represents a major and necessary advance on the conventional and demonstrably ineffective strategy of 'tinkering' with the existing system for the administration of criminal justice. This approach is based on the fallacious assumption that a regime which has oppressed Aboriginal people for more than 100 years can effectively dispense 'justice' if only it undergoes a relatively painless sensitization process. Autonomy-based reform is also consistent with a more sophisticated conception of the nature of the justice problem in Aboriginal communities: an approach which looks beyond the mere fact of over-representation, and seeks to confront the underlying reality of dispossession.

An endorsement of community-based autonomy as the guiding principle of future reform strategies involving Aboriginal peoples does not carry the implication that projects such as Aboriginal courtworker programs, cross cultural training courses for justice system personnel, and the development of alternative dispositions, need be abandoned. However, meaningful support for this new direction requires that reforms within the context of the existing justice system must exhibit an awareness of the wider context of Aboriginal self-government, and of the need for compatibility with emerging autonomous Aboriginal justice mechanisms.

In a submission by the Manitoba Assembly of Chiefs to the Aboriginal Justice Inquiry of Manitoba, Chief Louis Stevenson observed:

> The changes that are needed in our community will not be brought about by the impositions of institutions or mechanisms that are not designed or controlled by our people. The issues and problems facing Indian people have to be dealt with in the context of self-determination. Our people must feel that they have control over their affairs.[1]

The extent to which Aboriginal justice reform in Canada will enter a new phase during the 1990s will depend on the extent to which respect for this principle is endorsed politically and entrenched constitutionally.

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1. Chief Louis Stevenson, Assembly of Manitoba Chiefs, *Presentation No. 790 to the Public Inquiry into the Administration of Justice and Aboriginal People* - Transcript of a Community Hearing (Winnipeg, November 22 1989) 7736 at 7758.

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