A Decade of Aboriginal Justice Reform Policy in Manitoba: The Intricacies of Providing Equitable Justice

By:

Rosie Parmar

A thesis submitted to the Faculty of Graduate Studies

in fulfilment of the requirements for the degree of

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A Thesis/Practicum submitted to the Faculty of Graduate Studies of The University of Manitoba in partial fulfillment of the requirements of the degree

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MASTER OF ARTS

The only form of injustice exists when our chambers of conscience seize to function ....

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TABLE OF CONTENTS

Abstract

Aboriginal peoples' negative encounters with the criminal justice system have received increased political attention over the last 30 years now. The consistent manner in which the Canadian criminal justice system has failed Aboriginal peoples in Manitoba is well evidenced in the disproportionate and discriminative nature of the system. Justice reform policy strategies in Manitoba are well evident in the Aboriginal Justice Inquiry (AJI) which has been the most in-depth public inquiry regarding Aboriginal justice issues undertaken to date. Followed up with the Aboriginal Justice Implementation Commission (AJIC) eight years later, both of these reports' recommendations represent an attempt to reverse the negative trends and provide justice for Aboriginal peoples. An examination of both reports discloses that the fate of the reports has been both displeasing and unable to produce any significant changes. An in depth closer examination reveals the role of governments to be a key factor which must be surpassed in order for justice to be fully served for the Aboriginal peoples of Manitoba.

Acknowledgements

This is not the end. It is not even the beginning of the end. But, it is, perhaps, the end of the beginning.

- Sir Winston Churchill

This journey that I embarked upon in completing this rewarding milestone, contains chapters in which I have poured my heart and soul. Hard work, commitment, and self discipline have been the pillars that have driven me to the completion of what I honestly began to think was never going to end. No one walks alone in such a journey and how do you thank those that joined you, walked beside you, and helped you along the way. It is through their teachings, inspiration, and support that I have successfully finished.

I would like to begin by thanking those directly involved in my thesis work, my thesis committee members. Words alone are inadequate to express my thanks to Paul Thomas for his undue encouragement and guidance. I hope to lead others one day in the way you have led me. His gentle yet firm direction has re-affirmed the value of an education and an educator. My deep appreciation goes to Peter Kulchyski for his profound faith in me to take my knowledge at such a premature stage of my graduate studies, and distribute it by giving me an opportunity to teach. "You have to start somewhere" I clearly

recall him saying. I also need to thank Brenda O'Neill for maintaining her role even after her leave from the University of Manitoba to the University of Calgary. As well, all the individuals whom I interviewed for their valuable time and information.

I would like to also thank those not directly involved with my thesis: my friends and family. I would like to thank my best friend, Kerran Seth, who had the misfortune of living with me during this 'thesis era'! She spent many hours at the keyboard typing out my words as I have spent writing them. Your enlightenment and consistent confidence helped me surpass what you once called would be "an accomplishment worth the struggle" ... and indeed you were correct. An instrumental role played by my mother has superseded the role of parenthood which was carried out unconditionally on her own. She delicately defended the pursuit of self-determination and persistence which is evident in this piece of work. Each and every sacrifice of hers has been petals of a flower that I hoped to have returned.

I would like to say that as much as I try to reach the moon in my endeavours, I always keep in mind that if the struggles along the way leave me distant from that moon, my final landing will still be amidst the stars. On that note, a final quote that I would like to express that kept my focus, motivation, and drive intact:

"If you stand straight, do not fear a crooked shadow..."

- Chinese Proverb

Introduction

Aboriginal peoples are surely one of the most investigated people in the world. Canada's international image has suffered over the years because of its treatment of Aboriginal peoples. They have stimulated, amongst all ethnic categories in Canada, the most academic research to date. Amongst those stimulated, I myself am one. Most of my latter academic years have been engulfed in grappling myriads of information on the ongoing status of Aboriginal peoples. The negative tone of the language used in reference to Aboriginal peoples resounds in my memory continually. It has created an impulse in me to write. It is true that every writer is first a reader. I have read enough, and now I have decided to write ... to become a part of this ongoing debate, but with emphasis added, this is not the last word(s).

To say the least, it has been a struggle coming to terms with the way in which history has treated the Aboriginal peoples of Canada. The real struggle is the current situation, however. Among the various issues that confront Aboriginal communities today, this research tries to make sense of the complexities surrounding Aboriginal people and their involvement with the criminal justice system. Aboriginal communities have had a fierce battle in their demands for justice in all aspects of their lives. For myself, the area of ' criminal

justice' was a great place to begin. It is rare that we watch television and not come across programs on crime and punishment. For Aboriginal communities, their experiences with the criminal justice system are deplorable without any doubt.

The past two decades have witnessed Aboriginal peoples' experiences with the justice system as none other than deteriorating. This debate as it has developed since 'Aboriginal people and the criminal justice system' emerged as an identifiable topic of investigation during the 1970's.[1] Indeed, justice has emerged as a key element of the Aboriginal political agenda and Aboriginal justice has evolved into a distinct field of academic research. 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.[2] It is one of the primary aims of this thesis to assess the major developments in the field of 'Aboriginal justice' within Manitoba. The negative experience(s) of a discriminatory and disproportionate justice system is just one area amongst others that will enable Aboriginal peoples to lead a healthy life in Manitoba.

This research was designed, initially, to provide a review all across Canada. However, I soon realized that this was simply too large a project to realistically attempt. Consequently, given that I knew of "a large proportion of

[1] McNamara, Luke (1993) 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 Legal Research Institute of Manitoba @ 1.
[2] Cuneen, C. (1990) Aborigines and Law and Order Regimes 3, Journal of Social Justice Studies at 37.

Canada's Aboriginal population lives in the Prairie region"[3] I decided to place my focus there. What drew myself towards Manitoba, in particular, was the fact that of the 10 provinces of Canada, Manitoba has the highest proportion of Aboriginal peoples in its population. As well, Manitoba had several disturbing events that triggered it as an attractive place to investigate. For example, there were the deaths of Helen Betty Osborne and J.J. Harper that sparked great outcry from Aboriginal communities, which later lead to reports attempting to understand why the justice system was failing Aboriginal peoples at such a large scale. These two reports, The Aboriginal Justice Inquiry (1991) and the Aboriginal Justice Implementation Commission (2001), have been identified as significant developments in the relationships of Canadian Aboriginal peoples with the criminal justice system. In offering an analysis of the context, content, and the impact of these two reports, this thesis seeks to answer the following main research question: "What factors have contributed to the fate of the reports in terms of their acceptance or lack of acceptance by the Government of Manitoba?" In answering this question, the thesis seeks to understand the policy impact of the reports and therefore, the status of Aboriginal justice reform within Manitoba.

Alongside, the multiple and deep-rooted causes of criminal behaviour among Aboriginal peoples will be examined. Also, the controversy that swirls around the issue of what constitutes justice for Aboriginal people and how this

[3] McNamara (1993) @ X.

can be obtained from the mainstream justice system will be reviewed. Accordingly, the thesis becomes more a process study rather than a substantive study. It will trace the flow of events, ideas, and institutional responses from the origins of the AJI down to the time of writing this thesis. Though the focus is on the process side, some content is studied for substance because it is difficult to ignore the contents of the reports, particularly the AJI Report. While this thesis has recognition of the countless number of reports, inquires, and task forces that have tackled this issue, it will be shown that both the AJI and AJIC Reports go beyond the predictable repetitiveness of many of the findings and recommendations of those reports.

This research has drawn upon three main types of sources. Secondary literature, key documents including the AJI and AJIC and qualitative interviews with selective respondents involved with Aboriginal justice issues were conducted. The respondents interviewed through the usage of open-ended questions include the following: Commissioners of the AJI Report, Associate Chief Justice A.C. Hamilton & Associate Chief Judge C.M. Sinclair, Commissioner of the AJIC Report, Paul Chartrand, Justice Minister Gordon Mackintosh, and Harvey Bostrom from Department of Aboriginal and Northern Affairs who acted in an advisory capacity as the Executive Director for the AJIC Report. The interviews were 45 minutes to an hour in duration and were both

tape-recorded with permission from each interviewee, and note-taking was conducted as well.[4]

I believe we have a place for Aboriginals in our justice system, we live in a world where space is of no limitations. Aboriginal communities, have for long, demanded separate justice systems since the existing criminal justice system is not compatible with Aboriginal conceptions of justice. What exactly does 'justice' mean for Aboriginal peoples? This thesis will address this question and identify key areas of conflict between mainstream Canadian justice and traditional Aboriginal justice systems. The opening paragraphs of the Aboriginal Justice Inquiry of Manitoba stated:

> The justice system has failed Manitoba's Aboriginal people on a massive scale. In has been insensitive and inaccessible, and has arrested and imprisoned Aboriginal people in grossly disproportionate numbers.[5]

These words electrify society. Many automatically, and shall I add ignorantly, believe that the Aboriginal community is themselves responsible for this situation. These words, however, represent a truth. They do not represent a distrust or rejection on the part of Aboriginal peoples. In order to combat preconceived notions that many non-Aboriginal people have of Aboriginal peoples, this research also examines the meaning of Aboriginality in the minds of

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[4] Refer to the appendix for the script read before the commencement of each interview, and for the interview request sent to each interviewee. Some interviews involved discussion towards the end where a few select interviewees, whom out of their own free will, provided additional information that they found would be useful in the thesis writing process.

[5] Commissioners A.C. Hamilton & C.M. Sinclair (1991) Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry* (hereinafter *"AJI Report"*), vol.1: The Justice System and Aboriginal People Winnipeg: Province of Manitoba @ 1

society. In doing so, this research has aimed at opening up as many questions as it might answer.

I have gone through many states during my studies in Aboriginal politics – many different emotions, but as I write at this very moment I realize that besides other reason(s), as obvious as some may be, what I am now doing is simply making room for reality ... a reality that is not an illusion. That is, that the situation of Aboriginal peoples in relation to justice is in need of serious attention and no longer can we tolerate continued ignorance. It is my goal, one for that matter, for the readers to not only read my words but to identify and recognize the sound of my words. While this is my writing, my hope is to allow the voices of Aboriginals to be heard in these pages. The perspective contained within these pages is mine and so I take responsibility for the views expressed as my own.

Though I am an outsider to this study – being a non-Aboriginal woman, at the same moment I find myself considerably closer to the state of an insider. Through vigorous researching, interviews, and writing, I have become well acquainted with the materials that I have gathered. It is difficult to detach myself from what has already become embedded in me. This research is the product of not only a learning experience, but of a disturbance within myself that I have finally put into words. I hope that the idiosyncrasies of my outlook will provoke thoughts in others. Thoughts that will hopefully be able to finally rid of the injustice that plagues Aboriginal communities in relation to the legal system.

I have worked on more than a mere framework of understanding the current situation of Aboriginals and the criminal justice system. I have also provided a framework for change in this research. My whole-hearted belief is that this change will soon materialize. In that hope, I will walk away from this research with not an air of disappointment, but with one of victory. A victory that has contributed in reversing over 200 years of subordination and marginalization of Aboriginal peoples. In that respect, I am confident that I have been to a large degree, successful.

Having said that, this thesis examines the concerns that have arisen between Aboriginal peoples and the criminal justice system in Manitoba since the call for the creation of the AJI Report. While this assessment is undertaken in more general terms in chapters 2 and 3, chapters 4 through 6 take a considerable detailed approach. Chapter 2 examines the legacy of unpleasant relations between the governments and Aboriginal peoples. This chapter uncovers the relationship between historical influences and Aboriginal criminality. Chapter 3 presents a series of causes of Aboriginal criminal behaviour, and provides a comparison of the two competing justice models of Aboriginal and Western justice systems. Chapter 4 and 5 individually examine the AJI and AJIC Reports. The sixth and final chapter is designed to come to terms with the fate of both reports. In doing so, it looks at the factors that potentially could have influenced the fate of the reports in terms of immediate adoption by governments. It

concludes with where justice reform and Aboriginal policy-making stands in Manitoba.

My hope in this thesis is that it will make the journey of Aboriginal peoples in Manitoba easier. In addition, to the benefits Aboriginal communities will reap, as they are the obvious benefactors, both levels of government will hopefully also derive a sense of immediacy and commitment that could make this journey rewarding. I would also hope for many Canadians to be educated on the nature and importance of the issue(s). I trust that the reader(s), no matter how uninformed on justice matters pursuant to Aboriginal peoples, will take a moment and reflect on the undoubtedly increasing severity of the issues(s) presented. Aboriginal justice concerns will not dissipate over night, nor does this thesis seek to argue that. Likewise, this thesis doe not seek to answer every problem raised. I firmly believe that the most viable answers will come from those affected being the Aboriginal peoples of Canada, the federal and provincial governments, and the public opinion of Canadians who will take, what I like to call a 'moment of humanity' and recognize the interconnectedness between many of the facts that lay within these pages.

Instead of progress in Aboriginal justice reform in Manitoba since the creation of such high profile reports, there has been further consideration followed by more discussion. The main recommendations of both the AJI and

AJIC reports remain untouched. By identifying the roadblock in progress, this thesis has at the very least, attempted to make a critical awareness of the factors that if handled wisely, could reverse the usual historical trend that Aboriginal policy-making has taken. This trend according to Alison Dubois, has been incremental in nature in which it has been built on previous policy, meaning that the government's objectives have remained the same since the 1969 White Paper (discussed in chapter 2) which guides current Aboriginal policy as well.[6]

A final thought to keep in mind while reading this thesis:

"The offender is not born in the Indian – the Indian is born into a system which offends."

- Chief Louis Stevenson, Assembly of Manitoba Chiefs

[6] Dubois, Alison (2003) Instruments of Policy-Making: Canadian "Indian" and "Aboriginal" Policy in Oakes, Jill & Riewe, Rick & Wilde, Kimberly & Edmunds, Alison, and Dubois, Alison in Native Voices in Research Winnipeg: Aboriginal Issues Press @ 241.

Chapter Two:
Aboriginal and Governmental Relations: A Poor Start

"I want to get rid of the Indian problem ...our objective is to continue until there is not a single Indian in Canada that has not been absorbed."

-Duncan Campbell Scott, Superintendent-General of Indian Affairs, 1920

The perception of Aboriginal peoples[7] as a 'problem' to be solved has served as a central motive in the evolution of governmental policy towards Aboriginal peoples. Canada's 125-year old policies of attempting to assimilate Aboriginal peoples into mainstream society have been an open platform of failure. Moreover, the policies have had negative long-term consequences for Aboriginal peoples, the legacy of which is seen today in the deplorable conditions of many Aboriginal peoples and their communities. Paternalism, discrimination, neglect, manipulation, and dishonesty have characterized past policies towards Aboriginal peoples.

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[7] There is no one way of defining the Aboriginal population. Since there is no single or "correct" definition of the Aboriginal population, the choice of definition utilized usually depends on the purpose for which that definition is being used for. The term 'Aboriginal peoples' will be utilized throughout this thesis to encompass and include all people who trace to time immemorial their ancestry in Canada. As a result, 'Aboriginal peoples' includes all Indians (registered or non-registered), Metis, and the Inuit. This definition keeps in line with section 35(2) of the Constitution Act, 1982 which defines the term to include "the Indian, Inuit, and Metis peoples of Canada." It is crucial to point out that Aboriginal peoples are not a homogenous group. However, we can speak of them as a group that has experienced and still continues to experience similar treatment when compared to other groups in Canada.

This chapter will begin with a historical overview of governmental policies and actions from the time of the Indian Act (1876) to the present. Although presented in brief general terms, this historical overview is necessary to set the context for the remaining analysis presented in the thesis. A proper understanding of the contemporary situation of Aboriginal peoples is impossible without some understanding of the history of relations between them and the government, as an important set of factors contributing to the justice challenges facing Canadian governments in dealing with Aboriginal individuals and communities.

The history of Aboriginal-governmental relations will be examined by looking at significant events[8] that have influenced relations between Aboriginal peoples and the governments. After a brief introduction of some of the events that have made up the history, each will be discussed in more detail and its significance for the overall study will be explained. First, we have the historical period that includes the introduction of the Indian Act of 1876 and the advent of residential schools. From the outset, the Indian Act treated Aboriginal peoples as dominated and subjugated peoples and was a control mechanism that was to say the least, extremely overbearing. Second, we have the emergence of what the

[8] While this chapter looks at some of the events that shaped the relations between Aboriginal peoples and the government, it is important to realize that the legacy of relations between the two are very lengthy and complex for which dedicating a chapter is not sufficient and adequate in terms of space. However, for the purposes of the thesis as a whole, this chapter introduces and examines a few select moments to draw upon the point that there are enough historical injustices that can account for the problems that Aboriginal peoples have with the criminal justice system today.

federal government came forward with in 1969 called the "White Paper." Within this period, Aboriginal peoples were expected to give up everything and to convert to Canadian citizens. Implicit in this time was the argument that 'equality' and 'non-discrimination' should become the basis for addressing the problems of Aboriginal people. The final period we will examine involves debates and negotiations between Aboriginal organizations and governments over the concept of self-government. This began in the early 1970's until present in which Aboriginal leaders and organizations began seriously fighting for their rights.[9]

An analysis of all these historical moments reveals that the current issues facing Aboriginal people, particularly their too frequent encounters with the criminal justice system, are at least partly rooted in the historical government policies which created in many instances a dysfunctional way of life. One of the major consequences of governmental policies, for example, has been the destruction of Aboriginal communities and of the very foundations of Aboriginal

[9] Prior to that time, Aboriginal peoples were held responsible for their own problems, as well, they were seen to lack the adequate skills and commitment necessary to address their problems in a constructive way. Post 1970's, a different set of theoretical assumptions emerged in relation to the personal and social problems Aboriginal peoples experienced. Now, not only were Aboriginal peoples ready to fight for past injustices, but the government was willing to look at the 'Aboriginal problem' in a different light. The government was finally ready and willing to bridge this gap of misunderstanding. This federal policy discourse shift now recognized Aboriginal rights over land, identity, and political voice.

culture and traditions.[10] Let us now look into more detail revealing the many disturbing realities that have continued for several generations.

Canada's Indian Policy: Beginning With the Indian Act

"The Indian Act became a public embarrassment and a source of confusion."

-Sally Weaver, 1981

"If it is sickness you seek, look into the minds and hearts of the men who conceived, implemented and maintained residential schools, not at its victims."

-Dr. Roland Chrisjohn, 1993

Protection, civilization, and assimilation have always been the goals of Canada's Indian policy.[11] Since the 17th century Britain had employed men, referred to as Indian Agents to maintain relations with Aboriginal peoples. The Indian Agent, a field officer of the Department of Indian Affairs, "was a constant reminder of their wardship status, of their social inferiority, and subjection to government control."[12] Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs from 1913-1932, stated regarding the ultimate goal of Indian policy that "the government will in time reach the end of its responsibility as the Indians progress into civilization and finally disappear as a separate and distinct

[10] Aboriginal communities have over the years mobilized as a group, and taken control over their affairs. Many such cultural and traditional events that were once outlawed, are joyously practiced today.
[11] Tobias, John L. (1983) Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy in Getty, Ian A.L. & Lussier, Antoine S. (Eds) As Long As The Sun Shines and Water Flows: A Reader in Canadian Native Studies Vancouver: University of British Colombia Press at 39.
[12] Brownlie, Robin Jarvis (2003) A Fatherly Eye: Indian Agents, Government Power, and Aboriginal Resistance in Ontario, 1918-1939 Ontario: Oxford University Press @ 30.

people, not by race extinction but by gradual assimilation with their fellow citizens."[13]

In 1876 the first Indian Act[14] was enacted by the Parliament of Canada consolidating existing laws regarding Indians. The Indian Act of 1876 has been of great importance because it has touched virtually every aspect of Aboriginal lives. More specifically, the very purpose of the Act was the assimilation of Aboriginal peoples into mainstream society.[15] This piece of legislation served as an important tool in controlling First Nations[16] peoples and their resources. Under the Indian Act of 1876, an 'Indian' became "any male person of Indian blood reputed to belong to a particular band, any child of such person, and any woman who is or was lawfully married to such a person."[17] Excluded from Aboriginal status were persons living continuously five years or more in another country, and Aboriginal women marrying non-Aboriginal men. As a result of the Indian Act the First Nation's population in Canada became legally distinct peoples having a set of different rights, restrictions, and obligations.

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[13] Duncan Campbell Scott, in Proceedings of the Fourth Conference of the Institute of Pacific Relations (Canadian Institute of International Affairs, 1931) quoted in Bowles et al, eds, The Indian @ 112.
[14] Prior to the Indian Act, The Enfranchisement Act of 1869 was tabled to assimilate Indians, later discussed in this chapter. In subsequent legislation, the Indian Act of 1876 was another method of assimilation and/or the erasure of the distinct status of Indians.
[15] Wotherspoon, Terry & Satzewich, Vic (2000) First Nations: Race, Class, and Gender Relations Saskatchewan: Canadian Plains Research Center at 31.
[16] The Act only affected First Nations, as Metis and Inuit were excluded.
[17] Gibbins, Roger (1997) Historical Overview and Background: Part I in First Nations in Ponting, Rick J. Canada, Perspectives on Opportunity, Empowerment, and Self-Determination (1997) Toronto: McGraw-Hill Ryerson Limited at 21.

In retrospect, the most disturbing aspect of the Indian Act was the power it gave to the federal government.[18] The Act extended the reach of the government into every corner of Aboriginal life. The Act was administered by Indian agents having extraordinary administrative and discretionary powers. New non-Aboriginal chiefs displaced traditional Aboriginal leaders in order to bring in a new way of living which would support the government's plans of assimilation. Harold Cardinal argued that "instead of implementing the treaties and offering much needed protection to Indian rights, the Indian Act subjugated to colonial rule the very people whose rights it was to protect."[19] As a result, three facts became clear. Jamieson (1978:38) notes that federal officials held three convictions that determined the content of the legislation - one, Aboriginals and their lands were to be assimilated, secondly, that Aboriginals were not capable of making rational decisions for their own welfare so this had to be done by the officials for protection. Finally, Aboriginal women should be subject to their husbands as were other women.[20] It is evident that protection was only a temporary goal of the government until all Aboriginal peoples were assimilated into white mainstream society.

In 1857, legislation provided for the process of enfranchisement whereby Indians could acquire full Canadian citizenship by relinquishing their ties to the

[18] It should be noted that the Constitution Act of 1867 confirmed state responsibility for Aboriginal peoples by conferring federal jurisdiction over Aboriginal lands and affairs.
[19] Cardinal, Harold (1969) The Unjust Society The Tragedy of Canada's Indian's Edmonton: Hurtig at 43-44.
[20] Jamieson, K. (1978) Indian Women and the Law in Canada: Citizens Minus Ottawa: Minister of Supply and Services at 38.

community. For example, this included giving up one's culture and traditions and any rights to the lands. Aboriginal people who indicated their acceptance of Euro-Canadian values by obtaining a professional degree would be enfranchised immediately during that time. Furthermore, the government sought to wipe out Aboriginal cultural values by promoting Christianity through schooling. As a result, Aboriginal peoples would disappear as a distinct cultural group, and as soon as they would be enfranchised there would no longer be such a person called an 'Aboriginal.'

Next, if we take a closer look at promoting Christianity through schooling, was seen to be the most effective tool in the assimilation process. Set up and run primarily by churches on behalf of the federal government, residential schools changed ideology and beliefs. Local missionaries, who were agents of the government, wanted to lead Aboriginal peoples from a state of 'savagery to civilization.' Residential schools were established both on reserve and off reserve where Aboriginal children could be removed from the so-called negative influence of their parents. These schools were "charged with the responsibility of leading Indian children to civilized pursuits, ... residential schools sought to first eliminate any trace of Indian behaviour."[21] Isolation from parents was strictly enforced. "In some schools letters from children to their parents were routinely censored by school authorities, and parental visits to children were

[21] Dyck, Noel (1991) What Is The Indian Problem: Tutelage and Resistance in Canadian Indian Administration St.John's: Institute of Social and Economic Research at 81.

limited to one per month."[22] King (1967) describes a typical day at a residential school:

> A visit by parents to the school is unexpected and uncomfortable. The staff knows that many children are welfare cases and has heard lurid tales of drunkenness, sexual promiscuity, and family neglect about various parents. The staff therefore tends to assume that the visitor is of the dissolute category and is not inclined to accord the visitor the same respect that a non-Indian parent might expect during a visit to a regular public school.[23]

The struggles at these residential schools involved issues of power and control. The message given to the students was that they were inferior and that the priests and nuns in position of authority knew what was best for them. The whole message of the residential school experience was white superiority and Aboriginal inferiority. Many Aboriginal students resisted while others continually suffered.

The abuse that took place in these residential schools has been a story of unparalleled damage to a segment of Canadian society as a result of public policy. Sexual, physical, mental, psychological, and spiritual abuses all took place and had devastating consequences for the survivors of the schools. For example, verbal abuse such as being called "dirty Indians," "savages," and "bastard" are just a few to mention.[24] Systemic discrimination imposed on Aboriginal people by the government destroyed family life and violated parents'

[22] Haig-Brown, Celia (1988) Resistance and Renewal: Surviving the Indian Residential School Vancouver: Tillacum Library at 79.
[23] King, Richard (1967) The School at Mopass: A Problem of Identity Toronto: Holt, Rinehart, and Winston at 52.
[24] Ibid.

right to make decisions on behalf of their children. There were occasions where children were taught to hate their parents and lifestyles.[25] Children were taught that the beliefs of their ancestors such as Elders were to be abhorred.

In dealing with the residential school experience, survivors tended for decades to avoid the topic of what happened to them. Simply put, discussing the experiences at the residential schools was unthinkable. The harsh environment and the lack of empathy from the staff only taught residential school victims to suppress whatever feelings they had. Looking down deeper, we find that because the pain was so intense and since Aboriginal children were overwhelmed by a sense of shame and guilt, they never knew how to talk about it. Last but not least, Aboriginal children were taught to not express their language, culture, or identity. Not being able to use their language lead to silence. This silence lead to an internal suffering involving feelings of shame that were difficult to escape from.

The residential school era, also known as the 'Residential School Syndrome,' has had by one estimate, the effect of having eighty-five percent of the clientele in drug and alcohol abuse treatment programs have been in residential schools.[26] One of the reasons for high rates of alcoholism and crime

[25] Grant, Agnes (1996) No End of Grief: Indian Residential Schools in Canada Winnipeg: Pemmican Publications Inc at 223.
[26] Ibid at 248.

among Aboriginal communities is identified with residential schools. Hodgson (1992) notes:

> Fear is a significant factor in mental breakdown, suicide, sexual abuse, and violence. Fear and loneliness are the two deepest emotions alcoholics experience and those two emotions impede their ability to reach out. Not having power or control over our lives increases fear and the sense of powerlessness. The need for power and control is a key factor motivating violence.[27]

Aboriginal peoples and their encounters with the criminal justice system become more fully understood when we examine the devastating consequences of past policies and practices. Abuses that took place years and years ago, continue to have negative effects that have resulted in Aboriginal peoples' involvement with the justice system. "The numbers of Aboriginal peoples in our jails must reflect, at least in part, the devastating effect of so many children being taken away from their parents during their formative years and placed with strangers who, intentionally or not, contributed to their abnormal development."[28] The magnitude of loss of language and identity cannot be stressed enough within these pages. In addition, the spiritual loss[29] has been compounded by

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[27] Hodgson, Maggie (1992) Rebuilding Community after the Residential School Experience in Nation to Nation: Aboriginal Sovereignty and the Future of Canada, Engelstad, Diane & Bird, John, eds. Ontario: Anasi at 105.

[28] Hamilton, A.C. Honourable (2001) A Feather Not A Gavel: Working Towards Aboriginal Justice Winnipeg: Great Plains Publications @ 146.

[29] For Aboriginal peoples, spirituality is the cornerstone to their way of living. It is not seen to be solely a religion or a practice, but a way of life, intertwined in all aspects of daily living. It encompasses Aboriginal people's values, ceremonies, song, dance, and teachings. Many Aboriginal people give thanks and prayer to "the Creator" for everything they receive and everything that occurs. This is the most important belief as it is believed that the Creator has provided the Mother Earth, be it animals, people, plants, water and everything is a life force and part of it or comes from the Earth. Values and teachings, such as kindness, honesty, sharing, caring, respect, wisdom and strength are fundamental to this way of life and Elders of the Aboriginal people often have the responsibility of modelling and teaching these.

skyrocketing rates of alcoholism, substance abuse, domestic violence, and suicide.[30] Much, if not most, Aboriginal crime is associated with alcohol use. "Alcohol abuse is considered one of the single largest contributors to the disproportionate levels of First Nations offenders within the criminal justice system."[31]

Coming back, the Indian Act created a check on Aboriginal people's autonomy but simultaneously created a state of dependency. "Although the purpose of the Indian Act was not generally understood by the public, and by many Indians as well, the Act soon became a symbol of discrimination, a piece of racist legislation."[32] Aboriginals did not have any part in electing the politicians who legislated the Indian Act since they were not allowed to vote up until 1960. In short, the Act was so inclusive that Aboriginal peoples themselves had virtually no voice in the management in any of their own affairs.[33]

For the Government of Canada, the Indian Act was a measure to control Indians until they were fully assimilated through enfranchisement. Enfranchisement, however, did not do well in Canada being only a lure for assimilation, many Aboriginal peoples chose not to fit the dominant cultural mode of a full citizen. In short, Aboriginal people chose not to exchange cultural

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[30] Fleras, Augie (2000) The Politics of Jurisdiction: Pathway or Predicament in Long, David & Dickason, Olive Patricia Visions of the Heart: Canadian Aboriginal Issues Toronto: Harcourt Canada at 122.
[31] Trebilcock, Romola [2000, May 15]
[32] Weaver, S.M. (1981) Making Canadian Indian Policy: The Hidden Agenda Toronto: University of Toronto Press at 19.
[33] Some Aboriginal people were able to make daily decisions themselves, especially the further north you went.

characteristics for citizenship. It was not until the 1960's that this policy of enfranchisement changed and Aboriginals were granted the right to vote in federal elections.[34] "Citizenship and assimilation were no longer equated; one could be both a First Nation person and a full-fledged Canadian citizen."[35]

The Indian Act went through many revisions between 1885-1951. The Act underwent a major final change in 1951 after which the prohibition of the religious ceremony of the potlatch was repealed, for example. Other prohibitions that the Indian Act had placed were finally lifted included: not being allowed to leave the reserves without written permission from the agent, possessing or consuming alcohol, and the suppression of religious ceremonies like the Sun Dance.

The main features of the 1876 legislation had not been altered after the 1951 amendment, but the amended Act reduced the degree of government intrusion into the cultural affairs of Aboriginal peoples. A closer look at the 1951 Indian Act compared with the Indian Act of 1876 shows that there were only minor differences. In format, content, and intent they were quite similar. In 1969, the government announced its intention to absolve itself from responsibility for Indian affairs and the special status of Aboriginal peoples and to repeal legislation such as the Indian Act. The announcement of this policy in the 1969 White Paper is discussed next.

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[34] Prior to 1960, First Nations people were required to give up their Indian status to be considered Canadian citizens under the law

[35] Gibbins (1997) at 24.

The White Paper of 1969: Special Status or Equal Status?

"The new Indian policy promulgated by Prime Minister Pierre Elliott Trudeau's government, under the auspices of the Honourable Jean Chretien, presented in June 1969 is a thinly disguised programme of extermination through assimilation."

-Harold Cardinal, 1969

This new phase of Aboriginal-government relations sparked great controversy when the Government of Canada under the Liberal party led by Prime Minister Pierre Elliott Trudeau introduced in 1969 a discussion document called "The White Paper." The so-called White paper reflected the political philosophy of Prime Minister Trudeau stressing individualism and the protection of individual rights. It proposed to drastically restructure Aboriginal-governmental relations, by removing all privileges for Aboriginal people. Henceforth, they would receive services on the same basis and through the same channels as all other Canadians. It was accepted at the time that Aboriginal peoples had been neglected for too long and reform was necessary.

Trudeau was well-known for his strong views in opposition to singling out cultural groups for separate treatment, such as the French Canadians (also called the Quebecois). He argued that 'politics cannot take into account what might have been' and 'no society can be built in historical "might-have beens."' In his well-known book, "Federalism and the French Canadians," Trudeau argued:

> To insist that a particular nationality must have complete sovereign power is to pursue a self-destructive end. Because every national minority will find, at the very moment of liberation, a new minority within its bosom which in turn must be allowed the right to demand its freedom.[36]

Trudeau questioned that if such a principle were to work, why had the last two centuries been full of war and not a single final solution been found? Humanity, for Trudeau, must be a sum of personal freedom. In other words, Trudeau argued that individual freedom can not be destroyed by some collective ideology. This is something the Aboriginal peoples were not ready to hear or accept.

Tabled in the House of Commons on June 25, 1969, the White Paper stated:

> The government believes that its policies must lead to the full, free and non-discriminatory participation of the Indian people in Canadian society. Such a goal requires a break with the past. It requires that the Indian people's role of dependence be replaced by a role of equal status, opportunity, and responsibility, a role they can share with all other Canadians.[37]

The report clearly recognized the fact that government policies to-date had been failing. Based on this understanding, the federal government decided to eradicate special treatment and the only way to do this was by getting rid of the Indian Act, for example. As well, special legislation and bureaucracy that had been developed to-date needed to go. In addition, Indian Affairs would be

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[36] Trudeau, Pierre Elliott (1968) Federalism and the French Canadians Toronto: MacMillan Canada at 158.
[37] Government of Canada (1969) Statement of the Government of Canada on Indian Policy Ottawa: DIAND at 5.

dismantled within five years. Federal funds normally spent on Indian administration would be transferred to the provinces, although this subsidy would be phased out eventually.[38] The end result would be that Aboriginal peoples would receive the same services as other fellow Canadians. They would be equal to other Canadians, perhaps, an idea that was too radical indeed.

Aboriginal peoples were given a simple choice between discrimination or equality. The report created unequivocal opposition from Aboriginal communities. In a state of shock, Aboriginal communities rejected the report which was a reaction that according to most commentators, caught the Trudeau government off guard. Aboriginal groups found the White Paper to be a racist document in its intent and potentially genocidal in its consequences. Having already expressed concerns over the Indian Act, Aboriginal peoples' suggestions and recommendations were given no input in what was titled, the 'White Paper.'

Instead, status Indians wanted the right to conduct their political, social, and cultural affairs without excessive interference from Ottawa. They wanted their special rights honoured and their historical grievances recognized and dealt with. However, the report did not prioritize any of these concerns. "The policy in both substance and preparation indicated otherwise; it had been prepared within government and without Indian participation."[39] The ironic twist was the fact that although the government was attempting to remove an air if distrust, it

[38] Dyck (1991) at 108.
[39] Weaver (1981) at 5.

only reinforced it. It was the 1960's that witnessed an increasing distrust of the government from not only Aboriginal peoples but from the public and the media as well.

The officials who drafted the White Paper did not anticipate the sentiments of Aboriginal communities and the capabilities of Aboriginal representatives. After the first counter-proposal, the Red Paper[40] prepared by the Indian Chiefs of Alberta (1970), Trudeau publicly said that the government would not press the implementation of the White Paper.[41] By Spring 1971, the policy was formally withdrawn. Harold Cardinal's influential book, *The Unjust Society* (1969) was one document that heavily criticized the demands of the White Paper. Cardinal wrote as a response to Trudeau's governments' plan to eliminate Aboriginal rights. His message captured the feelings and emotions of many Aboriginal peoples. He stressed how Aboriginal peoples were marginalized in Canada through bureaucratic neglect, political indifference, and societal ignorance. He labelled Canada's treatment of Aboriginals as 'cultural genocide.'[42] Cardinal delivered a revolutionary message in a transformative time.

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[40] In the first days of June 1970, Indian leaders gathered in Ottawa at Carleton University where they debated whether to adopt Alberta Indian Association's position paper *Citizens' Plus* as the Official National Indian Brotherhood's response to the White Paper. After making certain revisions to the paper, by expanding the section on dealing with treaties to include Aboriginal rights they endorsed the Albertan 'Red Paper' on June 3, 1970. Traditional Indian regalia was worn by some of the Indian leaders adding to the drama of the setting.

[41] Ibid at 5.

[42] Cardinal (1969) at 139.

Gibbins (1997) notes:

> The White Paper was also a response to values within the policy-making arena of the national government. It was designed more to protect the government from external criticism than to meet the aspirations of Canadian First Nations as these were articulated by First Nations leaders.[43]

The rights of the individual were placed above the collective survival of Aboriginal peoples. While the White Paper sought to end paternalism[44] and discrimination against Aboriginal peoples, at the same time it failed to acknowledge that discrimination could in fact persist even by erasing privileges given to Aboriginal peoples. In a debate of equality, the issue became one of special rights for minority groups. In a twistful manner, the White Paper (1969) argued:

> To argue against this right [to equality] is to argue for discrimination, isolation, and separation. No Canadian should be excluded from participation in community life, and none should expect to withdraw and still enjoy the benefits that flow to those who participate.[45]

In sum, a few points should be noted. One, although there was extensive consultation with Aboriginal leaders, their input was ignored. Second, it was a major policy initiative of that time on which Trudeau spent a lot of time. Third, it completely ignored the major policy thrust of the 1966-7 two volume *Hawthorn*

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[43] Gibbins (1997) at 32.
[44] 'Paternalism' was seen as a force denying Aboriginal peoples the freedom to develop as they wanted and discouraging any initiatives they undertook.
[45] Government of Canada (1969) at 8.

Report.[46] Fourth, interestingly enough, many Aboriginal peoples firmly believe that the report's objectives remain an unofficial policy of the government to this day.

The question of how Aboriginal peoples ought to be accommodated within Canada has not left the societal and institutional agendas of governments to date. This is evident by the works of two scholars, Alan Cairns and Tom Flanagan who hold two separate viewpoints on the issue. Alan Cairns[47] argues in his book, *Citizens Plus: Aboriginal Peoples and the Canadian State*, that the term "citizens plus" provides the basis for rejecting the assimilationist assumptions of the White Paper. Cairns' enters the current debate over the relationship between Aboriginal peoples and the Canadian state with the aim of finding ways to hold society together. He argues that "our present discourses have difficulty being simultaneously sensitive to our diversity and yet sympathetic to and supportive of a togetherness that is more than geographical(6)".[48]

Tom Flanagan, in his book, *First Nations? Second Thoughts*, takes a different individualistic, liberal approach in answering this question of accommodation. Aboriginals deserve to be treated as other individuals, with the same rights and

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[46] The Hawthorn Report of 1966-7 rejected assimilation and the disappearance of separate Aboriginal status as a goal. The past, it argued, could not be ignored. The historic presence of Aboriginal peoples prior to the arrival of Europeans and their subsequent negative treatment, in spite of the treaties, justified according to the Hawthorn Report, a permanent positive recognition, labelled "citizen's plus."

[47] Cairns had worked with the Hawthorne Commission which explored the situation of Indian people in Canada in the mid-1960's, and coined the term "citizen's plus." Surprisingly enough, almost thirty-five years later Cairns had not changed his mind in this regard because he believed that the term recognizes Aboriginal "difference" while simultaneously emphasizing that a sustainable relationship between Aboriginal and non-Aboriginal peoples must be underpinned by a common citizenship.

[48] Cairns, Alan C. (2000) Citizens Plus: Aboriginal Peoples and the Canadian State Vancouver: UBC Press at 6.

responsibilities advocates Flanagan. Flanagan's solution is for Aboriginals to become full Canadian citizens with all the opportunities and responsibilities of citizenship. For him, Aboriginal peoples are ordinary human beings and the individual is the determinant of value and not the collective. Flanagan adamantly argues that:

> In order to become self-supporting and get beyond the social pathologies that are ruining their communities, Aboriginal people need to acquire the skills and attitudes that bring success in a liberal society, political democracy, and market economy. Call it assimilation, call it integration, call it adaptation, call it whatever you want: it has to happen.[49]

It is clear that Flanagan supports the philosophy of the White Paper, and directly, criticizes the Hawthorn Report. His comment on the concept of "citizens plus" from the Hawthorn Report is that it will lead in practice to an ever-growing flow of money to Aboriginal governments combined with economic development projects based on multiple goals such as job creation, employment training, reserve infrastructure, Aboriginal entrepreneurship, and cultural preservation.[50] He believes that the White Paper, on the other hand, protects Aboriginal societies and since Aboriginal peoples live life like other Canadians, the real question is not one of assimilation but one of the extent to which their identity is to become *politicized.*

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[49] Flanagan, Tom (2000) First Nations? Second Thoughts? Montreal: McGill-Queen's University Press at 195-6.
[50] Ibid at 106.

Having seen two[51] different perspectives on this issue[52], the truth of the matter is that the White Paper of 1969 was rejected. The rejection of the White Paper opened up a new and confused policy era; the direction of First Nation policy in the 1970's was "up for grabs."[53] As a matter of fact, "the White Paper became the single most powerful catalyst of the Indian nationalist movement, launching it into a determined force for nativism - a reaffirmation of a unique cultural heritage and identity."[54] Up until the end of the rejection of the White Paper, Aboriginal peoples had little or no control over the policies that directed their lives. Now, however, there was suddenly a moment where Aboriginal leaders would have input into policy objectives that would take Aboriginal aspirations into consideration. This is one opportunity they quickly reached out for and the changes that slowly began emerging will be reviewed in the next section.

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[51] Due to space limitations, only two perspectives are offered here. There is an abundance of other views, particularly Aboriginal views that can be reviewed for a more deeper understanding on what others have said about this issue.

[52] Please refer to Cairns, Alan & Flanagan, Tom An Exchange Inroads, Vol 10, 2001, pgs 101-122 where both scholars offer one another feedback and the most important contributions and flaws from eachothers books.

[53] Ibid at 32.

[54] Weaver (1981) at 171.

Self-Government: Closer to Control?

"They have given us a longer leash and a bigger playpen, but they are determined to keep us under control".

- Chief Bill Two Rivers, Kahnawake Mohawk Council, at the Indigenous Peoples Conference, London, Ontario, 1991.

From the 1970's onwards, we had a different scenario emerging. This new phase involved some recognition of diversity within Canadian society and acceptance of the fact that there would be a permanent Aboriginal presence in Canada. The relationship shifted from one of assimilation and integration to one of *limited Aboriginal autonomy*.[55] The ongoing issue of the Aboriginal 'problem' was now being seen in a different light by the government. To the joy of many Aboriginal peoples, the government perception of the Aboriginal agenda began finally to change. Throughout the late twentieth and early twenty-first century the federal government gradually gave Aboriginal peoples more authority to control their local affairs.[56] This had been a remarkable shift in recognizing Aboriginal rights.[57] Fleras & Elliott (1992) note that:

> To its credit, the government has accepted the idea that Aboriginal peoples (a) are a separate people, (b) possess a threatened culture and society that require massive government intervention for survival, (c) need special measures to bring about renewal, and (d)

[55] This term 'limited Aboriginal autonomy' is my own term used to describe the policy shift in the 1970's onward.
[56] Cassidy, Frank & Bish, Robert L. (1989) Indian Government: Its Meaning and Practice Lantzville: Oolichan Books at 6.
[57] Aboriginal rights refer to a whole range of entitlements which are drawn from a variety of sources such as international law, the treaties, Royal Proclamation of 1763, and natural law.

> depend on central authorities and legal obligations to ensure Aboriginal progress as self-determining people.[58]

Several events illustrate that this governmental consensus had crystallized. Most prominent was the acceptance of the concept of self-government.[59] From 1982 onwards the focus on Aboriginal rights was centered around the successful recognition and acceptance of the right to self-government[60] in the Canadian Constitution.

Self-government, however, has been widely misunderstood by Canadians. Many Canadians even take offence at the use of the term.[61] What Canadians want is for Aboriginal peoples to become full participants in society while possessing the tools to preserve their heritage.[62] Canadians grow particularly hesitant when there is an impingement on their established rights. Nowhere does the conflict between the tolerant society and equality worship become more nettlesome than in Aboriginal policy.[63]

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[58] Fleras, Augie & Elliott, Jean Leonard (1992) The Nations Within, Aboriginal-State Relations in Canada, the United States, and New Zealand Toronto: Oxford University Press at 52.

[59] Self-government is not a new concept to Aboriginal peoples. Aboriginal governments existed long before the arrival of Europeans in North America. Through the original Aboriginal government structures, the various tribes exercised their occupation of the land, and sovereignty over their own people. In this sense, Aboriginal self-government is very much rooted in the heritage and culture of Aboriginal peoples.

[60] The right to self govern includes a greater self determination and social justice (that is, control over one's destiny) rather than subordination to political and bureaucratic authorities, economic development to end dependency, poverty, and unemployment, protection and retention of Aboriginal culture, and social vitality that will overcome such existing social problems like health, housing crises, education, criminal justice, alienation, etc.

[61] While the public endorses the general concept, they disagree with the practical implications such as the transfer of money, transfer of authority, etc.

[62] Bricker, Darrell & Greenspon, Edward (2001) Searching for Certainty: Inside the New Canadian Mindset Canada: Doubleday at 278.

[63] Ibid at 276.

For Aboriginals, self-government means simply that they, as the First Nations, will govern their own people and their affairs including the land and its use. Negotiations represent an "opportunity to at least partially reverse hundreds of years of oppressive government policies and neglect."[64] For governments, it means a cut in the heart of the Constitution, at the very least. For example, there is fear that entrenching Aboriginal self-government in the Constitution will possibly lead to a fourth order of government. Many Canadians believe that accepting the Aboriginal right to self-government is an inappropriate response to rectifying past mistakes, and in fact, Aboriginal peoples are not ready for political control while other Canadians believe that it would be a great solution.

Even if this fear of Aboriginal peoples not being able to manage their own agenda was to have some merit it is crucial to keep in mind that "self-government is an emergent, iterative process – its meaning and validity become clearer with its practice."[65] One of the biggest challenges facing advocates of self-government is to translate their demands into concrete, practical proposals. The case of Aboriginal self-government in which Aboriginals have been trying to demonstrate how political control provides the opportunity for more effective and culturally appropriate solutions to community problems can in their opinion, serve to reduce Aboriginal peoples encounters with the justice system.

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[64] Hawkes, David C. (1985) Aboriginal Self-Government: What Does It Mean? Ontario: Institute of Intergovernmental Relations, Discussion Paper at 1.
[65] Warry, Wayne (1998) Unfinished Dreams: Community Healing and the Reality of Aboriginal Self-Government Toronto: University of Toronto Press at 49.

The most significant and decisive influence on the future direction of Aboriginal justice reform is the emergence of Aboriginal self-government.[66]

In 1982 a Special Committee of the House of Commons on Aboriginal self-government was appointed to review legal and institutional issues related to the status, development and responsibilities of band governments on reserves. Its 1983 report entitled, *Indian Self Government in Canada,*[67] also known as the *Penner Report,* recommended that the federal government recognize First Nations as a distinct order of government within the Canadian federation, and pursue processes leading to self-government.[68] In order to achieve this the report proposed a three part programme.[69]

As well, in 1982 through the demands of Aboriginal organizations our Constitution Act in sections 25, 35, and 37[70] recognized and affirmed existing

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[66] McNamara, Luke (1993) 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 Legal Research Institute of Manitoba @ 107.

[67] Canada, 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.

[68] Wherett, Jill [1999, June 17] Aboriginal Self-Government: Library of Parliament Retrieved July 15, 2003 from http://www.parl.gc.ca/information/library/PRBpubs/962-e.htm

[69] This three part programme included: (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; (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; and (c) that the Canadian Constitution be amended so as to expressly recognize and entrench the right of Indian peoples to self-government.

[70] Section 25 of the Charter guaranteed any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; Section 35 recognized and affirmed the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada, as such Aboriginal peoples of Canada included the Indian, Inuit, and Metis people; Section 37 outlines the constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces, and the need for their agenda to include the identification and definition of the rights of those peoples to be included in the Constitution of Canada.

Aboriginal and treaty rights.[71] With the addition of section 35 the Canadian government, for the first time, constitutionally acknowledged that there were not only Aboriginal people but Aboriginal rights. The key impact of section 35 was the way it shifted emphasis from the question of legal existence of Aboriginal rights to the issue of whether they had been terminated.[72] The central point of dispute was not the acknowledgement by the state of these rights, rather, it was what ought to be included within the meaning of section 35.

Aboriginal rights can be described as encompassing a broad range of economic, social, cultural, and political rights.[73] Since 1982, the courts have issued a number of major decisions effecting the contemporary status of Aboriginal rights. For example, in *Sparrow v. Regina*[74] Macklem states:

> At issue was whether the Musqueum nation ...could assert an Aboriginal right to fish that would override federal regulations...The Musqueum asserted that their right to fish was an 'existing' Aboriginal right, recognized and affirmed by s.35(1) of the Constitution Act, and therefore, paramount over federal law that regulated its exercise. [75]

Of all these cases, the judgement delivered in the Sparrow case was important because it was the first case to consider the meaning of section 35 of the Constitution. The outcome of this case was that the Supreme Court ruled in their

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[71] Cassidy, Frank & Bish, Robert L. (1989) at 16.
[72] Sanders, D (1989) Pre-Existing Rights: The Aboriginal Peoples of Canada in G.A. Beaudoin & E. Ratushny, eds. The Canadian Charter of Rights and Freedoms, 2nd ed Toronto: Carswell @ 731.
[73] Asch, Michael (1993) Home and Native Land: Aboriginal Rights and the Canadian Constitution Vancouver: UBC Press at 30.
[74] *Sparrow v. Regina* (1986), 36 D.L.R. (4th) 246 (B.C.C.A.

[75] Macklem, Patrick (1992) Aboriginal Peoples, Criminal Justice Initiatives and the Constitution University of British Columbia Law Review (Special Edition), pgs. 280-305 at 283.

favour. Fishing was seen to be 'Aboriginal' and a part of 'existing' Aboriginal rights guaranteed by the Constitution. The significance of this case pertained to the fact that the government acknowledged the duty to not only protect certain activities, but to protect a way of life - the Aboriginal way of life.

After the 1982 Constitution acknowledgement, section 37 [76] required a constitutional conference where Aboriginal organizations would sit at the constitutional bargaining table with first ministers called the First Ministers Conference (FMC). Held in March of 1983, the conference made some progress. Three additional conferences were duly held in 1984, 1985 and 1987 as well which focussed exclusively on the right of self-government. Although the conferences failed in their major objective of giving substance to the inherent right of self-government, they nevertheless signalled the arrival of Aboriginal people as equal partners closer to political autonomy.

In March 1985, the federal government adopted a *"two-track" approach* to self-government. On one track were constitutional negotiations and on the other, were community-based negotiations. At the constitutional level, the principles of self-government and the questions of inherent jurisdiction would be addressed. At the community level, Aboriginal self-government and how it would be

[76] Section 37 states: (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.

carried out in a day-to-day manner would be addressed. However, many Aboriginals wondered whether this was the federal government's approach to assimilation once again clothed as recognition. At this point in time Aboriginal leaders were furious with mere talks, instead, they were wanting to see concrete results. They wanted this so they could take control over issues that were destroying their communities such as criminal justice due to high rates of crime. Concerns arose over whether Aboriginal self-government was to be considered a creature of the existing federal and provincial governments which could be changed or modified by them. Instead, Aboriginal peoples argued for a fourth order of government that would have sovereignty and autonomy within its own sphere of activity. As a result, they could take control over many issues such as justice matters by putting an end to the restriction imposed upon their communities to govern themselves.

During the 1980's, the matter of Aboriginal self-government had become a constitutional issue: a question of national importance. Nevertheless, recognition of this right by the federal and provincial governments did not follow. The government continued to question the meaning of Aboriginal self-government in practice, but they also found that it was an issue they could not ignore. In the process, Aboriginal peoples were excluded from participation in the constitutional negotiations that led to 1987 Meech Lake Accord. This produced strong Aboriginal protests that contributed to the Accord's defeat on June 23, 1990. In Manitoba for example, Elijah Harper (MLA Rupertsland)

rejected the passing of the Accord. Asch and Macklem's thoughts were that "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."[77] Although the Meech Lake Accord collapsed, the way in which Aboriginal rights would be dealt with in future constitutional reforms would be different.

"After much negotiation, the provincial premiers, territorial government leaders, Aboriginal organizations and the federal government agreed, as part of the 1992 Charlottetown Accord, on amendments to the Constitution Act 1982 that would have included recognition of the inherent right of self-government for Aboriginal people."[78] For the first time, Aboriginal organizations had been full participants in the talks, however, the Accord was rejected in a national referendum.

With the defeat of the Charlottetown Accord in 1992 the level of uncertainty regarding Aboriginal self-government remained large. It is crucial to keep in mind that the issue of self-government encompassed much more than the type of government to be exercised by Aboriginal peoples. *In essence, the place of Indian people as a whole in Canadian society was at stake.* In other words, by being granted the right to govern themselves Aboriginal peoples would take charge of

[77] Asch, Michael & Macklem, Patrick (1991) Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow, 29 Alta. Law Review 498 @ 516.
[78] Wherett, Jill [1999, June 17] Aboriginal Self-Government: Library of Parliament Retrieved July 15, 2003 from http://www.parl.gc.ca/information/library/PRBpubs/962-e.htm

their people and no longer would they be classified as Canadians nor accountable to the two levels of government.

What would the Charlottetown Accord have changed? Let's look at a few changes. The Charlottetown Accord would have recognized the inherent right of self-government for Aboriginals and would have acknowledged that First Nation governments constituted a fourth order of government in Canada. Federal and provincial laws would remain in place until they would be superseded by Aboriginal laws. In addition, native peoples would have had a new role of one kind or another in the House of Commons, Senate, Supreme Court, first ministers conferences, and the constitutional amending formula.[79] Although the negotiation of self-government agreements had been on the national agenda since the early 1980's, the Accord would have established for the first time a "firm legal and policy framework to govern negotiations, to clarify the scope of Aboriginal jurisdiction, to ensure adequate funding for the process, and to provide for the constitutionalization of the self-government agreements and for their implementation."[80]

Asch (1992) notes that:

> Federal and provincial governments have generally agreed that any political powers they might be willing to recognize in Aboriginal self government must ultimately be "contingent." In other words, they must derive from the present constitutional division of powers between the federal and

[79] Dyck, Rand (2000) Canadian Politics: Critical Approaches (3rd Ed.) Ontario: Nelson Thomson Learning at 75.
[80] Hogg, Peter W. & Turpel, Mary Ellen (1995) Aboriginal Self-Government: Legal and Constitutional Issues Royal Commission on Aboriginal Peoples at 381.

> provincial levels. Aboriginal government, they have argued, must depend on authority delegated from presently existing levels of government or on authority provided by Acts of Parliament.[81]

Clearly, the government wishes for Aboriginal governments and institutions to exercise their right of self-government within the existing framework of the Canadian Constitution. This is "a modern expression of paternalistic colonialism that attempts to keep Aboriginal peoples under the ultimate care and care of non-Aboriginals."[82] Governments appear to hold the present division of section 91 and section 92[83] powers to be an essential part of the Canadian political fabric. By implication, departing from this context of Confederation, by establishing separate powers for Aboriginal governments might threaten the integrity of the nation itself.[84]

An Era of Error: Where To Go Next?

Though Aboriginal peoples have made major breakthroughs since the defeat of the 1969 White Paper, they have also continued to face barriers in locating room for self-sufficiency. While the repudiation of the White Paper

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[81] Asch, Michael (1992) Political Self Sufficiency in Nation to Nation: Aboriginal Sovereignty and the Future of Canada, Engelstad, Diane & Bird, John, eds. Ontario: Anasi at 46.
[82] Ibid at 46.
[83] The Constitution Act 1867 divides jurisdiction between Parliament and the ten provincial legislatures. Section 91(24) of the Constitution Act 1867 gives Parliament exclusive jurisdiction in relation to "Indian, and lands reserved for the Indians." Section 92 (14) gives several powers to the provinces. Section 92(14) gives exclusive powers to provincial legislatures as it states:

> 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.

In summary, section 91(24) gives Parliament power to make laws with respect to "Indians, and lands reserved for Indians," and section 91(27) includes within federal legislative authority, the criminal law, except the Constitution of courts of criminal jurisdiction, but including the procedure in criminal matters.
[84] Long, Anthony J. & Boldt, Menno (1988) Governments in Conflict: Provinces and Indian Nations in Canada Toronto: University of Toronto Press at 77.

marked the formal end of the colonialist policy era, many of its underlying assumptions such as assimilation, for example, have continued to affect Aboriginal-governmental relations to this day. Although certain self-government cases have been successful [85], the fact remains that the government chooses not to fully share political power. Even though Aboriginal peoples have become actively engaged in confronting the government over matters that have left deadly consequences in areas like justice, the truth remains that Aboriginal communities are still lagging behind severely. "The upshot is that assimilation policy is by no means dead."[86] In the view of many Aboriginal leaders and other critics of contemporary governmental policies, the policy goal may have been dropped officially by the government, but continues to linger around unofficially.

Assimilation has been a central theme in all governmental policy towards Aboriginal peoples as the three phases discussed illustrate. This assimilationist goal has been clothed in many different terminologies. For example, integration and civilization have been utilized extensively. As an Indian Affairs member once stated: "The government wants total assimilation, but they call it

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[85] In 1984, the Grand Council of the Crees (of Quebec) and the Naskapi First Nations were the first to obtain a federally legislated base for their individual communities as an alternative to the Indian Act (through the Cree-Naskapi Act). In 1986, we had the passage of the Sechelt Indian Band Self-Government Act passed by Parliament. The Sechelt First Nation of British Columbia, was the first Aboriginal nation in Canada to negotiate a double bilateral self-government regime. Another case is the Council of Yukon First Nations whom demanded more than a land surrender. They pressed for an economic base to guarantee their future prosperity, and insisted on retaining significant portions of their traditional territory (Morse:1999:37). They reached an agreement called the Yukon First Nations Land Claims Settlement Agreement Act and the Yukon First Nations Self-Government Act in 1993. These two federal statues were proclaimed in 1996.

[86] Schouls, Tim & Olthius, John & Engelstad, Diane (1992) in Nation to Nation: Aboriginal Sovereignty and the Future of Canada, Engelstad, Diane & Bird, John, eds. Ontario: Anasi at 23.

integration." Aboriginal peoples have been expected to give up their cultures, languages, customs, and religious beliefs and to contribute to Canadian society. The civilization goal has been to ensure that Aboriginal peoples acquire and reflect the Euro-Canadian ways of life.

Dyck (1991) explains the relationship between Aboriginal peoples and the government as one of tutelage as follows:

> Reduced to its essentials, tutelage compromises a form of restraint or care exercised by one party over another as well as the condition of being subjected to protection or guardianship ... there is an implicit understanding of the unequal status and power of the two parties. What is unusual about the particular form of tutelage experienced by Aboriginal peoples in Canada is not that it has involved the exercise of power by one party to guide and shape the conduct of another...it is that their experience has been based neither upon a contractual agreement nor a negotiated understanding but upon the power of one side to regulate the behaviour of the other in accordance with a set of unilaterally selected purposes.[87]

The key word used in the above passage is 'unilateral.' Governments have made decisions and Aboriginal people have had no choice but to obey those decisions. Aboriginal people are still here, but their aspirations have seldom been those entertained by other Canadians. For too long in Canada the image in the public's mind has been one of the vanishing Aboriginal or of the assimilated Aboriginal. If public awareness of Aboriginal issues is to be enhanced, we need to move beyond stereotypes to the complexity of Aboriginal life.

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[87] Dyck, Noel (1991) at 24.

Time has changed matters in a more positive direction to some degree. In 1969, Aboriginal peoples were about to become an 'endangered species.' The so-called Aboriginal 'problem' was about to be solved by the abolishment of Aboriginal peoples as recognizable entities in Canada. All these years later, however, Aboriginal peoples are solidly entrenched as Canada's first citizens. In addition, they are recognized as distinct peoples with corresponding rights. They have had the right to sit with Canada's ministers and debate constitutional reform. The Aboriginal agenda has moved into political and public consciousness. The question remains regarding where changes in Aboriginal-governmental relations will lead. Nevertheless, issues facing Aboriginal communities today, with emphasis on criminal justice, are in serious need of attention. We must keep in mind, however, that even positive moves by the government are suspected of concealing 'hidden agendas.'[88]

So what purpose does this discussion of history serve in reference to Aboriginal overrepresentation within the criminal justice system? In a recent public opinion poll, "over 50 percent of Canadians believed that the problems facing Aboriginal peoples are due to the damaging system established by the government."[89] The events that occurred in the three phases discussed above are major historical changes that altered the Aboriginal way of living to-date. Aboriginal communities face what can be called a 'cultural breakdown' due to

[88] Fleras, Augie & Elliott, Leonard Jean (1992) at 125.
[89] Wotherspoon, Terry & Satzewich, Vic (2000) at 15.

governmental policies, and as a result, this breakdown can be clearly linked to the problems faced in the sphere of criminal justice.[90] Romola Trebilcock (2000) reports:

> Many of the problems that Aboriginal peoples face with respect to the criminal justice system are influenced by the context of their historical place in colonial and post-confederation Canada. [91]

Aboriginal over-representation within the system is not news to anyone. Neither is the fact that the problematic nature of the historical relationship is largely responsible for today's conditions. "Recognizing colonialism as a central explanation, if not the central explanation, for Aboriginal overrepresentation in the justice system is essential."[92] We must be careful in not minimizing the historic relations between Aboriginal people and the government as a source of the problems that Aboriginal peoples face in the justice system. For years before the arrival of the Europeans, Aboriginal peoples had their own laws and systems of resolving disputes. These systems have stood in contrast to the non-Aboriginal method of dealing with crime and criminal behaviour (looked at in more detail in next chapter). As a result, the concepts of justice imposed upon Aboriginals by a foreign system tend to continue on a legacy of historical injustices, which in turn leads to a life of crime where Aboriginals have no

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[90] In addition to the sphere of criminal justice, Aboriginal people are facing this 'cultural breakdown' in other areas such as poverty, unemployment, socio-economic status, domestic abuse, alcohol abuse, lack of education, high mortality rates, low life expectancy, etc.

[91] Trebilcock, Romola [2000, May 15] Aboriginal Peoples and the Criminal Justice System Canadian Criminal Justice Association (CCJA) Part I: Historical Factors Retrieved from April 4, 2003 from http://www.ccja-acjp.ca/en/abori.html @ 1.

[92] Monture-Angus, Patricia A. (2000) Lessons in Decolonization: Aboriginal Overrepresentation in Canadian Criminal Justice in Long, David & Dickason, Olive A. Visions of the Heart: Canadian Aboriginal Issues Toronto: Harcourt Canada at 363.

control. How one can not charge the government with at least some level of responsibility for this is incomprehensible.

For years the Canadian government has attempted to destroy Aboriginal cultures and families. Unfortunately, assimilation remains deeply entrenched in governmental practice even though it has been rejected as official policy. Fleras & Elliott (1992) report that:

> Nearly two decades of tinkering have not fundamentally altered the national Aboriginal agenda – at least not in any substantial sense. The basic principles of assimilation remain in place, suggesting that changes over the past 150 years have been largely illusory and rhetorical, with major developments restricted to strategies and symbols rather than objectives and content.[93]

We must keep in mind that governmental policy towards Aboriginal people was historically programmed to protect, assimilate, and civilize. Such a commitment is difficult to break. Control and domination has been seen as necessary and normal. White supremacist views have always been upheld while Aboriginal have been considered an inferior stock of people. We have surely moved from an ideology of control to consultation, however, ***interpretation*** and ***implementation*** of this revised philosophy remains controversial because many leaders of Aboriginal organizations, Aboriginal citizens, and critics of the federal and provincial governments believe that change is more rhetorical than substantive. While this new ideology has surfaced from the 1970's onwards, what remains is the need for the old ideology of control to completely be

[93] Fleras, Augie & Elliott, Jean Leonard (1992) at 52.

replaced. Until then, competing agendas and expectations will continue to frustrate the old-age Aboriginal 'problem' and the need to 'decolonize' Aboriginal-governmental relations remains.

On a more positive note, however, over time Aboriginal peoples have moved from full control over their bands and associated issues, to a status of assimilation, to again fighting to regain control over their communities. In the process, they have been imprisoned ... their minds imprisoned within walls that could not be seen. Though, just like the small flickering ember of a dying fire, Aboriginals are awakening and seeing the walls within which they have been confined. This awakening has included turning the overwhelming evidence of the justice system's disproportionate and discriminative impact on Aboriginal peoples, into taking positive initiatives to improve the administration of justice. When one looks at the overrepresentation of Aboriginal peoples at all stages of the criminal justice system, one is horrified. History has been shown to contribute to the overrepresentation in this chapter, however, what other causes account for this 'problem'? This is the subject of discussion in the next chapter.

Chapter Three:
Aboriginal People Within The Justice System: How Harsh Is Harsh?

"The first challenge in writing a report on justice is that the overall perspective of an aboriginal person towards Canadian legal institutions is one of being surrounded by injustice without knowing where justice lies, without knowing whether justice is possible."

-Elijah Harper

The 'problem' of aboriginal overrepresentation within the criminal justice system and the higher rates of incarceration have been the focus of numerous commissions, task forces, and inquiries. In 1988, Michael Jackson in the Canadian Bar Association's Report on Aboriginal Peoples and the Criminal Justice System stated that:

> Statistics about crime are often not well understood by the public and are subject to variable interpretations 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 or interpreted away.[94]

Notwithstanding the hundreds of recommendations made by these reports, the reality for aboriginal peoples is that the system is still not adequately

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[94] Jackson, Michael (1988) Locking Up Natives In Canada, Report of the Bar Association Committee on Imprisonment and Release; reprinted in UBC Law Review 23 (1989) pg.220. This report was adopted by the Canadian Bar Association at its annual meeting in 1989 @ 2.

meeting their needs.[95] Simply put, the number of aboriginal people tangled up within the system and within jail needs to be reduced.

This chapter has been designed to discuss the problems and conflicts that are associated with aboriginals when they are caught within the criminal justice system. In doing so, it compiles a sketch of a typical aboriginal offender by offering a preview into some of the basic facts that surround aboriginal criminality. Second, it will attempt to understand why these problems exist by looking at socio-economic conditions, demographics, racism/discrimination, etc that contribute to the high levels of aboriginal peoples involvement with crime. Simultaneously, this chapter steps forward in tackling the question of justice and what it means for both aboriginal and non-aboriginal peoples and how this meaning conflicts with one another.

It is perhaps a necessary starting point to first ask what the Canadian criminal justice system is and what its purpose(s) are? Criminal justice in Canada similar to other parts of the world, is a complex system of checks and balances involving many different decision-makers. To put it simply, the justice system has been understood to protect private property and uphold the individual rights of citizens. Certain acts in society need to be prevented for the protection of the public, and thus, the criminal justice system is an institution

[95] In stating 'not adequately meeting their needs' I am not suggesting that it is the purpose of the criminal justice system to serve "the needs" of offenders. I am, however, trying to place importance on the fact that the criminal justice system should recognize aboriginal peoples *distinctive* history and culture. In doing so, the system can avoid the high levels of imprisonment and recidivism that are high amongst the aboriginal peoples.

that achieves this objective. Others like to describe the system to include three components: the police, courts, and corrections. Each component has a unique and complementary role in ensuring that the system works.

Most generally, the federal government has authority to make criminal law[96], while the provinces are responsible for its administration. All courts are established and administered by the provinces. While space does not permit a detailed discussion of the history or basic principles of Canadian criminal law, it is suffice to say that there are two competing values systems which underlie the administration of criminal justice. One, the *'Crime Control Model'* "views the primary purpose of the criminal justice system as the protection of the public through the deterrence and incapacitation of offenders."[97] This model stresses the importance of controlling crime and it favours providing criminal justice officials with as much power as possible with which to respond to crime. In contrast, the *'Due Process Model'* "emphasizes procedural fairness and a presumption of innocence. "[98] This model prefers to place limits on the powers of criminal justice officials and there is an onus on the system to prove guilt.

The legitimacy[99] of the criminal justice system is based upon both its effectiveness and fairness. Canada uses deterrence, incapacitation, and

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[96] Criminal law can be seen to be a body of specific rules regarding human conduct that have been put in place by political authority applying to all members of a society.
[97] Griffiths, Curt T. & Verdun-Jones, Simon N. (1994) Canadian Criminal Justice, 2nd Ed. Toronto: Harcourt Brace and Company @ 10.
[98] Ibid @ 10.
[99] The manner in which the criminal justice system functions as a whole, from the complex sequence of judicial authorities, procedures and decisions from the reporting of a crime right through to the execution of a sentence are all of prime importance for the legitimacy of the administration of criminal justice.

rehabilitation as justice model goals for reasons to sentence offenders. Sentences serving as deterrents are intended to control crime and dissuade potential offenders. Secondly, incapacitation sentences are handed down to keep society safe. Thirdly, sentences for rehabilitative purposes are an approach that focuses on correcting the offender's behaviour in order for the offender's societal reintegration. The fundamental purpose and principles of sentencing in Canada can be found in section 718 of the Criminal Code.[100] Furthermore, section 718.1 outlines the central principle of sentencing.[101] However, section 718.2 codifies other sentencing principles that must be considered in the sentencing process by the judge at his/her discretion. Section 718.2 lists considerations[102] to be made

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[100] **718.** The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct;
(b) to deter the offender and other persons from committing offences;
(c) to separate offenders from society, where necessary;
(d) to assist in rehabilitating offenders;
(e) to provide reparations for harm done to victims or to the community; and
(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[101] **718.1** A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[102] **718.2** A court that imposes a sentence shall also take into consideration the following principles:

(*a*) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,
(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner or child,

by the judge, of particular significance is section 718.2(e) which was enacted in 1996 as part of a comprehensive review of sentencing policy in Canada stating: *(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.* Section 718.2(e) is not about excusing the criminal acts of Aboriginal people because they are Aboriginal. It is not about not jailing them simply because they are Aboriginal. Rather, it suggests that sentences other than imprisonment might meet the needs of the community and the offender better than incarceration. The reason for this fact is that they are not only disproportionately overrepresented in provincial and federal jails across Canada, but also that jails have not proven to be a very effective deterrent for Aboriginal offenders.

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(v) evidence that the offence was a terrorism offence shall be deemed to be aggravating circumstances;

(*b*) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(*c*) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(*d*) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(*e*) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

The Supreme Court of Canada's decision in *R. v. Gladue*[103] clarified the duty of sentencing judges to consider background and systemic factors in sentencing Aboriginal offenders. Some of the issues/factors that sentencing judges must consider are:

I. has this offender been affected by substance abuse in the community?
II. has this offender been affected by poverty?
III. has this offender been affected by overt racism?
IV. has this offender been affected by family or community breakdown?
V. has this offender been affected by unemployment, low income and a lack of employment opportunity?
VI. has this offender been affected by dislocation from an Aboriginal community, loneliness and community fragmentation?
VII. has the offender been affected by residential school education?

The *Gladue* decision[104] is an important watershed in Canadian criminal law. In this case, the sentencing judge erred in limiting application of section 718.2(e) to the circumstances of Aboriginal offenders living on or off reserve. Furthermore, the judge did not consider the background factors that influenced the accused to engage in criminal conduct nor did he pay attention to distinct conception of sentencing held by the Aboriginal community. While the judge did take other mitigating factors into consideration, he was of the belief that since the accused and the victim both were living off reserve and not "within the Aboriginal

[103] See Regina v. Gladue [1999] 23 C.C.R. (5th) 197.
[104] The accused, an Aboriginal woman, pled guilty to manslaughter for the killing of her common law husband and was sentenced to three years imprisonment. Upon appeal, the Court of Appeal found that the trial judge had erred in concluding that section 718.2(e) did not apply because the accused was not living on reserve, the systemic or background factors that may have caused the accused to commit the crime, or the differing conception of sentencing held by the victim's family, and by their community.

community as such" there were no special circumstances arising from their Aboriginal status.

The potential impact of the *Gladue* decision on the judiciary is arguably profound. The Supreme Court of Canada has clarified that Parliament's decision to add section 718.2(e) to the Criminal Code meaning that the courts must, as a matter of criminal law, recognize that Aboriginal people experience incarceration differently than others. While some might suggest that an Aboriginal person who receives the same sentence as a non-Aboriginal person is being treated equally, this has been rejected as fallacious reasoning by the Supreme Court of Canada. Sometimes treating different people the same results in inequality. Justices Cory and Iacobucci considered the argument that this treatment of Aboriginal peoples is "reverse discrimination" against non-Aboriginal people. They concluded that section 718.2(e) is not unfair to non- Aboriginal people, it simply requires judges to treat Aboriginal people fairly by taking into account their difference.

The wording of s. 718.2(*e*) on its face, then, requires consideration of alternatives to the use of imprisonment which amounts to a restraint in the resort to imprisonment as a sentence, and recognition by the sentencing judge of the unique circumstances of aboriginal offenders. In short, the purpose of s. 718.2(*e*) is to respond to the problem of over-incarceration in Canada, and to encourage sentencing judges to apply principles of restorative justice alongside or in the place of other, more traditional sentencing principles when making sentencing determinations.

Overrepresentation Overload: Fundamental & Systemic Causes

The situation of Aboriginal peoples and the justice system has been studied as a problem since 1967[105] when it was first documented by the Canadian Corrections Association Report, *Indians and the Law*.[106] Similar findings were contained in the 1974 Report, *The Native Offender and the Law* From the Law Reform Commission of Canada.[107] Numerous reports, conferences, and inquires have been devoted to understanding the problem, and offering recommendations to ensure justice for Aboriginal offenders. In 1975, a national conference[108] of government representatives, academics, and justice professionals and members of Aboriginal organizations met to discuss the concern over the high numbers of Aboriginal peoples in Canadian jails.[109] Since this landmark meeting, many of the reports to follow have been similar in trend and have followed the broad pattern set by the 1975 conference.

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[105] Monture-Angus, Patricia A. (2000) Lessons in Decolonization: Aboriginal Overrepresentation in Canadian Criminal Justice in Visions of the Heart: Canadian Aboriginal Issues, 2nd Ed. Long, David & Dickason, Olive Patricia Toronto: Harcourt Canada @ 363

[106] See Canadian Corrections Association (1967) Indians and the Law Ottawa: The Canadian Corrections Association.

[107] See Canada, The Native Offender and the Law (1974) Ottawa: The Law Reform Commission of Canada.

[108] In 1975, the Conference on Native Peoples and the Criminal Justice System adopted 'guidelines for action' which included closer involvement of Aboriginal peoples in the planning and delivery of justice services, greater control by Aboriginal communities over service delivery, cultural sensitivity training for non-Aboriginal staff, recruitment of Aboriginal persons for service functions at all stages, 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.

[109] 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 @ 3.

Some of these reports have been federal and nation-wide in which the broader issues of criminal justice[110] have been addressed, while others have had a narrower focus on the corrections system.[111] Others have been provincial in scope in which particular issues are addressed or where there is a focus on the experience of specific Aboriginal peoples.[112] An example of this latter would be the Report of the Aboriginal Justice Inquiry of Manitoba,[113] which is analyzed in Chapter Four. Despite all inquiries and their recommendations, the problem of the overrepresentation of Aboriginal peoples in conflict with the law, appearing before the courts and incarceration in Canadian penitentiaries is getting worse.

In Chapter Two it was made clear that history has had a profound impact on the position of Aboriginal peoples in society today. This impact is arguably most visible in prison facilities where a significantly disproportionate number of Aboriginal people are incarcerated. Prior to the Second World War, Aboriginal peoples in prisons were proportionate to their numbers in the Canadian

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[110] See Canadian Corrections Association, Indians and the Law (1967) Ottawa; Native People and Justice, Reports on the National Conference and the Federal/Provincial Conference on Native People and the Criminal Justice System (1975) Ottawa: Solicitor General of Canada; Law Reform Commission of Canada, Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice, Report No. 34. (1991)Ottawa.

[111] See Task Force on Aboriginal People in Federal Corrections, Final Report (1988) Ottawa: Solicitor General of Canada; Creating Choices, Report of the Task Force on Federally Sentenced Women (1990) Ottawa.

[112] See Royal Commission on the Donald Marshall Jr. Prosecution (1989) Nova Scotia; Report of the Osnaburgh/Windigo Tribal Council Justice Review Committee (1990) Ontario; Justice on Trial, Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta (1991); Report of the Aboriginal Justice Inquiry (1991) Manitoba; Report of the Saskatchewan Indian Justice Review Committee (1992); Report of the Saskatchewan Metis Justice Review Committee (1992); Report on the Cariboo-Chilcotin Aboriginal Justice Inquiry (1993) British Columbia.

[113] Commissioners A.C. Hamilton & C.M. Sinclair (1991) Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry* (hereinafter *"AJI Report"*), vol.1: The Justice System and Aboriginal People Winnipeg: Province of Manitoba.

population.[114] By 1965, 22% of the inmates at Stoney Mountain penitentiary in Manitoba were Aboriginal.[115] This, however, didn't last long. While Aboriginal peoples constituted less than 3% of the total Canadian population in 1991 at the time, 11% of the inmate population in federal correctional institutions and 15% of provincial prison population were Aboriginal.[116] In Manitoba, while Aboriginal people made up 12% of the population, they occupied over 50% of the 1600 people incarcerated on any given day of the year in correctional institutions according to the AJI in 1991.[117] The rates for Aboriginal youth are even more discouraging. According to a 1991 study, the forecast was that Aboriginal offenders between the ages of 12-18 would account for 40% of the admission of population to correctional facilities by the year 2011.[118] Michael Jackson raises an interesting point that if "placed in a historical context, the prison has become for many young Native people the contemporary equivalent of what the Indian residential school represented for their parents."[119] In short, these realities for both adults and youth are alarming, and require a serious response.

The disturbing question, as also posed by the AJI Report, becomes why so large a percentage of Aboriginal people seem trapped in the justice system? Are

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[114] Trebilcock, Romola [2000, May 15] Aboriginal Peoples and the Criminal Justice System Canadian Criminal Justice Association (CCJA) Part II: Demographics Retrieved from June 14, 2004 from http://www.ccja-acjp.ca/en/abori.html Part III @ 2.
[115] AJI Report @ 101.
[116] Department of Justice Canada (1991) Aboriginal People and Justice Administration: A Discussion Paper Ottawa: Minister of Supply and Services Canada @ 7.
[117] AJI Report @ 85.
[118] Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta (1991) Volume 1, Chapter 8, @ 17.
[119] Jackson, Michael (1988) @ 215.

Aboriginals committing more crimes or is the system discriminatory? There are multiple and complex explanations for the disturbing situation. Social causes were discussed briefly in the last chapter, reflecting the history of oppression by the Canadian government. More contemporary causes arise from certain features and conditions of the criminal justice system which fails Aboriginal offenders. The AJI Report noted that the combination of actual criminal behaviour on the part of Aboriginal people and discrimination within the justice system can account for the overrepresentation. These social and systemic[120] causes, which are interdependent, will be discussed individually next.

Extensive research points to a correlation between socio-economic disadvantage and involvement in the criminal justice system for Aboriginal people. The Report of the Royal Commission on Aboriginal Peoples[121] noted that Aboriginal peoples are amongst the poorest in Canada.[122] Similar findings for Manitoba were contained in the AJI Report. Poverty among Aboriginal people is mainly attributable to unemployment, but is also linked to low paying or part-

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[120] Systemic causes are the result of standard practices that create an adverse impact upon an identifiable group that is not consciously intended.

[121] The Royal Commission on Aboriginal Peoples (RCAP) issued its final report in November 1996. The five-volume, 4,000-page report covered a vast range of issues; its 440 recommendations called for sweeping changes to the relationship between Aboriginal and non-Aboriginal people and governments in Canada. In response, Aboriginal communities and organizations pressed for action on the recommendations. The report centred on a vision of a new relationship, founded on the recognition of Aboriginal peoples as self-governing nations with a unique place in Canada. It set out a 20-year agenda for change, recommending new legislation and institutions, additional resources, a redistribution of land and the rebuilding of Aboriginal nations, governments and communities.

[122] Canada, Royal Commission on Aboriginal Peoples, Towards a Just and Peaceful Society: 71e Corrections and Conditional Release Act Five Years Later, Solicitor General @ 478.

time work.[123] These conditions have caused Aboriginal peoples to depend heavily upon relying on social assistance. "In 1990, approximately 28.6% of all Aboriginal people over the 15 years of age depended on social assistance for at least part of the year, compared to 8.1% of the general Canadian population.[124] McCaskill, in a study on Aboriginal criminality in Manitoba, found that the socieconomic and offence profiles of a large sample of Aboriginal inmates and parolees were characterized by "serious social and personal disorganization, including family instability, alcohol abuse, and low levels of education and skill development."[125]

There are clear barriers that prevent Aboriginal peoples from escaping poverty. Lack of education in comparison to their non-aboriginal counterparts is a serious problem. Just 3% of Aboriginal people aged 15 and over had a university degree in 1996, compared with 13% of the non-aboriginal population, while 54% of Aboriginal people had not completed high school compared with 34% of the non-aboriginal population.[126] Today, although residential schools no longer exist, the truth of the matter is that Aboriginal parents do not place pressures upon their children to attend school due to their negative experiences from the past. As well, most of the course information is delivered by non-Aboriginal individuals who have limited understanding of Aboriginal history,

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[123] Ibid @ 479.
[124] Trebilcock, Romola [2000, May 15] Part III @ 1.

[125] McCaskill, Don (1985) Patterns of Criminality and Corrections Among Native Offenders in Manitoba: A Longitudinal Analysis Saskatoon: Prairie Region, Correctional Services of Canada @ 24.
[126] Canada, Statistics Canada, Aboriginal Peoples in Canada Ottawa: Minister of Industry, 2001 @ 5.

culture, and realities. In short, Aboriginal people's educational attainment levels are much lower than non-aboriginals. Particularly in Manitoba, The AJI Report noted that "according to the 1986 Census, 34.2% of Manitoba's Indian population over the age of 15 had less than grade nine education, compared to 18.2% of the total provincial population."[127]

Limited education leads to higher unemployment. In 1986, 57% of on reserve and 46% of off reserve Aboriginals were not employed, compared to only 12% for Canada in general.[128] As time has passed these rates have not gotten any better. Statistics Canada reported that in 1996, ten years later from the previous Census, "almost one in four(24%) Aboriginal labour force participants was unemployed, more than double the rate for non-Aboriginal people who had an unemployment rate of 10% that year."[129] In addition to lower levels of education, lower levels of literacy, and racism/discrimination there are other contributing factors to above average levels of unemployment.

Another reason for unemployment stems from the fact that many Aboriginals who live on reserve have few, if any, job opportunities. This forces many of them to search and relocate for work to the urban areas. The reality, however, is that moving to the urban areas involves more hardships. The reasons for this are twofold. First, Aboriginal peoples that move to the urban

[127] AJI Report @ 94.
[128] Trebilcock, Romola [2000, May 15] Part III @ 3.
[129] Canada, Statistics Canada, @ 5

setting lack the education and/or training to be able to compete with others for employment.

Second, the levels of discrimination/racism are beyond what one can imagine. As sad as it may sound, most employers are not keen on hiring Aboriginal peoples. Aboriginal peoples are ready and willing to work irregardless of the demanding work that is available, but they need employers to offer them an opportunity.[130] Ironically enough, many Canadians blame Aboriginals claiming that they are lazy and that they need to work. Aboriginal peoples get caught in a web of insults and differential treatment at places of employment which contributes to them losing desire to search for more work. Once hired, it doesn't get any better. Some of the main reasons offered for leaving their jobs are that they feel lonely and isolated working amongst all white people whom do not talk to them nor include them in their conversations. They are ignored, feel out of place, and the worst is when other employees make stereotypical and impolite remarks intended for them to hear.[131] Those discouraged and fed up with dead-end job prospects, Aboriginals get 'dislocated' within the urban setting.

Lack of education leads to fewer employment prospects which leads to poverty. It is a vicious cycle of oppression in which countless numbers of Aboriginal peoples to this day are caught trapped. Poor or no jobs and low

[130] Hamilton, A.C. Hon (2001) A Feather Not A Gavel: Working Towards Aboriginal Justice Winnipeg: Great Plains Publications @ 110.
[131] Hamilton, A.C. Hon (2001) @ 112

incomes leads to inferior housing conditions for Aboriginal peoples. Often Aboriginal families are large, so their housing conditions are crowded indeed. Poorer housing means improper sanitation, heating, plumbing and lack of clean water and these conditions lead to sicknesses, even death.[132] For example, the Royal Commission Report has linked poor housing to infectious diseases, and non-infectious respiratory diseases such as asthma.[133]

Alcohol and other types of solvent abuse are higher amongst Aboriginal peoples and this contributes to criminal behaviour. In fact, alcohol abuse is considered one of the main contributing factors to the overwhelming numbers of Aboriginal offenders within the criminal justice system.[134] Reliance on alcohol, drugs, and solvents has been described as "part of a circle of oppression, despair, violence, and self-destructive behaviour that must be addressed as a whole."[135] Aboriginal peoples identified a number of these conditions as contributing to solvent abuse: loss or absence of cultural identity; absence of family and/or community support; lack of awareness of the effects of solvent abuse; lack of spiritual guidance, and presence of other forms of abuse such as sexual, physical, verbal or mental.

Solvents are used frequently by Aboriginals for a number of reasons. They are legal, inexpensive, often more accessible than drugs or alcohol, and

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[132] Trebilcock, Romola [2000, May 15] Part III @ 5.
[133] Canada, Report of the Royal Commission on Aboriginal Peoples, Vol.3: Gathering Strength, note 20 @54.
[134] Trebilcock, Romola [2000, May 15] Part III @ 5.
[135] Hyde, Mary & LaPrairie, Carol (1987) Amerindian Police Crime Prevention, working paper prepared for the Solicitor General of Canada Ottawa, as cited in the Report of the Aboriginal Justice Inquiry of Manitoba @ 88.

have almost immediate effects. Solvent abuse is common among youth where the first use can begin at the age of only 4. Alcohol abuse is not a new phenomena in Aboriginal communities. A report prepared by Hugh Brody as far back as 1971 examined the role of alcohol in the adaptive process of skid row Aboriginal urban migrants. Brody found that on skid row "the Indian can get drunk without feeling that he is under fierce racial criticism for drinking."[136] Displaced in the urban setting with a poor socio-economic position, Aboriginals on skid row can drink and deal with the difficulties that welcome them.

As one would expect, all these unfortunate realities lead to constant bickering and arguments within Aboriginal homes. An immediate result of this is ongoing domestic violence and family breakdown. Domestic violence can come in many forms including physical, sexual, psychological, and economic. Numerous Aboriginal women are abused and end up taking care of their children on their own. The percentage of single parent families is twice the overall Canadian figure.[137] These families are not only single parent, but much more likely to be headed by an Aboriginal woman than a man.

The last factor we will look at for social causes which is the direct consequence of all issues thus far discussed is suicide. A Special Report on Suicide Among Aboriginal People conducted by the Royal Commission found that the rate of suicide among Aboriginal people in Canada for all age groups is 2 to 3 times

[136] Brody, Hugh (1971) Indians on Skid Row Ottawa: Northern Sciences Research Group, Dept of Indian Affairs & Northern Development @ 71.
[137] Trebilcock, Romola [2000, May 15] Part III @ 6.

higher and it is 5 to 6 times higher among aboriginal youth.[138] The Special Report lists four major risk factors for high Aboriginal suicide rates: psych-biological factors, life history, socio-economic factors, and cultural stress. Hopelessness, identity loss, and the general domination of public discourse and public policy by European norms/values has put many Aboriginal people in search of a final way out.

It has been argued that some level of the problem remains exclusively in the hands of decision-makers and of the criminal justice system whom are able to utilize discretionary authority. The AJI Report shows how unconscious attitudes and perceptions are applied by the decision makers where there is ample room for subjective decision making. As a result, "part of the problem is that while Aboriginal people are the objects of such discretion within the justice system, they do not "benefit" from discretionary decision-making."[139] Conflict arises when discretion can have different meanings for different cultures and value systems. So it can be seen why many Aboriginal people believe that the justice system has contributed to Aboriginal poverty by failing to provide them with the means to fight the oppressive conditions imposed upon them.

A proper assessment of Aboriginal overrepresentation involves not only a discussion of their deep-rooted inequalities and oppression, but a comprehensive review of the system that is also responsible in contributing to the spiralling

[138] Canada, (1995) Royal Commission on Aboriginal Peoples, Special Report on Suicide Among Aboriginal People @ 1.
[139] AJI Report @ 101.

dilemma. Both social and systemic causes translate into three decades of overrepresentation. To gain an understanding of what the latter causes are and what influence they have in explaining this phenomena, we will turn our attention to look at systemic causes. The overrepresentation of Aboriginal peoples in the Canadian criminal justice system is all too often seen as an 'Aboriginal problem,' meaning that the problem is with Aboriginal people themselves. In 1983, Don McCaskill observed that:

> The conventional explanation for this phenomenon views native offenders as members of a pathological community characterized by extensive social and personal problems. The focus is inevitably on the individual offenders. They are seen as simply being unable to adjust successfully to the rigors of contemporary society.[140]

This failure by the system and its officials to take some level of responsibility for the perpetuation of Aboriginal criminality has served to confirm among many Aboriginal peoples the view that the system is neither equitable nor just. Patricia A. Monture-Angus notes that "the belief that Aboriginal people should change to fit the system is still implicit."[141] A Prairie Justice Research publication, Law and Order for Canada's Indigenous Peoples, critically reviewed Canadian research on Aboriginal peoples and the criminal justice system up to the mid 1980's. The authors in a summary comment stated that:

> ...much of the available research literature is unsatisfactory in a general sense because it

[140] McCaskill, Don (1983) Native People and the Justice System in Getty, Ian A.L. & Lussier, Antoine S. As Long As The Sun Shines and Water Flows: A Reader In Canadian Native Studies Vancouver: University of British Columbia Press @289
[141] Monture-Angus, Patricia A. (2000) @ 362.

> looks at the interface between the Indigenous offender and criminal justice system in terms of the individual and/or group characteristics of these offenders and not in terms of the criminal justice processes themselves.[142]

In other words, reform has concentrated too heavily on *individualizing* the problem and not recognizing that the various components of the justice system, for example – policing, courts, and prisons make their own contribution to the outcome that Aboriginal peoples become repeat offenders.

The disparity of treatment between Aboriginal offenders and non-Aboriginal offenders needs examination. The AJI Report stated in its introductory paragraph that justice has not only failed Aboriginal people, justice has also been denied to them.[143] Every aspect of the criminal justice system has been problematic for Aboriginal people. In a country that places a high value on equality before the law, the drastically high figures discussed above are evidence enough of the need to find ways to reduce Aboriginal overrepresentation in all phases of the justice process.

The system is not only culturally inappropriate but is also discriminatory. The AJI Report has found that "Aboriginal peoples have experienced the most entrenched racial discrimination of any group in Canada."[144] Here are some startling observations regarding Aboriginal criminality:

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[142] Havemann, Paul; Couse, Keith; Foster, Lori and Matonovich, Rae (1985) Law and Order for Canada's Indigenous Peoples: A Review of Recent Literature Relating to the Operation of the Criminal Justice System and Canada's Indigenous Peoples Regina, Saskatoon: Prairie Justice Research, University of Regina @ xix.
[143] AJI Report @ 1.
[144] AJI Report @ 96.

I. Aboriginal people are more likely to be charged for multiple offences;
II. 22% of Aboriginal people appearing in court face four or more charges, while for non-aboriginal people this happens in 13% of the cases;
III. Once arrested, Aboriginal are 1.34 times more likely to be held in jail prior to their court appearances;
IV. Once in pre-trial custody, Aboriginal people spend 1.5 times longer in custody before their trials.[145]

In addition, Aboriginal peoples are more likely to be denied bail, spend less time with their lawyers, have no legal representation at court proceedings, and more than twice as likely to be incarcerated than non-Aboriginal offenders, plead guilty more often because they are intimidated by the court proceedings and want to get them over with, and Aboriginal Elders, who are spiritual leaders, are not given the same status as prison priests and chaplains.[146] Once in court, language/communication barriers for Aboriginal offenders can result in an unfair trial. Aboriginal peoples have little understanding of their rights, court procedures, or of legal aid. Without this basic knowledge, they tend to enter guilty pleas when either a) they are confused and think that is what they are supposed to do or b) they just want to get the whole procedure over with.

Circuit courts are another example of the system's unequal treatment. Northern Aboriginal communities in Manitoba can only be reached by airplane which creates the problem of accessibility. Weather conditions can always create

[145] Monture-Angus, Patricia A. (2000) @ 373.
[146] Trebilcock, Romola [2000, May 15] Part IV @ 1-2.

delays and cancellations. Unfortunately, cancellations are dreaded by Aboriginal peoples because they mean that the courts can not visit for another month.[147] Once a case is heard, the setting is nowhere similar to an actual courtroom. Cases are heard in either a school gymnasium or a community hall. Many judges have refused to hear cases in some communities because the conditions of the facilities are so poor.[148]

When circuit courts travel to remote communities, it does not reach them all. People from certain communities have to travel to great distances at significant costs to get to these circuit courts. Many Aboriginal peoples have no vehicles due to low incomes and thus, have no transportation methods of getting to a court outside their community. Travelling at high expenses and then getting a case remanded is highly stressful for Aboriginal peoples. If they do not attend, they get charged with failing to appear. It would be foolish for anyone to believe that the administration of justice in Manitoba provides equality in its services.

Aboriginal peoples relations with the police have not been positive either. As evident in the J.J. Harper case (to be discussed in the next chapter) and other high profile episodes, police often act on the basis of stereotypical views of Aboriginal peoples such as the image of the drunken, violent Aboriginal offender. The AJI Report found that "racism played a part in the shooting of J.J. Harper and the events that followed."[149] The idea that many police officers

[147] AJI @ 227.
[148] AJI @ 234.
[149] AJI Report @ 93.

experience problems in policing Aboriginal peoples because they know little of Aboriginal culture, the community, nor its residents is another problem.[150] Such stereotypes leads to behaviour by police officers towards Aboriginal peoples that are both disrespectful and insensitive.

There are differences in policing[151] whereby Aboriginal peoples are more vulnerable than the general population to surveillance, frequent arrest, and strict interpretation of legal and criminal authority, at the same time as police and law enforcement services are inadequate for responding to requests for assistance by Aboriginal peoples.[152] The degree of hostility is well evidenced in a national survey of Aboriginal offenders in which three-quarters(81% of males; and 55% of females) of respondents[153] indicated that they felt that the police employed differential treatment towards natives and non-natives.[154] Without a doubt, Aboriginal-police relations have a long and controversial history which has only served to increase the likelihood of conflict and high arrests.

Trends indicate that Aboriginal offenders are most often incarcerated for 'social', rather than criminal problems.[155] Most crimes are of the violent or of

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[150] Griffiths, Curt T. & Verdun-Jones Simon N. (1994) @ 641.
[151] Griffiths, Curt T. & Verdun-Jones Simon N. (1989) Canadian Criminal Justice Toronto: Butterworths @ 551-52.

[152] AJI @ 595.
[153] It should be noted that these are perceptions of offenders whose views may or mat not have a basis. Such perceptions, irregardless of their factual basis, are important because they express a lack of trust in the justice system.
[154] Morse, Brad & Lock, Linda (1988) Native Offenders Perceptions of the Criminal Justice System Ottawa: Department of Justice Canada, Research and Development Directorate @ 33.
[155] Any occurrences that Aboriginal offenders are incarcerated for are of the criminal nature because each crime is a violation of the Criminal Code. What is meant by 'social' problems is that most of these crimes are committed due to the poor socio-economic situation that circles Aboriginal communities. In addition to

social disorder nature. A bulk of the violent crime is directed against family members (a minimum of 41.4%).[156] Alcohol tends to be a prominent factor associated with Aboriginal criminality, and many are incarcerated in default of fine payments. In spite of this, we must be cautious in overgeneralizing on the basis of these trends. Regional variations[157] suggest that individual Aboriginal crime characteristics alone are not enough without us examining differences in laws, policing, and sentencing. For example, the prairie provinces have been proven to have higher rates of overrepresentation and discrimination.

In 1989, Correctional Services of Canada reported that 75.6% of federal Aboriginal inmates were under the age of 35; and over 98% were male; 52% of that population was single.[158] Simply put, the common characteristics of Aboriginals convicted and sentenced are that they are typically young, male, single, poorly educated, and of low socio-economic status. According to Associate Chief Judge Murray Sinclair, it is unfortunate that the disproportionate representation of Aboriginal peoples is on the *wrong* side of the justice system.[159] Equally important to reducing the number of Aboriginals processed through the

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this, their legacy of historical relations is contributory resulting in crimes that are more common amongst Aboriginal peoples.

[156] Canada, Report of the Royal Commission on Aboriginal Peoples, Vol.3: Gathering Strength, note 20 @ 167.

[157] See AJI Report of Manitoba; Saskatchewan Indian Justice Review Committee;Sakatchewan Metis Justice Review Committee; The Royal Commission on the Donald Marshall Jr. Prosecution, Nova Scotia; and the Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta to identify the high concentration of over-representation and discrimination in the Prairie provinces.

[158] Correctional Services of Canada (1989) Native Population Profile Report, Population Register 03/31/89 Ottawa: CSC Management Services @ A5.

[159] Sinclair, Murray Associate Chief (1990) Dealing with the Aboriginal Offender, Presentation to New Provincial Court Judges, Far Hills Inn, Val Morin Quebec April 5th @ 4.

system, is the under-representation of Aboriginals in positions of authority within the system. Many criminal justice officials, who tend to be non-aboriginal, are not sensitive to the cultural needs of Aboriginal people. Furthermore, these officials tend to minimize the importance of the problems within the existing justice system and the link they have with the historic relations between Aboriginals and the government. Patricia A. Monture-Angus emphasizes that "this is a significant difference that continues to separate Aboriginal and non-Aboriginal understandings of the problem."[160]

Explanations for over-representation clearly vary. Carol LaPrairie, cites social learning theory as a way to understand the "integration of theory, crime and social disorder in inner city environments."[161] In other words, individuals learn anti-social behaviours anywhere from their families to schools, being on the bottom of the social ladder, they become vulnerable to anti-social attitudes/behaviours due to the lack of proper of family support structures, and community resources. This theory helps explain Aboriginal experiences with the justice system as a lack of integration into society and proper role models can lead to a lack of social control leading to criminal behaviour.[162] Other theories have been forwarded by the AJI Report as well,[163] however, the fact remains:

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[160] Monture-Angus, Patricia A. (2000) @ 367

[161] LaPrairie, Carol (2002) Aboriginal Over-representation in the Criminal Justice System: A Tale of Nine Cities, Canadian Journal of Criminology (April 2002) 44, 2:181-208 @ 184-86.

[162] Proulx, Craig (2003) Reclaiming Aboriginal Justice, Identity, and Community Saskatoon: Purich Publishing Ltd. @ 27.

[163] Theories such as: genetic/biological theory, functionalist theory, superiority theory, strain theory, conflict theory, social disorganization theory, ecological theory, and differential association theory.

Aboriginal peoples are frustrated with the processes which they must go through in the justice system irregardless of the reasons that bring them there.

It is of great benefit in having a vast collection of research and findings to help us identify key issues that cause the overrepresentation of Aboriginal peoples in the justice system. Simultaneously, however, it is of greater benefit if this research includes Aboriginal peoples, otherwise, it will likely reflect the paradigm of dominance and colonization that historically is fundamental to the criminal justice system.[164]

Justice at Odds: Aboriginal versus Non-Aboriginal Concepts of Justice

Among all causes for overrepresentation discussed thus far, perhaps the last one to be discussed is in the writer's opinion by far, the most influential one. The Euro-Canadian values of the Canadian criminal justice system have always been at odds with traditional Aboriginal dispute resolution method(s). Simply, most values of the Aboriginal peoples conflict with those of non-Aboriginal peoples. To go one step further, the fundamentally different worldviews of the two groups clash. The worldviews of Euro-Canadians are based on authority, hierarchy, and ruling, which are opposed to concepts of spirituality, tribal will, and custom/tradition of Aboriginals. The AJI Report stated that "the differences between these two worldviews account, in large part, for the differences in philosophy, purposes and practices of legal and justice systems."[165] High levels

[164] Strategies to Reduce the Over-Incarceration of Aboriginal Peoples in Canada: A Research Consultation (1990) Regina: Prairie Justice Research, School of Human Justice, University of Regina @ 8.
[165] AJI Report @ 21.

of incarceration and law enforcement are problematic for Aboriginals who see peace and harmony as the essential goals of dealing with criminal offenders.

Historically, non-literate aboriginal societies were ruled essentially by morality laws derived from tribal custom and maintained by oral tradition.[166] Common forms of dispute resolution were ridicule, avoidance, shaming, and teasing among others.[167] Measures such as banishment and the death penalty were only utilized when the survival of the entire community was placed at risk.[168] Before the arrival of the Europeans in North America, Aboriginal societies had no jails. Rather, acts of crime were resolved by a form of conciliation between the victim and offender, with the end goal of restoring peace and harmony in the community. From the beginning of European arrival, the system has been imposed upon Aboriginal peoples.

Geoffrey York illustrates the difference between the two views of justice by stating that:

> Canada's justice system is founded on the European tradition of adversarial justice, which concentrates on placing blame and assessing guilt. Each case is resolved by a form of retribution or revenge against the offender – which is completely foreign to the native tradition of justice.[169]

For aboriginal peoples, there is significant emphasis on holistic approaches to justice that integrate the social, religious, and economic functioning of the

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[166] Morse, Brad & Lock, Linda (1988) @ 6.
[167] Ibid.
[168] Trebilcock, Romola [2000, May 15] Part IV @ 3.
[169] York, Geoffrey (1989) The Dispossessed Toronto: Lester & Orpen Dennys Ltd. @ 155.

offender vis-à-vis the community.[170] The Law Reform Commission of Canada recognized this and commented that "the Aboriginal vision of justice gives pre-eminence to the interests of the collectivity , it is overall orientation being holistic and integrative."[171] Similarly, the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta commented that "justice and dispute resolution in traditional aboriginal societies can be illustrated by a restorative model of justice .... The holistic context of an offence is taken into consideration including moral, social, economic, political and religious considerations."[172] Therefore, the retributive way in which the criminal justice system responds to Aboriginal crime is not only foreign, but another area within Canadian society that Aboriginal people find alienating.

The above discussion has looked at the disparity of views on justice and as a result, the unequal treatment of Aboriginal offenders. Even where equal treatment is afforded to Aboriginals and non-Aboriginals, Aboriginals are at a disadvantage because the legal system and adversarial process, as well as specific terms such as guilt, innocence, and lawyer are absent from Aboriginal people's traditional vocabularies and systems of justice.[173] The end result is a great deal of dissatisfaction on the part of Aboriginals who view the system to be repressive and just another form of continuing dominance by the Euro-Canadian

[170] Nielson, M. (1982) Native People and the Criminal Justice System: The Role of the Native Courtworker Program, 5:1 Canadian Legal Aid R, @ 56.
[171] Law Reform Commission of Canada, (1991) Report on Aboriginal Peoples and Criminal Justice: Equality, Respect Ministers Reference, Report 34, Ottawa @ 6.
[172] Justice on Trial @ 9-6.
[173] Stevens, S. (1991) Aboriginal People and the Canadian Justice System in Samuelson, L & Schissel, B. eds, Criminal Justice: Sentencing Issues and Reforms Toronto: Garamond Press @229.

society. One of the Round Tables hosted by the Royal Commission on Aboriginal Peoples had a widespread view that the current system was too legalistic, formal, and too removed from the Aboriginal communities its supposed to serve.[174]

For Aboriginal peoples appearances before the courts is a highly confusing and misleading process. Courts have certain rules and standards which apply to all accused persons. However, when an Aboriginal person is before the courts, he/she can behave in a manner which does not accord with these rules/standards. In his article in the Canadian Law Reporter, Rupert Ross noted that if there is a general picture of an Aboriginal accused: it is that of a silent individual who says little or nothing to lawyers, judges, psychiatrists, custodians or to the court itself and those in attendance.[175] Such behaviour leads to use of words and phrases like uncommunicative, unresponsive, unable to offer insights into his actions, unwilling to confront his past, unwilling to explore his feelings toward himself or his victim or his surroundings.[176] When it comes to testifying, Aboriginals tend to be very reluctant. Giving testimony can be viewed as wrong and direct confrontation is to be avoided which is the result of an underlying cultural tradition.[177] Once on the witness stand, Aboriginal peoples come across as highly emotionless and remorseless which obviously leaves

[174] MacPherson, James C. (1993) Report from the Round Table Rapporteur in Aboriginal People and the Justice System: Report of the National Round Table on Aboriginal Justice Issues, Royal Commission on Aboriginal Peoples Ottawa: Minister of Supply and Services @ 6
[175] Ross, Rupert (1989) Leaving Our White Eyes Behind Canadian Native Law Reporter @ 3.
[176] Ibid @ 3.
[177] Ibid @ 3.

justice officials to assume that they are neither repentant nor seeking rehabilitation.

Rupert Ross, in his book, "Dancing With a Ghost," describes several rules or ethics which are central to Aboriginal lives in the past and present: the ethic of non-interference, the ethic that anger not be shown, the ethic respecting praise and gratitude, and the conservation-withdrawal tactic.[178] These ethics all speak of the differences in culture which if not understood leads to more misinterpretations within the justice process at all stages. Just as non-aboriginals are not conscious of the way they behave and think it is 'correct', so do Aboriginal people. Thus, coming before the courts for Aboriginal peoples is not half as bewildering as the response they get for the way they behave when there. In the end, it is nothing but a horrifying experience that leaves Aboriginal peoples feeling worthless. If the underlying principles of the criminal justice system are confusing and inappropriate in Aboriginal individuals, then it is not surprising that the system is regarded with great mistrust by them and usually ending up failing to deal with them appropriately.

This chapter has aimed at demonstrating the way in which the Canadian criminal justice system does not meet the needs of Aboriginal peoples. In doing so, it has shown the overrepresentation in virtually ever aspect of the system, and the social/systemic causes that play key roles in that reality. Chapter two

[178] Ross, Rupert (1992) Dancing With A Ghost: Exploring Indian Reality Markham: Webcom @ 12-40.

and three have both showed the *universal brokenness*[179] that Aboriginal peoples feel in their day-to-day lives. From historical injustices, to social/systemic inequities, Aboriginal peoples are confronted with many obstacles in their lives that they have no control over. If we look across Canada, we see that the "Canadian city with the highest concentration of Aboriginals in poor neighbourhoods is Winnipeg."[180] Rick Linden in a consultation paper he prepared for the AJIC Report, found that in addition to the social and systemic causes of crime, "ultimately the battle against crime .... will not be won until Aboriginal people have overcome the legacy of the Indian Act, residential schools, and other policies that led to cultural destruction."[181]

Since the focus of this work was designed to narrow in on Winnipeg, Manitoba we shall devote the next chapter to the problems associated with Aboriginal peoples and the justice system in this province. While the historical data and social and systemic information provided is applicable to Manitoban residents, chapter four will introduce and examine the AJI Report, in specific, and outline the origins and immediate causes of the report. Both the Harper and Osborne case will be analyzed as well.

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[179] This term is one that I, as the writer, have created and chosen to use. It refers to the encompassing effects of history combined with social/systemic factors that play significant roles in placing many Aboriginal peoples behind bars, and result in recidivism.

[180] Richards, John (2001) Neigbours Matter: Poor Neighbourhoods and Urban Aboriginal Policy C.D. Howe Institute Commentary, no.156, November @ x.

[181] Linden, Rick (2000) Crime Prevention in Aboriginal Communities Consultation Paper, AJIC Report @ 32.

Chapter Four:
The Report of the Aboriginal Justice Inquiry of Manitoba: What Went Wrong in Manitoba?

"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."

- (AJI: 1991: 252)

The calls for change within the realms of Aboriginal justice became an *outcry* in Manitoba in late 1987 and early 1988. Two incidents during this time, the death of Helen Betty Osborne and J.J. Harper,[182] were enough to illustrate the manner in which Manitoba's justice system was failing Aboriginal people. In response to these incidents, *'The Aboriginal Justice Inquiry (AJI)'*[183] was created in 1988 by the Government of Manitoba, which was lead at the time by Premier Howard Pawley and other cabinet members from the New Democratic Party. The Commissioners working on this inquiry, *Associate Chief Justice A.C. Hamilton & Associate Chief Judge C.M. Sinclair*, were expected to inquire into, and make findings about the condition of Aboriginal peoples within the justice system. In doing so, they were to produce a final report for the Minister of Justice with conclusions, options, and recommendations.

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[182] The circumstances behind these 2 cases that lead to the creation of the Inquiry are summarized in volume one of the inquiry @ 2 and in volume two which is solely dedicated to the cases.

[183] Commissioners A.C. Hamilton & C.M. Sinclair (1991) Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry* (hereinafter *"AJI Report"*), vol.1: The Justice System and Aboriginal People Winnipeg: Province of Manitoba

The inquiry which lasted three and a half years, was established by an Order in Council of the Pawley government on April 13, 1988 (a little more than a month after J.J. Harper's death). When the NDP government was defeated in the legislature on a vote on its budget, an election was called and the Progressive Conservatives assumed office two months later. The new government led by Premier Gary Filmon expressed its support for the inquiry.

Judge C.M. Sinclair,[184] one of the Commissioners of the AJI of Aboriginal descent, stated in an interview, "the political climate at the time of the AJI Report was heavily oriented towards discussions between governments and Aboriginals."[185] The work of the AJI was also influenced by a growing awareness on the part of the public about issues surrounding Aboriginal peoples. As a result, Judge Sinclair pointed out that "we did not consider ourselves to act as negotiators or mediators looking for some middle ground, rather, we felt an important undertaking for us to be visionaries meaning we were going to look at the situation realistically and plan out a future for Aboriginal and non-Aboriginal peoples of the province."[186] Judge Sinclair's co-chair to the AJI Report, Honourable A.C. Hamilton[187] felt that it was "Judge Sinclair's presence

[184] Judge Sinclair was appointed Associate Chief Judge of the Provincial Court of Manitoba in March 1988. He was Manitoba's first Aboriginal judge and Canada's second at that time. In the course of his legal practice, one of his primary fields was Aboriginal Law.
[185] Interview with Judge C.M. Sinclair [June 3, 2004]
[186] Ibid.
[187] In addition to Hamilton's work as one of the AJI Commissioners, Hamilton has also worked extensively on Aboriginal justice issues in the province of Manitoba. He was a former consultant to the federal minister of Indian Affairs, and a founding board member of the Indian and Metis Friendship Centre in Brandon, Manitoba. His experiences as a lawyer and judge include over 30 years of knowledge of Aboriginal peoples, particularly in the area of criminal justice.

that was key to the success of the AJI Report in getting so many Aboriginal peoples to open up and talk."[188] Paul Chartrand,[189] Commissioner of the AJIC Report, described in an interview that the AJI Report raised the question of "if things were right, what would they look like."[190]

This chapter first describes briefly how the commission conducted its work. It then summarizes the key findings and recommendations of the report, and also presents a critical analysis of what those findings mean for justice reform in Manitoba. The report is a significant and ground-breaking contribution in the area of justice reform for Aboriginals within Manitoba. In an interview with Justice Minister Gordon Mackintosh, he noted that at the time of the AJI Report "the government recognized a principle, a need to move towards greater justice for Aboriginal peoples and the recommendations were ways to pursue the implementation of the principle."[191] For this reason, it is imperative that we take an in-depth look at the issue(s) analyzed in the report and the proposed policy responses to the problems identified.

The inquiry stated in the beginning of the report that:

> The justice system has failed Manitoba's Aboriginal people on a massive scale. It has been insensitive and inaccessible, and has arrested and imprisoned Aboriginal people in grossly disproportionate numbers. Aboriginal people who are arrested are more likely than non-Aboriginal people to be denied

[188] Interview with Honourable A.C. Hamilton [August 11 2004]
[189] Paul Chartrand also served on the Royal Commission on Aboriginal Peoples (RCAP). Also, he is a former professor in Aboriginal law and policy issues.
[190] Interview with Paul Chartrand [June 23 2004]
[191] Interview with Justice Minister Gordon Mackintosh [June 20 2004]

> bail, spend more time in pre-trial detention and spend less time with their lawyers, and, if convicted, are more likely to be incarcerated.[192]

In order to expand understanding of these shocking facts, the inquiry's scope of investigation was broad. For example:

> 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.[193]

The inquiry made recommendations on almost every aspect of the relationship between Aboriginal people and the justice system. The AJI held over 123 days of hearings, received over 1200 presentations and exhibits, travelled more than 18,000 kilometres, and generated 21,000 pages of transcripts. Its final report, released in 1991, filled two volumes and contained 296 recommendations.[194] For example, judicial hearings were held in relation to the two cases that had originally sparked the investigation, open community hearings were held in 36 Aboriginal communities and in 5 provincial correctional institutions. The

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[192] Ibid @ 1.

[193] Ibid @ 3.

[194] The commissioners heard from approximately 1000 presenters/organizations at the hearings listed ibid @ 769-82, 783-85. The commissioners also received more than 60 written submissions from individuals who did not appear at the hearings listed ibid @ 782-83.

Commissioners believed it was critical to hear directly from Aboriginal peoples.[195] Open expressions made by Aboriginal peoples themselves would better help understand their personal feelings about the system and if they were being well-served by it.

The inquiry also embarked on several major research projects.[196] Fourty-one research papers were completed by the Inquiry's research staff. For example, experts prepared background papers dealing with such topics as the Metis people and the justice system, effects of police contact among Aboriginals, alternatives to incarceration, and costs of the justice system attributable to Aboriginal people. 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 more than three and a half years of operation, the inquiry accumulated an impressive collection of materials.

In August of 1991, the Commissioners officially presented the AJI's final report to the Minister of Justice consisting of two volumes. The first volume, 'The Justice System and Aboriginal People', was the culmination of the inquiry's exhaustive analysis of the broader issue of Aboriginal contact with the criminal justice system. Volume two, dealt specifically with the 'Deaths of Helen Betty Osborne and J.J. Harper'. Within the first volume, the position of Aboriginal

[195] Aboriginal people welcomed the inquiry with community feasts, traditional prayers, and pipe ceremonies which opened the inquiry. Aboriginal peoples took the hearings very seriously, as many presenters said it was the first time anyone representing the government had asked them for their opinion.
[196] These research projects are listed ibid @ 721-22.

people and the criminal justice system was placed in a historical context. Particular emphasis was placed on Aboriginal concepts of justice and on the development of Aboriginal and treaty rights. The roots of Aboriginal over-representation in correctional institutions were discussed, and the causes of criminal behaviour were examined, as well as the role, if any, played by systemic discrimination. The inquiry focused in proposing a separate Aboriginal justice system based on the right of Aboriginal self-government. The report stated that "Aboriginal communities must have the right, as part of self-government, to establish their own rules of conduct, to develop means of dealing with disputes(such as courts or peacemakers), appropriate sanctions(such as holding facilities or jails), and the full range of probation, parole, counselling, and restorative mechanisms once applied by First Nations."[197]

The remaining part of volume one looked at various parts of the criminal justice system that need transformation. These parts were dealt with in separate chapters: court reform, jails, juries, alternatives to incarceration, parole, Aboriginal women, child welfare, young offenders, and policing. The section concluded with a chapter on how these recommendations would be implemented. Volume two reviewed the cases of Helen Betty Osborne & J.J. Harper, and recommendations were made on each case. The report clearly

[197] Ibid @ 260.

represents a major contribution to the Canadian body of Aboriginal justice literature.

Both volumes will be examined in turn. This chapter will begin with volume one - The Justice System and Aboriginal People. The first thing that is alarming in this volume is the breadth of issues covered. The 700-page report opens with a discussion on Aboriginal concepts of justice setting the tone for the detailed investigations which follow. It begins by noting that the conceptions of justice supported by the dominant society and by Aboriginal society are fundamentally different. The dominant society's focus is on punishment; Aboriginal society's on peace and equilibrium. Furthermore, the worldviews of both groups is different. The differences between the two worldviews accounts for the differences in the philosophy, purposes and practices of justice systems.

Aboriginal peoples are shown to have distinctive ways in which they resolved disputes within their communities. They have had their own governments and laws. "The daily, systemic cultural discrimination upon Aboriginal people by the justice system, however unintentional, demeans and diminishes the importance and relevance of their cultures, languages, and beliefs."[198] Emphasized in this chapter is the incompatibility between the principles and procedures of the Canadian criminal justice system, and Aboriginal culture. For example, the role of elders is highlighted to illustrate the

[198] Ibid @ 18.

prominent position they carry. In the case of inmates, elders believe that healing is required and that incarceration results in damage upon an individual's mind and spirit.

As we have already witnessed in chapter two, the AJI reports the intensity of the conflicts noted above in an historical overview in chapter three, to reveal the impact of the Canadian legal and political system after which the report concludes that:

> 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 failing to deal in a forthright and respectful manner with legitimate Aboriginal claims, Canadian government policy has done all Canadians a disservice.[199]

The inquiry notes the poor manner in which Aboriginal history has been documented. To the detriment of Aboriginal communities, there has been little on the contribution Aboriginals have made to Manitoba. The Commissioners argue that this must change. Aboriginal history must be better understood by fellow citizens so that Aboriginal peoples can be recognized in society and be on equal grounds as others.

Chapter four begins with a startling fact: "Aboriginal people constitute approximately 12% of the Manitoba population, yet, Aboriginal people account

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[199] Ibid @ 83.

for over one-half of the 1,600 people incarcerated on any given day of the year in Manitoba's correctional institutions."[200] There are two obvious explanations of this overrepresentation. Either Aboriginal people commit a disproportionately high number of crimes, or they are victims of a discriminatory justice system. The truth of the matter is that both these reasons play a role according to the report. There is nothing about Aboriginal peoples or their culture that makes them more prone to committing crime. With that clear, the report concludes that the overrepresentation is due to a long history of inequality and discrimination. The administration of justice is further problematic making decisions regarding Aboriginals in a discriminatory fashion at every stage of the system. The chapter carries onto look at social roots of crime, the socio-economic situation of Aboriginals, and discrimination. An underlying theme that emerges in this chapter is the cultural oppression, social inequality, the loss of self-government, and systemic discrimination are all intertwined factors that carry significant weight in explaining why Manitoba's jails are overloaded with Aboriginals. The chapter concludes by stating that:

> 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 discriminated against current generations of Aboriginal people by applying laws which have an adverse impact on people of lower socio-economic status.[201]

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[200] Ibid @ 85.
[201] Ibid @ 109.

A lengthy chapter on Aboriginal and treaty rights comes next. Here the report attempts to highlight the political and legal context for the recommendations which follow later. A key point made in this chapter is how Aboriginals have been treated unfairly by the federal and provincial governments. Numerous violations of treaties that were signed between the Aboriginal peoples and the governments are outlined. The report notes that "today, the treaties are still important to Aboriginal peoples because they represent a state of affairs that was abrogated arbitrarily and unilaterally by one party: the government."[202] At the time the report was written, only one land entitlement case had been settled. As a result, the Aboriginal people of Manitoba have lost trust and respect for the governments which has only gotten worse over the years. The report presents a series of recommendations that it finds could resolve historic injustices that affect present-day relations.[203] One example is for the federal and provincial governments to issue a public statement of how they intend to meet their fiduciary obligation towards the Aboriginal peoples.

The remaining chapters in this volume address specific components and groups within the existing justice system. 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

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[202] Ibid @ 118.
[203] Ibid @ pages 156, 169-209.

communities with a mixture of disdain and disregard. Also, one which is "ineffective, insensitive, and when compared to the service provided to non-Aboriginal people, decided unequal."[204] The report's 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 "simply 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."[205] 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."[206] The AJI represents an important break from this pattern by 'factoring' in Aboriginal autonomy aspirations as a legitimate and fundamental component of the justice reform equation.

One of the report's major recommendations is its "strategy for action" in its proposal that Aboriginal communities be empowered to establish their own justice systems. The report argues that "there is no reason why Aboriginal courts and their justice systems cannot assume full jurisdiction over all matters at their own pace."[207] The Commissioners reached this position after noting that "the call for separate, Aboriginally controlled justice systems was made repeatedly in

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[204] Ibid @ 249.
[205] Ibid @ 252.
[206] Ibid.
[207] Ibid @ 642.

our public hearings throughout Manitoba."[208] 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.[209] It also considers the relevant Australian and New Zealand experience.

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 in a less formalistic court-room environment. The essence of the proposal is that every component of the justice system operational within an Aboriginal community - from police, to prosecutor, to court, to probation, to jails - must be controlled by Aboriginal people.[210] Due to the relatively small size of many Aboriginal communities in Canada, a regional network is recommended which would allow several communities to share facilities and resources including judges. The report considers a range of possible legal bases for the establishment of Aboriginal justice systems.[211] The establishment would be based on negotiations with the federal and provincial governments 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 recognized and affirmed by section 35 of the Constitution

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[208] Ibid @ 259.
[209] The visits to these tribal courts on Aboriginal reserves, many which were the same in size and socio-economic status to reserves in Manitoba, by the commissioners revealed that separate Aboriginal justice systems are not only possible but practical.
[210] Ibid @ 314.
[211] Listed ibid @ 311.

Act, 1982. 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. The report states that "justice systems must not be imposed on Aboriginal people. To do so would be to perpetuate the policy of paternalism and imposition that has been the hallmark of Aboriginal affairs in this country for too long."[212]

The creation of Aboriginal justice systems, as appealing and valuable as they may sound, are not without controversy. Paul Chartrand believes that "if Aboriginal justice systems were to exist, Canada still has obligations towards Aboriginal individuals as Canadian citizens."[213] In Chartrand's opinion, this is a significant omission in the AJI Report because it does not adequately address the question of the functional relationship between Aboriginal justice systems and the Canadian justice system. Chartrand listed two obligations of Canada towards Aboriginal peoples: 1) obligation towards all citizens/persons within Canadian jurisdiction; and 2) obligation of Canada as a nation-state.[214] In short, Chartrand strong-heartedly contended that "it is not feasible for Canada to accept Aboriginal justice systems where it would wash its hands of protecting human rights."[215] State obligations must be recognized and can not be ignored.

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[212] Ibid @ 310.
[213] Interview with Paul Chartrand [June 23, 2004]
[214] Ibid.
[215] Ibid.

The remaining part of this volume looks at 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 report on the basis that, while the establishment of Aboriginal justice systems are crucial and the key to genuine change, exclusive jurisdiction is not the only answer.[216] First, not all Aboriginal people will have access to an Aboriginal justice system in their community.[217] Second, there will be a period of transition before Aboriginal justice systems achieve the full jurisdiction that is anticipated they will assume.[218] All recommendations made within these chapters highlight how necessary it is for every stage of the justice system be revamped.

With the court system, some of the report'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 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

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[216] Ibid @ 258.
[217] For example, those Aboriginal peoples living in urban areas such as Winnipeg would not fit neatly into the scheme of things.
[218] Ibid @ 339.

attempting to facilitate a reconciliation between the victim and the offender through the use of traditional Aboriginal dispute resolution techniques.[219]

The report recommended significant changes to the jury selection process. "For a century the legal system made it clear that it did not want or need Aboriginal jurors."[220] Either Aboriginal peoples are under-represented on jury panels, or lawyers through the use of peremptory and stand-asides, screen out Aboriginals. Some of the changes that are needed in the jury selection process made by the report included the elimination of standasides and peremptory challenges, and the introduction of procedures designed to ensure that jurors are drawn from the community in which the trial is to be held. The Commissioners found that this would be a great solution since it "seeks to return to the community involved a direct sense of involvement in, and control and understanding of, the justice system."[221] According to the report, the recommendations would help create a truly representative jury system.

The report carried onto show the need to develop alternatives to incarceration in the next chapter. The problems of incarceration are outlined to be that incarceration is not effective in rehabilitation/deterrence; it exposes offenders to conditions that further complicates the process of reintegration back into society; and that the costs far outweigh the benefits.[222] The report encourages the use of more creativity in sentencing by trial court judges, with a

[219] Listed ibid @ 343-75.
[220] Ibid @ 379.
[221] Ibid @ 386.
[222] Ibid @ 394.

view towards decreasing the use of incarceration as the 'standard punishment.' It also recommended that cultural factors be given a greater consideration during the determination of sentences, and that judges adopt the policy of inviting Aboriginal communities to express their views on any case involving a member of their community. Furthermore, the report recommended that Canada's Criminal Code be amended. The amendment would allow judges to deliver culturally appropriate sentences that would be better than incarceration. "Cultural factors should not be seen as extraordinary considerations for the court. Rather, they should be considered in the normal course of sentencing each and every Aboriginal defendant."[223]

Chapter eleven documents the overwhelming evidence of an ineffective prison system. Although the report recommended a number of improvements designed to enhance the system's effectiveness, the conclusion reached after a detailed survey of conditions in Manitoba's jails and youth centre was that "... fundamental reforms, based on a new set of principles are required."[224] The report identified the need 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 to increase the 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

[223] Ibid @ 406.
[224] Ibid @ 433.

programs, and the adoption of a formal policy by the government and prison authorities that would guarantee Aboriginal people culturally appropriate services. With the present parole system, the report recommended to 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."[225] It also called 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 next individually with the problems faced by Aboriginal women and young offenders. It addresses the problems of women as both victims of crime and as offenders. 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 need for alternatives to incarceration such as greater use of open custody facilities for Aboriginal women living is isolated or rural communities, and the establishment of culturally appropriate group homes in urban areas where Aboriginal women could serve their sentence.

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[225] Ibid @ 462.

In relation to youth, the Commissioners observed that "the level of over-representation is ever greater for Aboriginal youth."[226] 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. Many changes to the Young Offenders Act (YOA) are listed because "young Aboriginal people are not being dealt with according to the principles expressed in the YOA."[227] In summary, young Aboriginal offenders need to be dealt with in more culturally appropriate methods by Aboriginal people. Judge Sinclair noted that on the topic of Aboriginal youth, one noticeable omission in the AJI Report was the failure to address street gangs.[228] While it was not a pressing concern at that time, it has developed into a major problem within Manitoba.

The Commissioners turned to the controversial topic of policing in chapter 16. The report 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 numbers of Aboriginal police force officers on existing forces."[229] In relation to the first objective, the Commissioners made the recommendation that "as soon as possible, Aboriginal police forces take over

[226] Ibid @ 549.
[227] Ibid @ 558.
[228] Interview with Judge C.M. Sinclair [June 14 2004]
[229] Ibid @ 645.

from the RCMP the responsibility for providing all services in Aboriginal communities."[230] The Dakota Ojibway Tribal Council (DOTC) Police Force was utilized 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 Commissioners called for the adoption of a community policing approach, 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 cross-cultural education components of all police training courses, and a mechanism for screening out any police recruits displaying racist attitudes. The chapter concluded by stressing a need for an effective and accountable way in which public complaints can be handled.

This concludes the recommendations of the first report. The second report, focussing on the deaths of Helen Betty Osborne and J.J. Harper, included a separate set of specific conclusions and recommendations. Amongst these findings, the Commissioners were critical of the conduct of the RCMP in relation to the former incident, and perhaps, more seriously, that of the Winnipeg Police Force in relation to the latter. On a broader level, both were condemned for racist policing practices and inadequate investigation and review strategies.

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[230] Ibid @ 649.

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; 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 report's investigation into 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."[231] 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 Constable Robert Cross and to vindicate the Winnipeg Police Department.[232]

[231] AJI Report, Volume II @ 39.
[232] Ibid @ 12.

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 "proper and more independent methods of investigating officer-involved shootings must be instituted immediately ... and the Fatality Inquires Act be amended so as to create an inquest procedure in Manitoba that has, as its primary objective, the goal of ensuring public proceedings at which the family and community learn the material consequences of the unexplained death."[233]

The report reveals that racism played a part in the deaths of both Osborne and Harper and in the events that followed both incidents. It concluded that "it is clear that Betty Osborne would not have been killed if she had not been Aboriginal."[234] 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. The report also raised the question whether the case would have come more quickly to a conclusion if more Aboriginal persons were in the police or in the Crown Prosecutor's office. 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."[235]

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[233] AJI Report,Volume II @ 13.
[234] Ibid @ 98.
[235] Ibid @ 93.

Responses to the report's findings and recommendations seemed to be positive. Representatives of Aboriginal organizations in Manitoba and across the country conveyed their approval of the report and its plan(s) for change. For example, Phil Fontaine, Grand Chief of the Assembly of Manitoba Chiefs, described the report as "a solid piece of work with recommendations that represent fundamental social change in this province and elsewhere."[236] The overwhelming positive response to the report appears to have been based on a belief that the justice concerns of Aboriginal people has finally been addressed in a serious and constructive manner by an independent inquiry. For Judge Sinclair the fact is that "the increased attention Aboriginal peoples have received over the years since the AJI Report is directly attributable to the report."[237] 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."[238]

The report merits praise for its ability to endorse 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. The report draws away from making small internal changes to an existing justice system. The strategy outlined in the AJI reflects a decision to move beyond the conventional pattern of choosing only from a necessarily

[236] Santin, A Findings, recommendations, exactly what natives expected [Winnipeg Free Press] (August 30, 1991) @ 5.
[237] Interview with Judge C.M. Sinclair [June 14 2004]
[238] Ibid by Bill Wilson, British Columbia Vice-Chief of the Assembly of First Nations.

limited pool of justice reforms, but instead, chose to acknowledge the fundamental connection between Aboriginal justice concerns and political aspirations.[239]

On January 28, 1992 the provincial government released its formal response to the report. Justice Minster Jim McRae announced a number of reforms which would result in a "better system in Manitoba for Aboriginal peoples than anywhere in the country."[240] Changes included placing more Aboriginal people in charge of decision-making within the system, greater access to cultural activities in provincial jails, a reassessment of sentencing practices to reduce incarceration levels, mediation and peacekeeping approaches to disputes, institution of pre-trial diversions including more conflict resolution, and the possibility of expanding tribal police services.[241] However, the Manitoba government refused to endorse the autonomous justice direction charted by the report because "such key recommendations as an Aboriginal justice system, separate criminal codes, civil codes and charter of rights for First Nations are not achievable within the current constitutional framework."[242] Aboriginal groups criticized the government's response indicating that they would not participate in the implementation process unless the government would agree to reconsider

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[239] McNamara, Luke (1993) 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 Legal Research Institute of Manitoba Winnipeg: Legal Research Institute of the University of Manitoba @ 61.

[240] Campbell, D & Weber, T. Province rejects separate native justice system [Winnipeg Free Press] (January 29, 1992) @ A1-2.

[241] Ibid.

[242] Assembly of Manitoba Chiefs, Aboriginal Organizations Propose Partnership with Province in AJI Implementation, News Release [February 3, 1992]

several key issues, including the relationship between self-government and Aboriginal jurisdiction over justice. What came across rather unsurprisingly was that the same government that had accepted Aboriginal peoples' inherent right of self-government, simultaneously refused to recognize one of the most vital components of inherent jurisdiction – the right of jurisdiction over justice.[243]

The report is extremely thorough in its coverage based on the broad mandate it was given. While it looks specifically at the situation of Aboriginals in Manitoba, much can be learned across Canada by others. It must have been a challenge putting the document together. First, gathering the information. Second, having the patience and diligence to deal with a huge volume of information. As a reader, it is just as difficult a process. First, reading the lengthy document cover to cover. Next, trying to come to some rational understanding and acceptance of the struggles of many Aboriginals for justice on their own terms. Understanding is perhaps the easier of the two. Acceptance in one way means the acknowledgment of past ill treatments by the governments. Rather, this thesis believes, acceptance must be focussed on a second component – which the Aboriginal Justice Inquiry deals with. This is connecting the demands for justice to political aspirations as mentioned above.

The AJI clearly envisages a redistribution of power in relation to the administration of justice. Indeed, this is primarily what sets the report apart

[243] McNamara, Luke (1993) @ 63.

from its 'internal reform' orientated predecessors.[244] It looks beyond the existing criminal justice system for answers as to why Aboriginal people are so heavily over-represented in Canadian prisons. By stretching the parameters of Aboriginal justice to incorporate the pressing political demands of Aboriginal people, the Aboriginal Justice Inquiry, has entered largely unchartered reform territory. The recommendation for the establishment of Aboriginal justice systems sets the report apart from all other reports within this area thus far. The recommendations expressed in the report are not radical in nature, they are precisely what exactly is needed for justice to 'equate to justice' for the Aboriginal peoples in Manitoba. Judge Sinclair contended that "I don't see any reason why the governments could not implement the recommendations that were made."[245] This report is a courageous attempt towards a trend in favour of the alignment of justice reform policy with Aboriginal self-government aspirations.

[244] Ibid.
[245] Interview with Judge C.M. Sinclair {June 14 2004}

Chapter Five:
The Aboriginal Justice Implementation Commission: Eight Years Later

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Canada's treatment of its first citizens has been an international disgrace. To fail to take every needed step to redress this lingering injustice will continue to bring tragedy and suffering to Aboriginal people, and to blacken our country's name throughout the world. By acting now, governments can give positive expression to the public support and good will we have encountered from Manitobans during the past three years.

- The concluding words of the 1991 AJI Report

While the creation of and response to the '*The Aboriginal Justice Inquiry (AJI)*' released in the fall of 1991 was generally supportive, when Justice Minister Gordon Mackintosh entered his office in the fall of 1999, he recalls "a copy of the AJI Report was still in its plastic casing on a shelf."[246] Eight years had passed since the report was completed and the Progressive Conservatives Government did little besides leaving the document to collect dust on a shelf. Judge C.M. Sinclair in trust of a similar view, explained that the AJI Report's major obstacle of implementation was "the change in governments resulting in a great change in philosophy regarding the governments feelings about Aboriginal peoples' issues."[247] That is to say, the New Democratic Government has identified more strongly with Aboriginal peoples than the Progressive Conservatives. In November of 1999, the NDP was back in office and it appointed the '*The*

[246] Interview with Justice Minister Gordon Mackintosh [June 20 2004]
[247] Interview with Judge C.M. Sinclair [June 14 2004]

Aboriginal Justice Implementation Commission (AJIC)'[248] to review the recommendations of the AJI Report to develop methods by which those recommendations could be implemented.[249] Commissioners Wendy Whitecloud and Paul Chartrand reviewed the AJI Report, along with the advice of elders Eva McKay and Doris Young. The Commissioners were expected to address only those AJI Report recommendations that touched upon the responsibility of the Manitoba government. The AJI Report on the other hand, as shown in the last chapter, recommended action not only by the provincial government but also by the federal government, and in some instances, through joint initiatives by the two governments.

This chapter outlines some of the key recommendations made by the AJIC Report, the principles that underlied its approach, and outlines progress that has been made since its creation. The AJIC Report has achieved much more progress than its successor, the AJI Report, which had limited progress in the decade following its release. Unlike the AJI Report which held extensive public hearings, the AJIC Report was not required to do so to fulfill its mandate. The AJIC was mandated to "communicate and consult with Manitobans on priority

[248] Commissioners Paul L.A. Chartrand & Wendy J. Whitecloud (2001) Aboriginal Justice Implementation Commission, Final Report and Recommendations (hereinafter "*AJIC Report*") Winnipeg: Province of Manitoba

[249] The AJIC Report was also instructed to have regard to the Framework Agreement entered into between the Canada and the First Nations, and to the reports of the Royal Commission on Aboriginal Peoples (RCAP).

areas for action and on implementation strategies."[250] The AJIC fulfilled that responsibility to consult and communicate by:

1) issuing quarterly reports that were posted on the AJIC website.
2) meeting with government officials, representatives of Aboriginal organizations, police and correctional officials, and community members.
3) commissioning a series of consultation papers, which were circulated to various interested organizations and posted on the web page.
4) sending a letter to each member of the legislative assembly, asking for input.
5) undertaking a survey of Aboriginal leadership.[251]

Unlike the AJI Report which had a very broad mandate including all components of the justice system, the AJIC Report had a less exhaustive scope. Paul Chartrand, one of the Commissioners of the AJIC Report, confirmed this by stating "our work, our mandate required us to be more focussed on feasible recommendations. There were recommendations made in the broad mandate of the AJI Report which I knew wouldn't be implemented and they were not."[252] Justice Minister Gordon Mackintosh provided a similar understanding noting that "we asked for the AJIC to provide recommendations that were doable in the short-term and directed more towards the provincial government, whereas, the AJI's recommendations were more directed at the federal government and more general in nature and not specifically focussed as the AJIC's."[253] Judge C.M. Sinclair, one of the Commissioners of the AJI Report, pointed out interestingly

[250] AJIC Report @ 10.
[251] AJIC Report @ 10.
[252] Interview with Paul Chartrand [June 23 2004]
[253] Interview with Justice Minister Gordon Mackintosh [June 20 2004]

enough that "our role was to identify the issues, identify the problems, and to plot out some future whereas the AJIC Report was to advise the government of how to act on the recommendations that we had made some ten years earlier."[254]

Upon appointment of the AJIC Report, the "Minister of Justice and the Minister of Aboriginal and Northern Affairs requested all government departments to provide the AJIC with reports on the status of implementation of the AJI recommendations that pertain to their departments."[255] The Commissioners reviewed those reports and met with each department. It is these recommendations that largely make up the AJIC. In summary, the AJIC Report was to make recommendations that were practical, cost-effective and attainable.

As stated earlier, the AJIC met and/or received submissions from various aboriginal organizations.[256] The Commission also had numerous informal meetings with members of the aboriginal and non-aboriginal community to discuss the work of the Commission.[257] Through consultation with Manitobans the Commission established priority areas of work. These priority areas were identified as:

- Child Welfare
- Policing

[254] Interview with Judge C.M. Sinclair [June 14 2004]
[255] AJIC Report @ 9.
[256] Listed Ibid @ 207.
[257] Listed Ibid @ 209-214.

- Community Justice
- Early Support and Crime Prevention Measures for Youth
- Violence towards Women and Children
- Aboriginal Rights
- Northern Flood Agreement
- Treaty Land Entitlement
- Metis Issues
- Employment and Cross-Cultural Training

"The Commission, through its consultation with Aboriginal people, government officials, and outside experts, and through its own research, has concluded that the resolution to the overrepresentation of Aboriginal people in the justice system will come, over the long term, from within and outside of the justice system."[258] One of the major themes that emerged from these consultations was the need to ensure that reform would not be limited to the justice system. In addition to the systemic conditions, the social conditions as outlined in chapter three were repeatedly discussed as issues that were contributory to the high levels of involvement of Aboriginal peoples within the criminal justice system. Based on these views, the AJIC Report set the above areas as focus of their work.

Three main themes emerged from these priorities: aboriginal rights; reform of the justice system; and the need for preventive measures which are all themes

[258] Ibid @ 2.

that reflect the main themes of the original AJI.[259] Based on these themes, the AJIC was organized into five sections: an introduction, a section on aboriginal rights and aboriginal relations, community and restorative justice, crime prevention through community development, and concluding thoughts.

In the first section on aboriginal rights and aboriginal relations, the Commission called for the fulfillment of obligations under the land entitlement policies, the Northern Flood Agreement, and to the Metis people. It called for an approach to aboriginal issues that would lead to a recognition and fulfillment of aboriginal rights, to the reconciliation between Aboriginal people and other Canadians, and to improving the justice system. This priority was given by the AJIC Report based on the AJI Report's examination of the rights of Aboriginal people in treaty and common law, and its review of the historical experience of Aboriginal people with the Canadian justice system. This led the AJI Report to propose the establishment of an aboriginal justice system and the recognition and fulfillment of unmet treaty and aboriginal rights.[260]

The AJIC presented these proposals in three chapters in its report: recognition and reconciliation, Metis issues, and treaty land entitlement and the Northern Flood Agreement. In the first chapter, the AJIC drew on the AJI's emphasis on a need for recognition and reconciliation. The AJI stated that the frustration, anger, and conflict resulting from weak and inadequate government responses to

[259] Ibid @ 14.
[260] Ibid @ 17.

Aboriginal issues has resulted in a poor relationship between Aboriginal peoples and the government.[261]

The AJIC Report argued that before aboriginal and non-aboriginals can move forward, past relations must be reconciled and healed. This reconciliation is possible if there is a recognition of the historical relations between the two groups.[262] A final concern in this chapter was the concept of an aboriginal justice system, which had been a central recommendation of the AJI Report and of the RCAP. In agreement with the recommendation of the AJI, the AJIC Report recommended that the Government of Manitoba take the issue of an aboriginal justice system and place it on the agenda of an Aboriginal Justice Commission or Roundtable on Aboriginal Issues.[263]

The next chapter examined Metis issues. The AJIC reported the recommendation of the AJI Report which proposed a Métis Child and Family Service agency, with jurisdiction over Métis and non-status Indian children throughout Manitoba be developed in conjunction with the Manitoba Metis Federation (MMF).[264] This recommendation was supported by the AJIC Report and eventually was accepted by the Manitoba government. The AJIC Commissioners consulted the MMF on the priorities of the Metis within the

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[261] Ibid @ 19.
[262] A consultation paper written by John Giokas, entitled *"Recognition, Reconciliation, and Healing"* can be found on the Commission's website discussing eight ways in which the Manitoba government could recognize the Aboriginal people in Manitoba, along with their past and present contributions.
[263] AJIC Report @ 21.
[264] AJI Report @ 540.

province of Manitoba.[265] Based on the recommendations of the AJI Report along with the extensive ten listed recommendations made by the RCAP, the AJIC recommended that the Government of Manitoba involve the MMF to develop a comprehensive Metis policy.[266]

In its discussion on Treaty Land Entitlement (TLE) and the Northern Flood Agreement the report noted that treaty land entitlement refers to the land that the government of Canada still owes the Aboriginal peoples based on historically signed treaties. According to the AJI Report, TLE should not even be an issue, rather, it's a "subject that is so simple and straightforward that it should never have arisen as a source of conflict in the first place."[267] Simply, Aboriginal peoples signed treaties with the federal government and certain lands were promised in return. If the issue was the failure to keep that promise by the federal government, the AJI Report was of the opinion that all that needed to be done was to return those lands to Aboriginal peoples. The Northern Flood Agreement was signed between Manitoba, Canada, Manitoba Hydro, and the Northern Flood Committee representing five aboriginal nations[268] to provide compensation for reserve lands flooded by major hydro-electric projects. "The agreement provided for an exchange of four acres for each acre flooded, the expansion and protection of wildlife harvesting rights, five million dollars to be

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[265] AJIC Report @ 30.
[266] Ibid @ 30.
[267] AJI Report @ 162.
[268] The five nations include: Nelson House, Norway House, Cross Lake, Split Lake, and York Factory.

paid over five years to support economic development projects on the reserves and promises of employment opportunities."[269] The agreement was also to deal with any adverse effects to the "lands, pursuits, activities and lifestyles of reserve residents."

The AJIC reported that Manitoba Hydro walked away satisfied from the massive project. However, that was not the case for Aboriginal peoples. For example, only reserve residents represented in the negotiations were to receive any of the benefits. "Many Metis and off-reserve Indians in the region still complain bitterly that their homes and traplines were destroyed and their hunting and fishing rights violated without any consultation or compensation.[270] In order to deal with this issue, the AJIC Report recommended any major natural resource developments shall not be able to proceed until treaty agreements are reached.[271] Furthermore, the government of Manitoba and Manitoba Hydro would negotiate for those nations already flood-affected.

The next lengthy section of the report looked at community and restorative justice divided into chapters each separately discussing youth justice, the courts, policing, aboriginal employment and participation in the justice system, and violence towards aboriginal women and children. Within each individual chapter, the AJIC Report provided a strategy for implementation

[269] AJI Report @ 173-74.
[270] Ibid.
[271] AJIC Report @ 36-37.

based on the reforms that were outlined in these areas by the AJI Report which all surfaced around the creation of Aboriginal justice systems.

The strategy proposed by the AJIC was based on the principles of community justice.[272] The AJIC Report drew the following contrast "the current system is centralized, isolated, and focussed on criminals, a community justice approach is rooted in neighbourhoods, requires collaboration among citizens, and is attuned to the situation of the victims and the community at large." In short, the AJIC Commissioners made proposals intended to reduce incarceration, increase usage of alternative sentencing, promote the use of aboriginal-controlled delivery services within the justice system, and provide for cross-cultural training in the system.

Beginning with youth justice, the AJIC Report agreed with the recommendations of the AJI Report and insisted that these recommendations could be implemented without significant increases in funding. Echoing the AJI Report, supported the idea of "least interference, and a proportionate, incremental approach to the involvement of young peoples in the justice system."[273] To implement this general philosophy, the AJIC Report made a series of concrete recommendations. In order to successfully reduce youth imprisonment the AJIC recommended, amongst many recommendations, that the Government of Manitoba avoid placing young peoples in pre-trial detention

[272] AJIC Report @ 39.
[273] Ibid @ 43.

and create ways to accomplish this.[274]

The Commission recognized that since there are a number of causes that brings aboriginal youth into jails, simultaneously, there must also be a range of solutions. The use of the most minimal sanction in any given case along with intervention addressing the needs of the individual person was a high priority for the Commissioners. The Commissioners also stressed that when detention was necessary, it be carried out in the home community of the accused. The key point, however, was that all other options should be used before detention occurred. Great emphasis was placed by the Commission on the development of stronger ties to families/community; sports and recreational activities; and encouragement of education for youth which were seen as ways to avoid contact with the justice system.

In an examination of the courts, the AJIC Report addressed once again the multitude of problems involved with aboriginal peoples understanding of the various components of the justice system. According to the AJIC Report, despite the AJI Report's recommendations, there still continues to be limited progress in this area. For example, the Commissioners found continuing problems in the areas of delay, circuit courts, community involvement, alternative sentencing, and probation. The AJI Report set forth reforms to allow community involvement and thus allow for a community justice approach. For example, the

[274] Ibid @ 45.

recommendations of the AJI Report "provide communities with a greater role in defining problems, developing approaches, reaching decisions, and then implementing those decisions."[275]

Hence, the AJIC Report also recommended a number of community justice measures after summarizing the AJI Report's community justice recommendations along with the progress on those recommendations. The AJIC Report called for community involvement and culturally appropriate services, and the creation of aboriginal controlled probation services amongst its many recommendations. The AJIC Report based these recommendations on the belief that "community justice approaches enhance the legitimacy, fairness, and effectiveness of the justice system."[276]

The Commissioners also provided an outline of the 16 accountability programs[277] established with the Manitoba government, that focus on taking low-risk offenders away from the justice system towards these programs. One final area of concern examined in this chapter was the issues that surround community justice. With the problem of resources, the Commissioners found that "if the Province of Manitoba experiences resource shortages in operating its

[275] Ibid @ 53.
[276] Ibid @ 54.
[277] These programs include: Manitoba Keewatinowi Okimakanak (MKO) First Nations Justice Strategy (Northern Manitoba); Community Conferencing Project (Portage la Prairie); St. Theresa Point Aboriginal Youth Court; Community Justice Committees; Waywayseecappo Aboriginal Justice Programs; Meditation Services; Hollow Water Community Holistic Circle Healing Project; Aboriginal Ganootamaage Justice Services of Winnipeg; CP1879 (Winnipeg); Youth Alternative Measures; Restorative Resolution; John School; Prostitute Diversion; Transition Program for Adults Sexually Exploited through Prostitution; Positive Lifestyle Program; and Interlake Peacemakers Project.

justice system, Aboriginal communities will face similar, if not more severe, resource problems if more justice responsibilities are moved into communities."[278] As well, the Commissioners discussed some of the complexities surrounding who will represent each community, and what will become acceptable and non-acceptable repercussions to criminal behaviour. A strong message delivered in this section was that no matter how worthwhile community justice is for Aboriginal communities, it is also not void of troubles.

A complex chapter on policing raised issues of racism, cultural sensitivity, and accountability. The Commissioners of the AJIC Report addressed important trends[279] in policing in Canada that "often run counter to the spirit of the Aboriginal Justice Inquiry recommendations."[280] For example, costs related to policing were noted to have been on the increase requiring governments to set firm budgets. Community policing was another trend that was identified as troublesome. The AJIC Report found that despite its popularity as a concept, community policing is a difficult process to fully understand and thus deliver. "There is no single definition of what it constitutes"[281] reported the Commissioners. The ability of the Commissioners to recognize these obstacles

[278] AJIC Report @ 65.
[279] These trends included issues pursuant to: costs; funding; regionalization; staffing; crime; services; governance; family violence; and community policing.
[280] AJIC Report @ 85.
[281] Ibid.

allowed for them to conclude that "it is not appropriate to expect new models of policing, such as community policing, to be both innovative and inexpensive."[282]

The remaining part of this chapter looked at the progress of the AJI Report's recommendations. The use of community policing in Aboriginal areas was reported to be slow. At the time of the AJIC Report the only Aboriginal police force in Manitoba was the Dakota Ojibway Tribal Police Service (DOPS). The development of fully trained regional Aboriginal police forces serving Aboriginal communities had been one of the main recommendations of the AJI Report. However, no major improvements had been made to the Provincial Police Act and Regulations,[283] and there was no creation of an Aboriginal Police Commission nor of a public complaints body. More limited, less expensive changes were made. It is apparent that the issue of policing in Manitoba is complex requiring the involvement of both the provincial and federal governments.[284] The slow nature of progress of Aboriginal police forces was attributable to costs and issues of service delivery. The AJI Report's recommendation requiring the strengthening of employment equity programs

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[282] Ibid.

[283] The province of Manitoba compares very poorly with other provinces in its regulation of police activities. Other provinces have clear definition of relevant terms, limitation on the terms of appointment of police commissioners, powers to make regulations, powers to set and enforce wide-ranging standards for the selection and training of constables, and the establishment of a police training facility. Manitoba's Act provides few of the specific details and no regulations exist to enforce the standards which the Act implies.

[284] The lack of progress made in Manitoba in the development of Aboriginal police forces needs to be viewed in the context of national policing trends. In 1992, the Government of Canada approved a First Nations Policing Policy (FNPP) which transferred Aboriginal policing from Indian Affairs to the Solicitor General. There has been considerable progress towards implementing this policy outsides Manitoba. The policy led to the creation of over 50 self-administered First Nations Police Services. Most of the forces were been created in Quebec and Ontario.

was positive. In addition, cross-cultural training was adhered to in that "the province's three major police forces all have undergone multicultural training programs."[285]

The AJIC Report came to identify three priority areas in policing that were far from being resolved: accountability and oversight; community policing; and Aboriginal policing. The Commissioners found all three to be interconnected meaning that change in one area would be contingent on change in another. The AJIC Report concluded that:

> The issues involve several layers of government, and the public, as well as fundamental questions of funding, policing, and governance. While the Aboriginal Justice Implementation Commission believes that progress must be made in all three areas, the Commission believes that what is required to break the current impasse is a Provincial task force on policing that is mandated to make recommendations on a new Police Act for the province of Manitoba.[286]

The final recommendations proposed by the AJIC Report were laid out in three categories: parallel, short-term, and long-term changes. Since the entire issue of policing was found to be rather cumbersome and complex, the Commissioners did not have sufficient time to consult all parties involved. "The AJIC believes that a more transparent and independent governance system, coupled with a community policing approach that requires use of peacekeeping or restorative, community-based, policing philosophies and strategies (and that is properly

[285] AJIC Report @ 88.

[286] Ibid @ 95.

funded), will create a police force that is more credible, legitimate, and effective."[287]

Aboriginal employment and participation in the justice system was next on the AJIC Report's agenda. The Commissioners stressed, as did the AJI Report, the need to increase the hiring of aboriginal peoples in the justice system. The AJIC Report recognized the change in this latter area, however, found that the "minimal goals set by the Manitoba government in 1983[288] and the Aboriginal Justice Inquiry in 1991 have not been met."[289] The AJIC Report agreed with the AJI Report that the best measures for increasing Aboriginal employment were "the result of management's commitment to improve recruiting, enhance training opportunities, remove barriers to employment, and enhance retention."[290] The Commissioners further concluded that any enforcement mechanism, such as an Employment Equity Commission[291] recommended by the AJI Report, was not viable at the time due to costs.

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[287] Ibid @ 96.

[288] In 1983, the Manitoba government adopted an employment equity policy. This policy identified four target groups that, in the opinion of the government of the day, had been victims of systemic discrimination in employment and were, therefore, underrepresented in the Manitoba government workforce. The target groups identified were: 1) women 2) Aboriginal people 3) member of visible minorities and 4) persons with disabilities. Under this policy, the government committed to continuing to hire the most capable job applicants, but when applicants were of equal capability, the government would hire the applicant from the target group. The programs goal for the year 2003 was 50 percent for women, 10 percent for Aboriginal people, 7 percent for persons with disabilities, and 6 percent for visible minorities.

[289] AJIC Report @ 105.

[290] Ibid @ 106.

[291] An Employment Equity Commission's mandate as set by the AJI Report would be to develop employment equity targets for employers within the legislative jurisdiction of the Province of Manitoba, to ensure that employers set policies and programs for the advancement and promotion of Aboriginal people, to monitor compliance with established employment equity targets, to require employers receiving government grants to establish an acceptable employment equity plan within which Aboriginals would be

A final chapter in section three focussed on violence towards aboriginal women and children examining the effect of abuse and how society responds to such abuse. The AJIC Report reviewed policy developments since the AJI Report and made some recommendations of its own. Revealed in this chapter, as in others, was that because of the funding shortage, certain recommendations have not been implemented and delivered. Some of the recommendations made in this area included for the government to continue research and evaluation of domestic abuse policies and programming, and the expansion of culturally appropriate aboriginal treatment and support programs for families.[292] In the case of children, the only recommendation made by the AJIC Report was that the appropriate departments, including the Departments of Justice and Family Services, report regularly on the status of the recommendations listed in the report, *A New Justice for Indian Children*.[293]

The fourth section of the AJIC Report centred on the theme of crime prevention through community development. Chapters ten through twelve discussed ways in which families,[294] young people,[295] and communities[296] could

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hired, and to hear and determine complaints against a person or employer who fails to comply with an established employment equity plan.

[292] Ibid @ 129.

[293] This report was prepared by the Winnipeg Children's Hospital Child Protection Centre and presented to the AJI Inquiry.

[294] Strengthening families involve: promoting healthy babies; improving parenting skills; increasing family cohesion; preventing child abuse and neglect; reducing aggressive behaviours; and enhancing children's intellectual and social development.

[295] Strengthening young people involves: providing support and guidance to vulnerable adolescents; providing educational programs that keep young people at risk in the school system; assisting young people whoa re at risk to successfully make the transition from school to work; improving school outcomes and

be strengthened. As chapter three illustrated, the causes that play a role in Aboriginal peoples entry into criminal behaviour are not limited to systemic discrimination. Social factors were marked to operate in combination in explaining the overrepresentation of Aboriginal peoples within the criminal justice system. Having said that, the Commissioners were supportive of the changes that could be made to the existing system to improve the problem of overrepresentation. In spite of this though, the reality is that "the roots of overrepresentation are not found only in the justice system, but in the broader social setting, and will require concerted action from all three levels of government in Canada."[297] Likewise, crime prevention requires an effort involving one to focus on the roots of social disorganization, rather than on the symptoms of that disorganization. [298]

The recommendations forwarded by the Commissioners in this section were preventive,[299] whereas the recommendations regarding reforms to the justice system were reactive.[300] It was believed that crime prevention measures in Aboriginal communities would tackle these issues and positively contribute in

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fostering pro-social behaviour; increasing social skills and reducing aggressive behaviour; and preventing youth homelessness.

[296] Strengthening communities involves: developing income policies that ensure that children grow up in families can meet their developmental needs; developing employment policies that provide meaningful work at wages that ensure that children grow up in families that can meet their developmental needs; and developing policies that reduce social inequality.

[297] AJIC Report @ 135.

[298] Ibid.

[299] Preventive recommendations focus on the roots of social disorganization and the linkage to crime and as a result, try to strengthen community building with the use of restorative methods.

[300] Reactive recommendations have been the preferred method of dealing with crime. The criminal justice system is reactive. The focus here is on the symptoms of disorganization and the linkage to crime and as result, try to reform the justice system to improve the efficiency and legitimacy of the system.

alleviating the very issues that place Aboriginal peoples before the justice system. The Commissioners also set out a list of principles[301]that, if adhered to, would result in the effectiveness of the policies in each of the three areas.

In the report's closing thoughts, it looked to the future basing its discussion on revenue generation and strategies for action. Given that the AJIC Report's goal was to find ways in which the recommendations of the AJI Report could be implemented, it was confident that it did fulfill its mandate. The Commissioners were satisfied with the actions proposed for implementation including setting priority areas after consultation with the government and Aboriginal people, providing research and analysis on those priority areas, and providing ideas via discussion papers to ensure that the debate that began on a wide-range of issues in the AJI Report would continue.[302]

As stated at the outset of this chapter, the Commissioners of the AJIC Report were required to adopt a course of action that was practical, attainable, and cost-effective. In a brief chapter dedicated to revenue strategy, various suggestions were made on how the recommendations made throughout the

[301] These principles include: 1) Comprehensiveness – programs should address the needs of the child, the family and the community; 2) Accessibility – programs must actively reach out to ensure that all targeted families have the ability to participate; 3) Proactive – programs must target children who are at risk of coming into conflict with the justice system; 4) Integrated – programs should bring together social service, education, and health care services; 5) Community Driven – the design, allocation, and delivery of programs should rest with community authorities; 6) Quality – there should be provincial standards of practice; and 7) Accountability – evaluation is an important component of crime prevention programming and must be encouraged in a provincial strategy. There must be ways of ensuring that funds go to services.
[302] AJIC Report @ 177.

report could be financed.[303] Four major sources of funding were identified: the control of tax on reserves, revenue from gambling activities, programs requiring partners, and the creation of a fund for the financing of Aboriginal programs.[304] In short, the Commissioners recommended the creation of a trust fund that would accumulate revenues from gambling related activities.[305]

The need for a successor institution post-AJIC recommended by the Commissioners was presented through the creation of an Aboriginal Justice Commission and second, the creation of a Roundtable on Aboriginal Issues. In strategies for action, the AJIC Report recommended for the government to develop a comprehensive aboriginal policy.[306] It is clear from the nature of these recommendations that the underlying goal is for them to receive the follow-up necessary for change. Another obvious conclusion that can be drawn from these recommendations is the serious need it tables in placing aboriginal policy on the governmental agenda.

The over 200 page AJIC Report is less exhaustive when compared to the AJI Report of almost a decade earlier. It is a focussed report that clearly identifies how words can be turned into actions, to then produce positive changes in the lives of Aboriginal peoples. It sets its goals at the outset of the

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[303] A consultation paper produced by Fiscal Realities Economists, entitled *"Innovative Provincial Aboriginal Funding Programs"* can be found on the Commission's website that examines means of financing Aboriginal programming.
[304] Further discussed ibid @ 173-74.
[305] Ibid @ 176.
[306] Ibid @ 178.

report and works on each goal in a clear, focused, and organized fashion. The report sets itself apart from the AJI Report through its devotion to an action-plan. The authors are well aware of the limited impact previous reports have had. In its year and a half of operation, the Commission made recommendations that did not simply reiterate solutions that had been offered in the past. The AJIC Report can be seen to illustrate the 'necessary' direction that justice reform should be taking for Aboriginal peoples. The AJIC Report looks beyond the criminal justice system for answers that are able to address why Aboriginal peoples are facing problems relating to the criminal justice system. It deserves our applaud for its attempt to courageously push towards a trend in favour of justice reform aimed at aboriginal control.

The AJIC Report is an impressive turn away from previous reports, task forces, and inquiries in one way. Many recommendations have been made before, however, the process of implementation has been less progressive. The recommendations contained in the AJIC Report, unlike those that made up the AJI Report, have been moving in the positive direction of change and implementation. This change is well documented in a report prepared by Manitoba Aboriginal and Northern Affairs and Manitoba Justice in the summer of 2004. The report entitled, *Progress Report on the Implementation of*

Recommendations,[307] lists steps taken to date in each area of priority identified by the AJIC Report. The Progress Report is evident of a strong awareness that change is needed and underway. More importantly, it signals the explicit recognition of the relationship between Aboriginal autonomy and the administration of justice. Justice Minister Gordon Mackintosh reported that "as listed in the 2004 Report, 94% of the recommendations directed at the provincial government are being worked on. Some recommendations are complete in their entirety, while many recommendations will always be worked on."[308] Furthermore, Justice Minister Gordon Mackintosh added that "these AJIC Report recommendations will take a lot of work over a long period of time because Aboriginal people are disproportionately represented in the justice system."[309] In dissent, Judge C.M. Sinclair was of the opinion that "the AJIC Report was too limited in focus so it failed it to address a lot of issues that could have been implemented by the province in the long-term."[310]

When looked at in another way, the AJIC is no different than previous reports, task forces, and inquiries. Upon close examination of the Progress Report, the first thing that can raise a readers eyebrow is the few pages of the total report. After having read both the AJI and AJIC Report, with one over 200

[307] The Aboriginal Justice Implementation Commission, Progress Report on the Implementation of Recommendations Summer 2004 Prepared By: Manitoba Aboriginal and Northern Affairs and Manitoba Justice
[308] Inter view with Justice Minister Gordon Mackintosh [June 20 2004]
[309] Ibid.
[310] Interview with C.M. Sinclair [June 14 2004]

pages and the other over 700, it is rather distressing and shocking to see that progress is contained in just a few pages. Of particular significance is the fact that since the creation of the first AJI Report in 1988, almost two decades later the only change that has materialized is a flimsy 10 page report. How could all of the recommendations listed in two major reports totalling over 900 pages be followed up in 10 pages? This raises the next point. Justice Minister Gordon Mackintosh very adamantly stated that 94% of recommendations are being worked on as evident in the Progress Report. Upon a thorough review of the Progress Report, it is apparent that there is ***no*** comprehensive listing of recommendations to such an extent. Rather, under each of the three major themes of the AJIC Report, steps that have been taken are listed whereas most of them are not implemented steps. Most of the them are indicative of the provincial governments mere acknowledgment of the AJIC Reports recommendations. For example, such words as "committed to", "working on", "discussions", "consultations", "developing", "identified", "tabled" form the bulk of the provincial government's progress. Other steps include amendments made to various acts and where more concrete steps have been taken in terms of agreements signed or the establishment of various councils/bodies, there remains concerns over "discussions are still ongoing" or "its mandate is still under review."

In short, many of the recommendations of the AJIC Report have not been adopted. Those few changes that have resulted are both the least expensive and controversial issues. Most, if not all, of the recommendations are still under study and require a cooperation of provincial and federal governments as well as Aboriginal organizations. It is of no surprise that the provincial government will present themselves as though they are taking the necessary measures required. After all, is that not what the public wants to hear?

While both the AJI and AJIC Report are significant developments in the relationship between Aboriginal peoples and the criminal justice system, the primary question of this thesis regarding where Aboriginal justice reform stands post-AJI/AJIC Reports remains. What was the fate of the reports? What still precludes the implementation of the remaining recommendations? These answers to these controversial and thesis-driven questions will make up next, chapter six.

Chapter Six:
The Upshot of the AJI and AJIC Reports: Was Justice Really Served?

Both Commissions were established in response to a public recognition that this overrepresentation constitutes a fundamental injustice. Both reports stress restorative approaches that seek to bring communities that are out of balance back into balance.

- AJIC Report

The past three decades have seen the development in Manitoba of an unprecedented profile for aboriginal concerns about the inadequacies of the criminal justice system. Aboriginal justice, as stated at the outset of this thesis, has evolved into a distinct field of academic research. The main reports under investigation, the AJI and AJIC Reports have significantly added to the emergence and development of the academic study of justice issues. In the world of practice, however, the impacts of the reports have been important, but incomplete. In other words, the policy impact that was anticipated from the reports has not materialized. Furthermore, we are left to question where exactly justice reform stands in Manitoba.

This thesis began chapter 2 with an examination of the historical influences on Aboriginal involvement with the criminal justice system showing that history has been a major contributory factor. Chapter 3 outlined the roots of Aboriginal overrepresentation within the system by looking at both social and

systemic causes of criminal behaviour revealing numerous conditions that are responsible for both entry into the system and discrimination once in. A discussion that also emerged from this chapter was the conflicting concepts of justice between the dominant Western justice system, and Aboriginal systems that pre-existed long before European contact. Aboriginal people and their commonly expressed feelings of alienation and foreignness from the justice system were better understood.

In chapters 4 and 5, both the AJI and AJIC Reports were reviewed to provide a more detailed understanding of the various justice reform directions taken in each. The AJI Report in chapter 4, signalled a shift in Aboriginal justice reform policy. The recommendation for the establishment of Aboriginal justice systems set the inquiry apart from other reports and is without doubt, was a courageous component of its overall report. In chapter 5, the AJIC Report was shown to have more progress than the AJI Report, but overall was identified not to be that much far ahead. The Progress Report released in 2004, a follow-up on the recommendations implemented since the AJIC Report, was a mere written commitment by the provincial government that the matter was being dealt with. However, a closer look at the report disclosed that a bulk of the recommendations were merely being identified and/or discussed.

This final chapter seeks to answer what are perhaps the most controversial set of questions thus far. What has been the fate of the reports?

What are the main causes for the lack of implementation of the recommendations? Why have some recommendations provided the basis for government action and others remain under study or have been rejected? What have been the apparent consequences of both government actions and inactions for the quality of justice for Aboriginal peoples in Manitoba? Answering these questions unequivocally is difficult for several reasons. First, the development and responses to the two reports took place in an evolving social and political context. In that context there was growing recognition of the problems faced by Aboriginal peoples in their dealings with the justice systems. Separating the impacts of the reports from wider trends and developments is impossible. Second, there are a wide range of potential factors which potentially could have influenced the fate of the two reports in terms of immediate adoption by the governments. Some of these factors have already been discussed in previous chapters, other are discussed later in this chapter.

One factor was the change of the governing party. The AJI Report was established in the last few months of the NDP party led by Premier Howard Pawley and other cabinet members. Within three months, the NDP was defeated in the legislature on a vote on its budget, an election was called and the Progressive Conservatives assumed office two months later. Although the new government led by Premier Gary Filmon expressed its support for the inquiry, nothing was done while they were in office. When the NDP were back in office almost ten years later, they appointed the AJIC Commission. The NDP has held

five northern seats in the 57-seat provincial legislature where there are significant Aboriginal populations, two current cabinet ministers are of Aboriginal heritage with one serving as Speaker meaning that with approximately one-fifth of the NDP caucus comprised of Aboriginal representatives, the NDP have stronger ties and are more favourable towards Aboriginal communities than the PC's.[311]

The positive degree of support from Aboriginal leaders and organizations, also discussed at the end of chapter four, is another factor. Representatives of Aboriginal organizations in Manitoba and across the country registered their approval for the reports. They agreed with the findings about the impact of the justice system on Aboriginal peoples, and as result, were favourable for the plans for change. Although in favour, some leaders and organizations were not able to mobilize themselves in a focussed way to get Aboriginal communities to activate either level of government. As a result, there was no significant pressure on the governments which lead to the sidelining of the issues soon after the release of each report. Stronger, pressing efforts by Aboriginal groups would have helped to keep the issue before the two levels of governments. However, Aboriginal people were of the opinion that if there was no will on either level of government to take the autonomous justice direction they hoped for, then the reports had produced no significant change and were of no benefit to them. Judge C.M. Sinclair suggested that had "Aboriginal leaders and organizations remained

[311] Thomas, Paul (2000) Making Aboriginal Issues Matter in the Government of Manitoba: Some Organizational and Procedural Options, Consultation Paper prepared for the AJIC Report @ 22.

committed and continued working with the government rather than just stepping back and accepting failure, perhaps that line of communication would have achieved a gradual stream of change."[312]

Third, we have the financial implications of the recommendations. The tight financial positions of the governments with the NDP's commitment to retain the balanced budget law adopted earlier by the PC's left little room for new spending. This was also a time when healthcare was consuming an ever-increasing share of the budget. In addition, the absence of budgetary conclusions about the costs of implementation, particularly in the AJI Report, was seen as problematic. In regards to the AJI Report, Judge C.M. Sinclair pointed out that "one obstacle to the adoption of the recommendations of our report was the shift in priorities towards fiscal responsibility. There was little recognition given for new spending or even changing/altering any existing spending patterns other than those that called for a reduction in spending."[313] Of course, the flip to this is that the costs associated with the number of Aboriginal people locked up were substantially high and were only increasing every year. Expenditures were something that could not be avoided either route.

Four, if the policy analysis in the reports was sound and persuasive for Aboriginal organizations and academic judges working in the field, for example, then this would indeed be beneficial. If so then sound policy ideas, capable

[312] Interview with Judge C.M. Sinclair [June 14 2004]
[313] Ibid.

political and administrative leadership, and efficient/effective administrative systems would result.[314] The problem, however, can be found in the small yet intense minority of individuals who reject the concept of self-government. The AJI Report tied its recommendations to the concept of self-government throughout the report. Five, the state of public opinion on these issues. While there was public support for dealing with the issues facing Aboriginal peoples in which they recognized that something needed to be done, there still were concerns about the costs and practical implications of a separate justice system. For a politically cautious government like the Gary Doer led NDP, these political considerations reinforced their aversion to taking big political risks. While public awareness levels increased due to the broadcasting of the public hearings of the AJI Report, this awareness was not completely of a positive nature. The effect the media has had on this awareness has been devastating. Centre for Research and Information on Canada (CRIC) in a piece entitled, "*Facing the Future: Relations Between Aboriginals and Non-Aboriginal Canadians*," Kelly Lendsay notes that while people are more sensitized to Aboriginal issues today, most of this sensitization is through negative media coverage which creates a backlash mentality.[315] CRIC also found that "a majority of Prairie residents would do away with Aboriginal rights if given the chance."[316]

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[314] Thomas @ 30.
[315] Centre for Research and Information on Canada: CRIC Paper (June 2004) Facing the Future: Relations Between Aboriginal and Non-Aboriginal Canadians @ 6.
[316] Ibid @ 15.

Six, jurisdictional conflicts discussed later in this chapter. Seven, the displacement of issue by the rise of other concerns. Other issues came to dominate the public policy agenda like health care, federal-provincial tensions over money, and the RCAP shifted the debate and consumed a great deal of the political energies of Aboriginal leadership are some examples. Eight, the racist attitudes and actions inherent in a century of governmental policy cannot be underestimated. A continuation of discriminatory and prejudicial attitudes held by government officials resulted in the matter not being taken as seriously as it merited. Stereotypical views of Aboriginal peoples along with no political benefit of dealing with Aboriginal issues have placed them at a low rank in a system of priorities of government. It is these key factors that played a role in encouraging or discouraging serious consideration by the government to endorse the recommendations.

Some of the answers can be found in the work of one of the AJI Commissioners, Hon. A.C. Hamilton in his book entitled, *"A Feather Not a Gavel: Working Towards Aboriginal Justice"*[317] to better understand the AJI Report. Hamilton proposes a parallel Aboriginal justice system in which he suggests returning to Aboriginal peoples the authority to manage their own lives, and to look after their own problems in their own ways. "In spite of the unilateral assumption of jurisdiction and ownership by federal and provincial governments

[317] Hamilton, A.C. (2001) A Feather Not a Gavel: Working Towards Aboriginal Justice Winnipeg: Great Plains Publications

of Canada, Aboriginal peoples are still the outright owners of portions of Canada, and that ownership arguably carries with it the right to run their own affairs as they please."[318] Hamilton criticizes the devolution of authority that the governments have proposed as inadequate because it does no permit Aboriginal peoples to make major decisions, rather it just gives them some administrative authority. The latter portion of his book is dedicated in illustrating how exactly a parallel system can be created and function. Issues such as jurisdiction,[319] appropriate training for Aboriginal peoples who would staff the system, and administration/coordination concerns are discussed. With respect to jurisdiction, it becomes even more complicated when the adoption of the recommendations requires the agreement of more than one order of government.[320] As has been stated before, many of the AJI Report's recommendations called for joint federal, provincial, and Aboriginal action. In its chapter "Strategies For Action," there is a clear division of what needs to be done by each level of government. While Hamilton admits that it will be no simple task in creating an Aboriginal justice system, he is highly supportive of the idea as the *only* solution. Successful change will only occur when both Aboriginal communities and the governments work together he argues.

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[318] Hamilton @ 85.

[319] Jurisdictional concerns refer 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.

[320] One very huge complication is which order of government, federal or provincial, should cover the costs of a parallel justice system.

One significant factor that must be considered in assessing the feasibility of a separate justice system in Hamilton's book, which is also the major recommendation of the AJI Report, is costs. Hamilton indicated that costs in his work for the AJI Report were not worked out because it was too lengthy a study to sort through. Hamilton did, however, stress that "until you know what the governments are willing to do, there is no need to work out the costs."[321] Hamilton was of the opinion that some changes could have been implemented without a lot of expenditure which still haven't been acted on. Hamilton's co-chair to the AJI Report, Judge C.M. Sinclair made an exceptional point noting that "we estimated that the costs of doing nothing was higher."[322] That point is well supported when we look at the duration and seriousness of the problem. In the AJI Report the Commissioners noted that "it should also be clear that we view some of our recommendations ultimately as cost-saving measures. Many of them address ways to avoid the continued incarceration of Aboriginal people, a practice which constitutes the single greatest drain on the already limited resources of the justice system."[323]

In Sam Stevens article, *"Native Self-Determination and Justice,"* Stevens who is an Aboriginal from Maniwaki reserve in Quebec sums up the idea well by stating "we cannot do a worse job than the present justice system is doing."[324] Of

[321] Interview with Honourable A.C. Hamilton [August 11 2004]
[322] Interview with Judge C.M. Sinclair [June 14 2004]
[323] AJI Report @ 672.
[324] Stevens, Sam (1997) Native Self-Determination an Justice in Morrison, Andrea P. & Cotler, Irwin Justice or Natives: Searching for Common Ground Montreal: McGill University Press @ 33.

course, the issue is not alleviating crime completely, instead, it is to allow the delivery of justice *by* Aboriginals *in* Aboriginal methods of crime control. Justice delivery in aboriginal settings, will differ radically from the dominant system. There will be problems in Aboriginal run justice systems, however, it will be through the process of trial and error that appropriate changes will be made similar to the way it is done in the existing system. Hamilton makes a worthy point where "it seems irrational for government to spend billions of dollars erecting and operating jails, while turning a blind eye to methods that would make those expenditures unnecessary."[325] The key part of Hamilton's sentence is 'blind eye.' Hamilton draws upon the experiences in the United States, Australia, and New Zealand where Aboriginal run justice systems not only exist, but are successful.

In an interview with the Hon. A.C. Hamilton, the disturbing question that troubles him after the AJI Report's recommendations is what it will take for the governments to take the necessary initiative in this matter. For Hamilton, the problem is that "the governments are not willing to make the change which is partly attributable to their *lack of interest* and partly to their *lack of belief* that changes could be implemented."[326] Instead of implementing recommendations, governments are 'watering down' the recommendations to mere recognition of

[325] Hamilton @ 313.
[326] Interview with Hon. A.C. Hamilton [August 11 2004]

the destructive issues that are destroying Aboriginal communities as shown at then end of the last chapter.

Hamilton believes all of the recommendations in the AJI Report are do-able. Some reasons for the AJI Report's unfortunate fate identified by Judge Sinclair, include: the shift in priorities towards fiscal responsibility where there was little recognition given for new spending or even changing/altering any existing spending patterns. Also, Sinclair noted that the RCAP which was released in 1996 had the impact of taking away the federal governments attention from what was going on in Manitoba.[327] That was in 1996. Almost a decade has passed and it seems as though the attention is still not where it needs to be.

Meaningful policy change requires leadership in government. After the NDP government took office in 1999, there was more leadership, commitment, and support because they identified more strongly than the PC government regarding Aboriginal issues. Both Paul Chartrand and Justice Minister Gordon Mackintosh have held a similar view. Chartrand supports the idea that "effective policy initiative occurs when someone in a key decision making role is dedicated to bring about change .... a champion for change, that's who we need."[328] In Manitoba, Chartrand argues that there is not one for the justice field. The most valuable point made by Chartrand is when he attempts to draw awareness to the fact that "there is no political benefit of dealing with Aboriginal

[327] Interview with Judge C.M. Sinclair [June 14 2004]
[328] Interview with Paul Chartrand [June 23 2004]

issues in governments because it simply won't keep you in power. Aboriginal issues are very low in a system of priority of government."[329] He carries on to indicate that the "levers of political power which include money, votes, public opinion, and resource of the power to implement budgets do not rest in the hands of Aboriginal peoples."[330]

Certainly, the lack of political will is a key factor in the fate of the two reports. The truth of the matter is that recommendations in the area of justice administration do not gain government support as quickly as we hope for. With reference to Aboriginal peoples, the issue gets even more complicated. Perhaps the government's response to the AJI and AJIC Reports has been too cautious. The lack of belief that change could be implemented and the lack of interest could be seen as cautionary measures. Nevertheless, it is of the writer's opinion that this caution is more than the aboriginal justice situation warrants.

Moving along, in a consultation paper prepared by Paul Thomas entitled, *"Making Aboriginal Issues Matter in the Government of Manitoba: Some Organizational and Procedural Options,"*[331] Thomas discusses ways in which Aboriginal peoples can receive serious attention in the decision-making steps taken by the government. Thomas outlines three[332] major sets of concerns and

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[329] Ibid.
[330] Ibid.
[331] Thomas, Paul (2000) Making Aboriginal Issues Matter in the Government of Manitoba: Some Organizational and Procedural Options , Consultation Paper prepared for the AJIC Report
[332] The three major sets of concerns include: 1) ensuring that issues affecting Aboriginal peoples achieve priority on the governmental agenda 2) ensuring coordination and integration of policies, programs, and

structures his former part of the paper on the key concepts of responsiveness[333] and coordination.[334] Thomas notes that "responsiveness is deemed to occur when there is a match between the declared policy preferences and needs of a particular population and the outputs (polices, programs, services, etc.) and the outcomes (the impacts of government activities in society) of government."[335] Thomas raises an interesting point in his paper. If there is merely a potential for influence, should the government be considered responsive? In our discussion above, if that is the case then the governments can be seen to have been responsive indeed. The next question, however, is whether responsiveness has been 'enough' in the situation of Aboriginal justice. Based on the findings thus far, it would be hard to agree.

More than just one level of government must do their share of the work in regards to Aboriginal policy making. Thomas states that "many priority areas of government require the design and implementation of complex intervention strategies that involve more than one level of government, several departments, and even organizations from outside the government."[336] Justice Minister

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services affecting Aboriginal peoples and 3) ensuring policies and programs reflect an adequate understanding of the values, special circumstances, needs and priorities of Aboriginal communities.

[333] Refers to the inclination and the capacity of governments at both the political and administrative levels to recognize and reflect in their actions the wishes and needs of the public at large and of those segments of the public who are most directly affected by particular initiatives and actions.

[334] Coordination is both a process and a desired outcome. It involves interactions in which two or more individuals/institutions take one another into account for the purpose of bringing their decisions/activities into a supportive relationship. Coordination as an outcome refers to a situation in which policies, programs, activities of government are characterized by minimal redundancy, incoherence, inconsistency and gaps.

[335] Thomas @ 5.

[336] Ibid @ 10.

Mackintosh in consensus adds "fundamental and significant change can come from joint cooperation from the governments and Aboriginal organizations. Departments other than justice are also instrumental in furthering the hopes of Aboriginal peoples."[337] This draws upon a major problem identified by Thomas with one of the key concepts of coordination. According to Thomas, coordination fails when no department is dealing with an issue, when two departments perform the same task, when policies/programs have differing goals and perspectives, and when clients are forced to find their way through this jurisdictional maze.[338] These concerns demonstrate that joint work from the various groups must have a primary agenda that all are working together to achieve. Overlap and jurisdictional issues can lead to poor levels of coordination in which the end result is that Aboriginal concerns are overlooked.

In terms of jurisdictional issues between the federal and provincial governments, the federal government accepts most of the responsibility for Aboriginal peoples living on reserves, but accepts no responsibility when they move to the city. The provincial governments have jurisdiction over the administration of justice but are reluctant to improvements for Aboriginal people unless the federal government will provide equal or greater financial support. The federal Parliament controls the Criminal Code, appoints judges at the upper levels of the court system, and runs the penitentiaries which house the most

[337] Interview with Justice Minister Gordon Mackintosh [June 20 2004]
[338] Thomas @ 11.

serious offenders. In combination with its primary responsibility for Aboriginal peoples, this means that agreement with Ottawa is crucial. Hamilton describes the situation in which "Aboriginal peoples are caught in the middle."[339]

Coming back, Thomas discusses how Aboriginal policy concerns do have a place on governmental agendas. "Most provincial governments have now created positions in cabinet and/or designated organizations to address Aboriginal concerns."[340] In Manitoba, Aboriginal and Northern Affairs is the department that is concerned with bringing about change that will affect the livelihood of Aboriginal peoples. The minister is supported by a small Aboriginal Affairs Secretariat and two members of Manitoba's cabinet. Such a department "confers symbolic legitimacy of the group, provides them with the leverage in pressing their claims and represents a focal point for them to channel their representations to government."[341]

Thomas carries on to reveal that mindful of the changes that are still unmet for Aboriginal peoples, the Government of Manitoba "has the led the way in terms of developing innovative policies and programs ... it has worked on a partnership basis with the federal government, the three leading provincial organizations, the private sector and local Aboriginal communities ..."[342] Thomas does acknowledge that the process and substance of government policy

[339] Hamilton @ 313.
[340] Thomas @ 16.
[341] Ibid.
[342] Ibid @ 17.

does still need improvements. He highlights the very valuable role played by the Aboriginal Affairs Secretariat in charge of promoting innovative policies/programs, advocating for the priority issues of Aboriginal peoples, and providing financial resources to support Aboriginal initiatives. Advocating on behalf of Aboriginal peoples, the Secretariat helps them frame and present issues to government and identifies the right locations and people with whom to place their demands.[343] In short, the Secretariat can be seen as a "helpful policy broker" as Thomas labels it.

While Manitoba has been the most responsive to Aboriginal issues in comparison to other Canadian provinces, the real issue of policy and program responses of the provincial government are still "up in the air." The truth of the matter as disclosed by Thomas is that "even though there are more numerous better organized and better financed Aboriginal organizations than in the past, there are still limits on the capacities of these organizations to participate on all levels of policy-making and program administration that have a bearing on the well-being of the peoples they represent."[344] Commitment, awareness, sensitivity, and new thinking must characterize the relationship between the governments and Aboriginal peoples. Changes to the structures and processes of governmental departments are concerns also raised by Thomas. As a result,

[343] Ibid @ 20.
[344] Ibid @ 22.

Thomas spends the rest of his paper assessing options that could be beneficial and the shortcomings of the existing structures and processes.

Thomas concludes his paper by pointing out that the choice of options he lists, depends on "a judgment about the strength of political will to deal with the issues, commitment to preserve in the face of controversy and the skills needed to mobilize public support for the actions involved."[345] Thomas indicates that successful government requires sound policy ideas, capable political and administrative leadership, and efficient/effective administrative systems. Similar to what Chartrand stated earlier, Thomas agrees that in order for Aboriginal issues to work within the Manitoba government, political support is required at the highest level. To sum up, Thomas has presented an insight into the workings of the governments where efficient planning and commitment over a reasonable period of time regarding Aboriginal issues is needed. In addition, understanding and sensitivity to Aboriginal peoples, along with effective cooperation from provincial governments, and increased participation from Aboriginal organizations during all stages of the policy cycle all the way through to implementation are needed.

One final area of concern that this chapter set out to answer was the status of justice reform in Manitoba. As can be seen throughout this thesis, the problem of overrepresentation within Manitoba's justice system has been

[345] Ibid @ 30.

ineffectively treated. Many of the key recommendations that have been made repeatedly in various commissions, inquiries, and reports including the AJI and AJIC Reports symbolize the failure of implementation. While there is strong evidence to support the fact that the establishment of Aboriginal justice systems is rapidly becoming the key solution of criminal justice reform policy, it is clear that there is still considerable opposition to this direction. Following the release of the AJI Report, a Winnipeg Free Press editorial described the proposal for Aboriginal courts as "ambitious," suggesting that "there is little 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."[346] 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.[347] As one commentator has observed, "the notion of scores of Indian bands across the country enacting their own criminal laws stirs visions of anarchy in a lot of legal brains."[348]

Many feel that fundamental issues that were also discussed in Hamilton's book, have been inadequately addressed. In light of this opposition, the failure of both levels of governments to act quickly on the recommendations is not

[346] Editorial, A Proposal for Reform [Winnipeg Free Press] (August 30, 1991) @ 6
[347] Editorial, Native Justice Inquiries [The Globe and Mail] (February 3, 1992) @ A18.
[348] Dafoe, J. Manitoba's Inquiry into Aboriginal Justice Merits Vastly More than Wariness [The Globe and Mail] (September 7, 1991) @ D2.

surprising. What is even more problematic is the Manitoba governments seemingly negative attitude towards both the AJI and AJIC Reports 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, Roundtable, or an actual Aboriginal justice system, as possible solutions to the overrepresentation of Aboriginal peoples in the system, the government has rejected a valuable opportunity to confirm a new direction in justice administration. Indeed, one commentator described the government's response as exhibiting "the unfortunate air of foot-dragging which has dogged Manitoba history."[349]

According to Emma LaRocque in her article entitled, *"Re-examining Culturally Appropriate Models in Criminal Justice Applications,"* Larocque argues in opposition to the use of Aboriginal 'traditions' in justice issues. In the favoured approach of establishing Aboriginal justice systems, Larocque argues that while such a system is a solution "but it is possible to construct new models that accommodate, real multidimensional human lives. Traditions can be and must be used in a contemporary context in such a way as to bring meaning to our young people, justice and equality to women, and safety and human rights

[349] Sheppard, R. Native Justice: Let's Take the Plunge [The Globe and Mail] (January 30, 1992) @ A17.

protection to everyone."[350] In short, Larocque is of the view that an Aboriginal controlled and run justice system must protect the human rights of all individuals and to use 'tradition' with some integrity.

It would be unrealistic to expect immediate adoption of all, or many of the recommendations in the two reports for justice reform. The experiences of countless inquiries and reports during the last thirty years has taught this lesson well. What would be a favoured approach, however, would include moving beyond the recognition level to at least a level of consideration. While it is true that the failure to adopt recommendations does not mean outright rejection, it is of the writer's opinion that serious consideration would give meaning and substance to the reports. Put simply, the governments need to create wise policy in which Aboriginal justice matters are dealt in harmony with the AJI and AJIC recommendations. Both reports do provide legitimate, well-grounded recommendations which are warranted, however, the extent to which they both expect different levels of governments to take certain courses of action, is slightly problematic. Governments need to employ "responsiveness, accountability, economy, efficiency, effectiveness, due process and fairness, integrity and probity, representativeness, coherence, coordination and consistency, and

[350] Larocque, Emma (1997) Re-examining Culturally Appropriate Models in Criminal Justice Applications in Asch, Michael, ed. Aboriginal and Treaty Rights In Canada Vancouver: UBC Press @ 91-92.

flexibility and stability."[351] Whether these values take prominence amongst government officials at both levels is questionable.

On a lighter note, both reports have made a valuable difference in the development of Aboriginal policy. They both depart from conventional strategies of justice reform that focussed on reforms such as increasing the number of Aboriginal people working within the system, cultural sensitivity training for non-Aboriginal staff in the system, and the use of more community based alternatives to incarceration are examples that have been routinely advanced. These types of reform suggestions were also initiatives suggested in the AJI and AJIC Reports, but these two reports have looked for answers beyond the justice system. The AJI Report offers a trend in favour of aligning justice reform policy with Aboriginal self-government aspirations. The AJIC Report follows in agreement with most, if not all, of its predecessor's recommendations.

Aboriginal justice reform in Manitoba requires necessary and major advances that have been long overdue. An endorsement of the recommendations contained in both the AJI and AJIC Reports as crucial reform strategies would be the first place to begin. The extent to which Aboriginal justice reform will enter this new phase will definitely depend on the respect that is allotted to the broader autonomy aspirations of Aboriginal peoples. The AJI Report was the only report tabled that listed recommendations based on the

[351] Thomas @ 3.

explicit recognition that there is a fundamental relationship between the undeniable needs for reforms to the way justice is administered in Manitoba, and the desirability of achieving meaningful Aboriginal self-government. It is a merging of these two key developments which signals the possibility of a new era for Aboriginal justice reform policy. The AJI 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 have the right to adopt any federal or provincial law and to apply or enforce that as well."[352] The use of Aboriginal dispute resolution methods, of which a comprehensive listing is beyond the scope of this thesis, would be perhaps the most important interface between the two systems.

This chapter has hoped to consider some of the difficulties associated with following through on the recommendations of the two reports. It discussed the critical role played by the government in terms of the slow progress that has been made. In allowing the justice pendulum to swing towards the Aboriginal side, the entrenchment and facilitation of an Aboriginal justice system is presented. What is pivotal in the move towards a positive direction for Aboriginal justice reform is the need for a revitalization of the governmental agenda. This thesis is in no way suggesting that the eventual resolution of Aboriginal justice is only through the doorway of Aboriginal self-government. It

[352] AJI Report @ 323.

is, however, presenting this thesis as a 'warning' about the challenges that Aboriginal peoples are facing in the area of criminal justice, and that something seriously needs to be done.[353] The recognition of Aboriginal autonomy through the recognition of Aboriginal self-government is one possible avenue of change that this thesis accepts. From this recognition, many areas in the lives of Aboriginal peoples will get returned the social order that their communities are without. Crime and criminal behaviour should not be examined in isolation, but something that should be examined as symptomatic of other problems.

It is the hope of this thesis that before the fourth decade of debate and reports, change will materialize. There is one final question that stems from that latter point. Where will Aboriginal justice be a decade from now? Judge Sinclair interestingly enough stated that "while the governments don't give it high priority, academics sure do. Ten years ago no one was doing a MA thesis on this topic."[354] All individuals agreed that in another decade Aboriginal justice will hoped to have reached its final destination, whatever that might be.

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[353] This warning is further exemplified by the police shooting and death of Mathew Dumas, 18 on February 01, 2005. A month earlier, on January 04, 2005, an RCMP officer shot and killed Dennis St. Paul in Norway House Cree Nation Reserve. Both cases in Manitoba are symbolic of the overall apartheid of the Canadian policing system and Aboriginal peoples. Aboriginal communities and leaders have not learned much from the police, specifically after J.J. Harper's death in 1988 also at the hands of the police.

[354] Interview with Judge C.M. Sinclair [June 14 2004]

Conclusion

Aboriginal peoples are tired of being studied and so too should governments and academics. Both governments and academics have formed a group with a common purpose and negotiated what I believe is a balance. A balance that is supposed to take knowledge from Aboriginal communities and return benefits to those communities. While academics have gone beyond that job description, governments have hardly even come close. Enough research has been conducted and an abundance of recommendations and proposals have been suggested. We have been getting few answers and are ending up asking more questions. The clock cannot be turned back all the way to chapter 2 where history began to inflict atrocities of a high magnitude on Aboriginal peoples that are shockingly yet shamefully unraveled in chapter 3. Nor is it possible to travel back to the time in which the AJI or AJIC Reports were complete and had sufficient opportunity to bring about change. Since this deadlock has been significantly caused and perpetuated by the deficiencies in the actions of governments, this thesis has aimed at identifying the root causes of those deficiencies in chapter 6.

Harvey Bostrom from Department of Aboriginal and Northern Affairs who acted in an advisory capacity as the Executive Director for the AJIC Report, placed emphasis on the fact that "we cannot rely on judges and lawyers for they act after a wrong happens. We need collaborative efforts from federal and provincial governments and we need them quick."[355] Bostrom went on to add that "Collaboration, mutual education, and acting on results are the key elements that are necessary for change in Aboriginal justice reform policy."[356] In short, Bostrom felt that if the findings of the AJI and AJIC Reports are to be fully recognized, then their incorporation in the vessels of change need a 'jump start.'

One observation made as writer is the following. If we look at the work of the AJI Report for example, there were numerous hearings held in Aboriginal communities where the Commissioners wanted to hear directly from Aboriginal peoples. This process of the Commission's work belonged to phase one. In phase two, the Commission's focus shifted from engaging Aboriginal voices to engaging the language of public policy. One would have expected that as the Commission consolidated the information gathered, Aboriginal voices would have disappeared. To the fortune of Aboriginal peoples, that was not the case. The AJI Report is full of examples utilized by the Commissioners to detail what exactly Aboriginal communities identified as troublesome in each area of the

[355] Interview with Harvey Bostrom [June 14 2004]
[356] Ibid.

justice system. In outlining the concerns of Aboriginal peoples, the AJI Report used those concerns/voices as the basis of their recommendations. Since the AJIC Report relied heavily on the recommendations of the AJI Report and were in agreement with most of them, this report can also be seen to actively make use of Aboriginal voices in policy making.

Another observation has to do with a major downfall of the AJIC Report. As much as the AJIC Report found the fact-finding and recommendations of the AJI Report accurate, Hamilton sadly informed me that "the AJIC Report completely ignored our major recommendation of a separate Aboriginal court system."[357] In one light, the AJIC Report seems to work in favour of Aboriginal communities. Its list of cost-effective and do-able recommendations along with its mandate to develop methods that could result in the implementation of the AJI Report's recommendations were signs of hope for Aboriginal peoples. When looked at in another light, the AJIC Report's disregard for the main recommendation of the AJI Report seemingly results in it slowing the Aboriginal justice reform process down. "The political leaders, therefore, must be entreated to slow down the political process, ensure that the needed research is carried out and then ... use the results with wisdom."[358] Needless to say, the AJIC Report did steer in the direction of much overdue change that we must recognize it for.

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[357] Interview with A.C. Hamilton [August 11 2004]

[358] Neilsen, Marianne O. (1994) Criminal Justice and Native Government in Silverman, Robert A. & Neilsen, Marianne O. Aboriginal Peoples and Canadian Criminal Justice Vancouver: Butterworths @ 255.

Two things are yet needed in order for Aboriginal justice reform to reach levels of achievement. *As a matter of justice,* the federal and provincial governments need to realize that Aboriginal peoples disproportionate overrepresentation within the justice system is not going to solve itself. Second, *as a matter justice,* both levels of government need to facilitate a process of empowering Aboriginal communities with control so they can be self-sufficient in delivering justice to their own communities. Since the advent of these two reports, and before them for that matter, Aboriginal peoples have been left going through bureaucratic channels in which they face uncompromising resistance. Justice demands certain courses of action to be taken by the government in so far as improved Aboriginal justice is a key element of concern.

Aboriginal justice reform is essential in achieving a new relationship between Aboriginal peoples and the government that Manitoba has been trying to work on for a while now. In Alan Cairns' words, "neither our togetherness nor our separateness can be escaped from. "[359] Cairns insists that words and symbols do matter, the right language can draw us together, while a poor choice of words can push us apart.[360] The words utilized throughout the two reports equate with his definition of 'right language.' The words of the governments used in reaction to the AJI Report were poor as shown in chapter four. Poor was

[359] Cairns, Alan C. (2000) Citizens Plus: Aboriginal Peoples and the Canadian State Vancouver: UBC Press @ 9.
[360] Ibid.

also their choice of words in the Progress Report of 2004 as outlined in chapter five. Poor words have created reactions of hostility and insult amongst the Aboriginal peoples of Manitoba. Much discipline and sacrifices must be made by Aboriginal peoples. However, if they continue to persevere in this quest, they know with their hearts that the goal is attainable. The reward is well worth the sacrifices made along the way. They have been seeking the reward for three decades and still anticipate and desire a process of justice.

The two reports, the AJI and AJIC Reports have had ground-breaking contributions in the area of Aboriginal justice specifically in Manitoba, and generally across Canada. Both have increased the body of knowledge in this field. The Government of Manitoba, Government of Canada, and Aboriginal organizations must all come together for the recommendations to foster implementation. 'Champions of change' must be at both the political and community levels. It is important that although the work of the reports is complete, the lines of communication that were established not be lost. With that, the benefits that should be derived from the immense levels of research of both reports can be integrated into policy and practice. When this will be the case is questionable. What is not questionable is the continuance of countless numbers of Aboriginal peoples entangled within the criminal justice system. As stated at the outset of this research venture, this work has hoped to not only identify the situation of Aboriginal justice in Manitoba, it has also attempted to

make a critical warning. This warning has filled close to 200 pages of this work and hundreds of thousands of pages of inquires, reports, and task forces. What will we do when we are out of space? The limits of tolerance have already been exceeded. The final words of the AJI Report were "to fail to take every step needed to redress this lingering injustice will continue to bring tragedy and suffering to Aboriginal people, and to blacken our country's name throughout the world."[361] A few final sentiments that I believe well describe the continuing crisis:

"Justice delayed, is justice denied."

- William Gladstone

[361] AJI Report @ 674.

Interview Script

I would like to begin by thanking you for taking your time out of such a busy schedule, to sit down and aid my thesis work. Just to refresh your memory, my thesis work as a graduate student in the Political Studies Department is on the policy impact of the Report of the Aboriginal Justice Inquiry and the Report of the Aboriginal Justice Implementation Committee.

In offering an analysis of the context, content, and the impact of these two reports, the thesis seeks to answer the following main research question: "What factors have contributed to the fate of the reports in terms of their acceptance or lack of acceptance by the Government of Manitoba?"

If I have your permission, I would like to tape record this interview so I can go over the information at a later time. So you are aware, I will be making transcripts from the tape recordings which I will provide for you once complete.

I will be asking you a series of open-ended questions, and if necessary, may ask you to repeat yourself at times. Upon completion of my list of questions, I may find it crucial to ask you a few follow-up questions based upon some of the answers you provide during the course of the interview.

During the writing stages in my thesis work, any information that I will retrieve from you today will not be quoted within the pages of my thesis until I first notify you and have your consent to do so. So, any direct quotations utilized within the thesis will first be approved by yourself.

I would also like to make you aware of the fact that once my thesis is complete and successfully defended, it will be available in the University of Manitoba Library as a public document. I will provide you with a copy of the abstract from my thesis once my thesis is complete.

Lastly, I would like to advise you of the fact that you are free to withdraw from the study at anytime and/or refrain from answering any questions you prefer to omit without consequence.

Do you have any questions before we begin?

Close of interview – Do you care to raise any areas that you believe I should have that would benefit my thesis work

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Interview Request

Dear _____:

I am writing to introduce Ms. Rosie Parmar, a graduate student in Political Studies who is preparing a Masters thesis on the policy impact of the Report of the Aboriginal Justice Inquiry and the Report of the Aboriginal Justice Implementation Committee.

Ms. Parmar has read extensively on the issues of aboriginal justice. Her thesis proposal was reviewed and approved by the Graduate Studies Committee of the Department of Political Studies. Also, the Joint-Faculty Research Ethics Board has approved of the research study.

To complement her reading of the official reports on the topic, Ms. Parmar needs to conduct a series of interviews with individuals who have first hand knowledge of the issues and the processes that were involved with the two inquiries. Your agreement to consent to an interview would broaden and deepen her knowledge of the topic.

Ms. Parmar will be calling you within the next few weeks to determine your availability for an interview lasting approximately 45 to 60 minutes. With your permission the interview will be tape recorded.

Nothing quoted directly from the interview will be attributed to you without your permission. Once the thesis produced from this study has been successfully defended in an exam, it will be deposited in the University of Manitoba Library which means that it will become a public document. I can assure that all the material gathered for the thesis will be analyzed in a professional and objective manner.

I encourage you to accept this invitation to participate in this study which promises to have both academic and practical value. I hope that you are able to agree to an interview with Ms. Parmar. If you have any questions, please feel free to contact me at 474-8116. If you have any complaints that stem from the interview process, please feel free to contact the Human Ethics Secretariat at 474-7122. Thank you for considering this request.

Sincerely,

Paul G. Thomas
Duff Roblin Professor of Government

Aboriginal and Treaty Rights

The Evolving Law on Aboriginal and Treaty Rights

- The federal and provincial governments each issue a public statement within 180 days of the release of our findings describing how each government intends to meet its fiduciary obligation to the Aboriginal people of this province.

Land Rights

- Current population figures be used for entitlement in conjunction with the formula set out in each treaty to determine the precise amount of land that is owed to each First Nation.
- The government of Manitoba reinstitute a moratorium on the disposal of Crown land in the Province and that no Crown land be made available to third parties by grant or lease until all First Nation land selection has been made or without the consent of the treaty land entitlement bands in the region.
- A Treaty Land Entitlement Commission be created for Manitoba consisting of five members, namely, one provincial nominee, one federal nominee, two nominees from the Assembly of Manitoba Chiefs, and a neutral chairperson selected by the other members of the Commission. This Commission should be empowered to render binding decisions on any disputes that may arise over:

- The exact population of an entitlement band.
- The amount of land originally set aside for the reserve that is to be deducted from the current treaty entitlement.
- The selection of Crown lands to fulfil the entitlement obligation.
- The location of boundaries.
- The amount of financial compensation for the delay.

- The Treaty Land Entitlement Commission be created by complementary federal and provincial legislation with the endorsement of the Assembly of Manitoba Chiefs. We further recommend that this legislation be drafted jointly by both governments in conjunction with the treaty land entitlement First Nations
- The governments of Manitoba and Canada recognize the Northern Flood Agreement as a treaty. The two governments should honour and properly implement the NFA's terms.

Appropriate measures be taken to ensure that equivalent rights are granted by agreement to the other Aboriginal people affected by the flooding.

- A moratorium be placed on major natural resource development projects unless, and until, agreements or treaties are reached with the Aboriginal people in the region who might be negatively affected by such projects in order to respect their Aboriginal or treaty rights in the territory concerned.
- The Federal Specific Claims Branch and the federal claims policy be fundamentally changed so that the Government of Canada establish a claims negotiation office that is independent of existing ministries and has a clear mandate to negotiate and settle claims, and has senior officials who have been appointed from outside the government.
- An independent claims tribunal be created. The tribunal should have full authority to hear and adjudicate on the validity of claims and on compensation questions where the parties cannot reach agreement. The tribunal should be established by legislation with power to create its own rules of procedure, be free from the strict laws of evidence and be able to impose deadlines on the Crown for responding to claims submitted.

The claims tribunal be a national board but with a sufficient number of members, half of whom should be nominees of First Nations, so that it can sit in panels of three to hear a variety of claims simultaneously, if necessary.

Aboriginal people be participants in the designing of the tribunal's precise mandate, drafting the necessary legislation and in selecting the members of the tribunal. The legislation should require that the tribunal, the federal claims policy and the process, be subject to an independent review every five years with the evaluation report to be made to Parliament and Aboriginal groups.

This tribunal be adequately funded and have its own research staff so as to be able to maintain sufficient distance from the federal government.

- The provincial government develop a policy that respects the desire of Aboriginal people to retain a role in the management and conservation of their traditional territory.

The federal government participate fully in the settlement of land claims through the tribunal we have recommended.

The governments of Manitoba and Canada refrain from requiring Aboriginal groups to consent to extinguish Aboriginal rights when entering into land claims agreements.

The independent claims tribunal have authority to resolve specific claims and comprehensive claims. The tribunal would have three basic functions:

- To decide disputes concerning the validity of a claim or its precise boundaries.
- To exercise supervisory authority over the negotiation process.

- If negotiations break down, to hold hearings to resolve the matter and to make a binding decision.

Natural Resources

- The federal government amend the Fisheries Act and the Migratory Birds Convention Act to clarify that Aboriginal and treaty rights prevail in cases of conflict.
- The Province of Manitoba recognize the harvesting of wild rice as an Aboriginal right.

The Province, if it wishes to exercise any influence over the regulation of this resource off-reserves, negotiate co-management agreements with the Aboriginal peoples concerned.

- The Province of Manitoba recognize Aboriginal and treaty rights to harvest timber resources.

The Province ensure that the exercise of wildlife harvesting rights is not infringed by timber management practices.

The provincial government pursue the development of co-management agreements with the First Nations and Metis peoples regarding timber resources off-reserve in the Aboriginal people's traditional territory.

- Existing Aboriginal rights to water and beds of waters be recognized by the federal and provincial governments.
- In keeping with provincial fiduciary obligations and to assist in the economic advancement of First Nations, the Province of Manitoba formally renounce its half interest in minerals within Indian reserves.

First Nations have the right to use and control totally all mines and minerals on reserve lands and to receive 100% of the benefits and income therefrom.

Federal government begin a process of negotiations with the First Nations of Manitoba to transfer title to the reserve lands into the names of the various First Nations.

The Special Position of the Metis

- The federal and provincial governments, by resolution of their respective legislative assemblies, specifically acknowledge and recognize the Metis people as coming within the meaning of section 91(24) of the Constitution Act, 1867 and that the Government of Canada accept that it has primary constitutional responsibility to seek to fulfil this mandate through devising appropriate initiatives in conjunction with the Metis people in Canada.
- The Manitoba Aboriginal Justice Commission, which is proposed and discussed in detail elsewhere in this report, be mandated by the Manitoba Metis

Federation, and the provincial and federal governments to define and designate the boundaries for "Metis communities" for program delivery, local government and administration of justice purposes.

- The issue of responsibility for off-reserve status Indian people be resolved by providing that, as a primary federal responsibility, financial services for them should come ultimately from the federal government, and that short term interim measures recoverable from the federal government should be provided by the Province.

The Indian Act

The Indian Act be amended to eliminate all continuing forms of discrimination, regarding the children of Indian women who regain their status under Bill C-31.

The Indian Act be amended to remove the two generation rule.

Any person designated as a full member of a recognized First Nation in Canada be accepted by the federal government as qualifying as a registered Indian for the purposes of federal legislation, funding formula and programs.

As a temporary measure, the Indian Act be amended to remove the authority of the Minister to veto by-laws enacted by First Nations pursuant to the Indian Act.

That section 81 be amended to increase the lawmaking powers of band councils by expressly empowering them to replace provincial legislation that may apply on reserves currently as a result of section 88 of the Act. The revised law-making jurisdiction should expressly include the ability to enact a comprehensive civil and criminal code.

Any amendments to the Indian Act be developed in accordance with certain key principles. They include recognition that:

- The Act is to be changed only in ways that enhance Indian self-determination.
- The amendments should have the support of First Nations.
- The legislation should be prepared in consultation with representatives selected by Indian people.
- The pace of change should be in accordance with the wishes of the people concerned.

- The federal government accept its fiduciary obligations in relation to the increase in First Nations membership generated by Bill C-31 and assume the expenses for First Nations resulting from this increase.

Statutes in Conflict with Treaty and Aboriginal Rights

- The government of Manitoba invite the Assembly of Manitoba Chiefs and the Manitoba Metis Federation to designate representatives to work with senior

provincial officials to review all relevant legislation that may conflict with Aboriginal and treaty rights. This review should identify specific areas of conflict and propose concrete solutions and statutory amendments. The Manitoba Aboriginal Justice Commission that we propose should be utilized to assist in this process if any of the parties wish.

- The federal and provincial governments establish a process to review all proposed legislation for its potential effect on the rights of Aboriginal peoples.
- The Interpretation Acts of Manitoba and Canada be amended to provide that all legislation be interpreted subject to Aboriginal and treaty rights.

Aboriginal Justice Systems

The Argument for Aboriginal Justice Systems

- The federal and provincial governments recognize the right of Aboriginal people to establish their own justice systems as part of their inherent right to self-government.

The federal and provincial governments assist Aboriginal people in the establishment of Aboriginal justice systems in their communities in a manner that best conforms to the traditions, cultures and wishes of those communities, and the rights of their people.

- Federal, provincial and Aboriginal First Nations governments commit themselves to the establishment of tribal courts in the near future as a first step toward the establishment of a fully functioning, Aboriginally controlled justice system which includes (but need not necessarily be limited to):

    - A policing service.
    - A prosecution branch.
    - A legal aid system.
    - A court system that includes:

i) a youth court system;

ii) a family court system;

iii)a criminal court system;

iv)a civil court system;

an appellate court system.

    - A probation service including a system of monitoring community service orders.
    - A mediation/counselling service.
    - A fine collection and maintenance enforcement system.
    - A community-based correctional system.

- A parole system.

The federal and provincial governments begin the process of establishing Aboriginal justice systems by enacting appropriate legislation.

At the same time as legislation to begin the process of establishing Aboriginal justice systems is enacted, the federal and provincial governments acknowledge, by resolution of their respective legislative bodies, that Aboriginal justice systems must be protected constitutionally from federal and provincial legislative incursions and that such systems will ultimately be recognized as an aspect of the right of Aboriginal people to self-government and will not be dependent solely upon federal or provincial legislation for their existence.

Aboriginal governments enact their own constitutions setting out, among other things, the principle of the separation of the judicial from the executive and legislative arms of each Aboriginal government so as to protect Aboriginal justice systems from interference and to provide security for their independence.

Creating Aboriginal Justice Systems

- Wherever possible, Aboriginal justice systems look toward the development of culturally appropriate rules and processes which have as their aim the establishment of a less formalistic approach to courtroom procedures so that Aboriginal litigants are able to gain a degree of comfort from the proceedings while not compromising the rights of an accused charged with a criminal offence.
- Where Indian and Metis communities are located side by side, the leaders of the two communities give serious consideration to establishing a jointly managed Aboriginal justice system which serves both communities.
- In establishing Aboriginal justice systems, the Aboriginal people of Manitoba consider using a regional model patterned on the Northwest Intertribal Court System in the state of Washington.
- Regional Aboriginal justice systems establish an independent and separate appeal process which makes use of either separate appeal judges or other judges of the Aboriginal system as judges of appeal.
- 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 system in place within that community.
- 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.

Aboriginal traditions and customs be the basis upon which Aboriginal laws and Aboriginal justice systems are built.

- The jurisdiction of Aboriginal courts within Aboriginal lands be clear and paramount, and that in appropriate cases Aboriginal courts be recognized as having jurisdiction over some matters arising in places other than the Aboriginal community, such as:

a) Child welfare cases in which the domicile of the child is the Aboriginal community over which the court has jurisdiction.

b) Cases in which a member of an Aboriginal community breaches the laws of his or her community, such as where a First Nation member hunts in a manner that is contrary to a First Nation law or regulation enacted by the government of that First Nation.

c) Cases in which an individual has breached a law of the Aboriginal community and has left the community to avoid detection or responsibility.

d) Civil matters in which the parties have agreed to submit the matter to an Aboriginal court for determination.

- The Manitoba Metis Federation and the government of Manitoba establish a forum of elected and technical representatives with a mandate to identify those Metis communities in the province where Metis justice systems can be established.

Metis communities that are identified as such by agreement of the Manitoba Metis Federation and the government of Manitoba be defined geographically through negotiations between the government of Manitoba and the Metis people of each community for the purpose of establishing a Metis justice system.

The presence of non-Aboriginal people within a Metis community should not prevent the community from being declared a Metis community, and the legitimate concerns of that minority should be respected.

If, and to the extent, that juries are a part of Aboriginal justice systems, jury selection processes be implemented which permit non-Aboriginal persons to sit on juries, provided they comply with appropriate residential criteria established by the community.

- Aboriginal judges be exempt from all civil liability in reference to actions or omissions while in the exercise of their judicial capacity.

Through appropriate Aboriginal legislation an Aboriginal Judicial Council be established to which any person can complain of judicial misconduct on the part of an Aboriginal judicial officer.

The same principles of judicial conduct be applied to Aboriginal judges as apply to other members of the judiciary

The Charter of Rights and Freedoms

- First Nation governments draft a charter of rights and freedoms, which reflects Aboriginal customs and values.

Court Reform

Changes to Court Structure and Administration

- The Manitoba Court of Queen's Bench and the Provincial Court of Manitoba be abolished and be replaced by a new court to be known as the Manitoba Trial Court. This court should have the combined jurisdiction of the courts it replaces.
- Jury trials be held in the communities where the offence was committed.

The Manitoba Trial Court have a General Division and a Family Division.

The Family Division be responsible for young offender, child welfare and family matters as well as for cases involving intrafamily physical and sexual abuse; and that the General Division be responsible for all civil matters and those criminal matters not dealt with by the Family Division.

All judges appointed to the Manitoba Court of Appeal come from the Manitoba Trial Court.

- Proper court facilities be established in Aboriginal communities that will be available for court purposes as required.
- Hearings in the Family Division of the Manitoba Trial Court be held separately from criminal proceedings.
- Unless they are travelling in commercial airplanes, circuit court judges not travel with lawyers or police to circuit court sittings.
- Judges insist that whenever an Aboriginal person is entering a guilty plea, the following procedure be followed:
    - The charge is read in full to the accused.
    - The judge confirms that the accused understands the charge by asking the accused to explain it.
    - The accused, and not counsel, enters a plea.
    - The judge confirms that the accused agrees with the guilty plea and that it is being given freely and voluntarily with a full appreciation of the nature and consequences of the plea.

Eliminating Delay

- Special court sittings be organized to address all cases outside the city of Winnipeg which have been outstanding for more than six months. If necessary, additional staff should be hired until all these cases have been disposed of.

- Circuit court sittings be scheduled in such a manner as to allow all the matters on a docket to be dealt with in one court visit. This may entail scheduling two-day visits to many communities.
- Lawyers attend in circuit court communities at least one day before court to ensure that cases can be properly prepared.

Legal Aid duty counsel be authorized to grant interim approval of all Legal Aid applications. If, upon review, the applicant does not qualify for Legal Aid, the approval could be cancelled.

Legal Aid application procedures be amended to allow accused individuals who live in communities where there is no Legal Aid office to apply by telephone. Where no Legal Aid staff are available, Aboriginal court workers be authorized to accept and forward Legal Aid applications.

Where no Legal Aid staff are available, Aboriginal court workers be authorized to accept and forward Legal Aid applications.

- Preliminary inquiries be abolished and replaced with a discovery and pre-trial process.
- The judiciary establish timelines and procedures that will ensure that a case gets to trial within a reasonable time.
- Manitoba courts implement a comprehensive case flow management program.
- The Criminal Code be amended to allow accused to appear by counsel or agent for all preliminary purposes.
- The Criminal Code be amended to provide that once an information has been laid the court does not lose jurisdiction merely because the accused is not present.

Pre-Trial Detention

- Bail hearings be conducted in the community where the offence was committed.

The Manitoba government establish a bail supervision program to provide pre-trial supervision to accused persons as an alternative to detention.

Inappropriate bail conditions, such as requiring cash deposits or financial guarantees from low-income people, that militate against Aboriginal people obtaining bail no longer be applied.

Personnel

- The provincial Justice department establish minimum and optimum targets for the employment of Aboriginal people at all levels. The minimum target must be no less than the percentage of Aboriginal people in Manitoba; the optimum target is to be equal to the percentage of Aboriginal people served by the department and its agencies.

Legal Aid Manitoba establish minimum and optimum targets for the employment of Aboriginal people at all levels. The minimum target must be no less than the percentage of Aboriginal people in Manitoba; the optimum target is to be equal to the percentage of Aboriginal people served by Legal Aid Manitoba.

- Legal Aid Manitoba provide representation in all criminal matters in which the accused meets the Legal Aid income criteria.
- The Justice department provide regular workshops to Crown attorneys on the range and effectiveness of the various community services which are available in Manitoba.
- The position of court administrator with magistrate's powers be created in each Aboriginal community served by a circuit court.

The Province of Manitoba establish a formal Court Interpreter's Program with staff trained in the interpretation of court proceedings, including legal terminology, from English into the Aboriginal languages of Manitoba. As part of this program, local court interpreters should be engaged in each Aboriginal community served by circuit courts.

The Province of Manitoba, in consultation with the Manitoba Association for Native Languages, establish a Legal Interpretation Project to develop appropriate Aboriginal translations of English legal terms.

- The Aboriginal Court Worker program have an Aboriginal board of directors and take over the functions and staff of the existing court communicator and paralegal programs. Court workers should be available in every Aboriginal community serviced by the circuit courts.
- Peacemakers be appointed in each Aboriginal community in Manitoba. They should be appointed through procedures which are agreed to by the community.

Peacemakers, recommended by recognized local Aboriginal groups, be appointed in Winnipeg and in other urban centres throughout the province.

Juries

How Aboriginal People Are Excluded from Juries

- When a sheriff grants an exemption from jury duty, the person who is exempted be replaced with someone from the same community.

Every person called for jury duty, who is not granted an exemption, be required to attend, and that summonses be enforced even when sufficient jurors have responded.

- The Criminal Code of Canada be amended so that the only challenges to prospective jurors be challenges for cause, and that both stand-asides and peremptory challenges be eliminated.
- The Criminal Code be amended so that rulings on challenges for cause be made by the presiding judge

Local Jury Trials

- Jurors be drawn from within 40 kilometres of the community in which a trial is to be held.

In the event that there is a need to look elsewhere for jurors, the jury be selected from a community as similar as possible demographically and culturally to the community where the offence took place.

In urban areas, juries be drawn from specific neighbourhoods of the town or city in which victims and accused reside.

The Manitoba Jury Act be amended to permit an Aboriginal person who does not speak and understand either French or English but who speaks and understands an Aboriginal language, and is otherwise qualified, to serve as a juror in any action or proceeding that may be tried by a jury, and that, in such cases, translation services be provided.

Alternatives to Incarceration

The Need for a New Approach to Sentencing

- Incarceration be used only in instances where:

a) The offender poses a danger to another individual or to the community.

b) Any other sanction would not sufficiently reflect the gravity of the offence.

c) An offender wilfully refuses to comply with the terms of any other sentence that has been imposed.

The provincial Justice department regularly and consistently collect, analyse and distribute information on the success rates of all sentences, and distribute that information to judges, Crown attorneys and the defence bar .

Probation officers be available when courts sit in Aboriginal communities. to explain the results of pre-sentence studies.

The Criminal Code be amended to allow judges to designate the specific place of custody for offenders.

- The Manitoba Court of Appeal encourage more creativity in sentencing by trial court judges so that the use of incarceration is diminished and the use of sentencing alternatives is increased, particularly for Aboriginal peoples.
- The Criminal Code be amended to provide that cultural factors be taken into account in sentencing, and that in the meantime judges be encouraged to take this approach.

- Judges invite Aboriginal communities to express their views to the court on any case involving an offence or an offender from their community.

Aboriginal communities be encouraged to develop the best method of communicating their concerns to the court in a manner that is respectful of the rights of the accused, and of the dignity and importance of the proceedings.

Community Sanctions

- Regional, Aboriginally controlled probation services be created to serve Aboriginal communities; and that Aboriginal people be employed by the Province as probation officers in numbers at least proportionate to their presence in the provincial population.

All Aboriginal offenders be supervised by Aboriginal probation officers.

Probation officers assigned to handle cases of Aboriginal persons be able to speak the language of the probationer.

Conditions of probation orders be related directly to the circumstances of the offence and the offender, and be conditions that can be realistically adhered to by the probationer.

There be a reorganization of the way community service orders are administered and supervised so that organizations are provided with the necessary resources to ensure that orders are fulfilled and that judges are provided with the necessary information to allow them to match offenders with programs.

Cross-cultural training programs be mandatory for all non-Aboriginal probation staff, and that there be an ongoing series of refresher courses.

When Aboriginal probation officers are not available to supervise Aboriginal offenders, judges make greater use of section 737(a) of the Criminal Code, which permits the court to place a person under the supervision of some "other person designated by the court."

Courts seek out individuals in Aboriginal communities who are willing to accept the responsibility of supervising individuals placed on probation.

- Judges make greater use of orders of restitution.
- The existing Fine Option Program be abolished and replaced with a Fine and Restitution Recovery Program which would follow these principles:

a) All fines and orders of restitution should be automatically registered with and enforced by the Fine and Restitution Recovery Program.

b) If the payment of a fine is not made, the program be empowered to collect the money by garnishment or attachment in the same manner as the way in which maintenance

orders are now enforced, or to take other actions such as preventing licensing of vehicles by the Motor Vehicle Branch.

c) If these measures fail, the offender be brought to a show cause hearing presided over by a hearing officer.

d) If the hearing officer concludes that the offender does not have the ability to pay, the officer may order a period of community service or extend the time for payment of the fine.

e) If the hearing officer concludes that the offender has the ability to pay but is simply refusing to do so, the officer could refer the case to a master or a judge.

f) A judge or master would have the authority, after all other efforts at collection have failed, to incarcerate those who have the ability to pay but refuse to do so.

The existing Maintenance Enforcement Program be expanded and adapted to administer the Fine and Restitution Recovery Program.

The automatic assessment of a term of imprisonment in default of payment of fines levied by Common Offence Notices be abolished, and that the Fine and Restitution Recovery Program apply.

The Criminal Code and other legislation allowing for the levying of fines be amended to require that, before levying any fine, judges be required to determine whether a person is able to pay a fine; and that fines not be imposed if the offender is unable to pay the fine at the time of sentence or within a reasonable time thereafter.

The Criminal Code of Canada, The Manitoba Summary Convictions Act and any other relevant legislation be amended to eliminate incarceration in default of fines.

Where a judge orders the performance of community service work of a specified number of hours, the judge have the option to specify the type and place of work, thus allowing the judge to fashion an appropriate sentence and eliminate the need for the offender to apply elsewhere to enter a program.

Where there is a default in the payment of a fine, the default be noted on the accused's record so that the default can be taken into account if the person comes before the court on a subsequent occasion.

Jails

Security

- Headingley Correctional Institution and Stony Mountain Institution be the only secure facilities for male offenders in Manitoba.

Brandon and The Pas Correctional institutions be converted into minimum security, open-door institutions similar to Dauphin.

Jail Location and Capacity

- Open custody programs for Aboriginal adult and young offenders requiring counselling, behaviour improvement, job training and other forms of assistance be established in Aboriginal communities.

Work camps, such as the one at Egg Lake, be established near Aboriginal communities for non-dangerous Aboriginal offenders who require incarceration.

As Aboriginal community-based facilities are opened, an equal number of units of capacity in existing correctional institutions be closed down and the space converted to vocational or academic programming.

Financial assistance be provided for families of Aboriginal inmates to enable them to communicate with and travel to visit relatives.

- Secure short-term holding facilities be established in Aboriginal communities.

Aboriginal accused be released on bail in their home communities whenever possible.

If Aboriginal accused are transported away from their home communities to be held in custody and are subsequently released on bail, the arresting authority be responsible to convey them back to their home communities.

Responding to Aboriginal Needs

- Correctional institutions develop a policy whereby elders recognized by provincial Aboriginal organizations as capable of providing traditional assistance or spiritual advice and counselling to Aboriginal inmates in a culturally appropriate manner, be granted status equivalent to chaplains under the Chaplaincy program of the Corrections Branch.
- The Correctional Services of Canada and the Corrections Branch of the Manitoba Department of Justice institute a policy on Aboriginal spirituality which:

a) Guarantees the right of Aboriginal people to spiritual services appropriate to their culture.

b) Recognizes appropriate Aboriginal organizations to provide Aboriginal spiritual services.

c) Provides training for correctional staff on Aboriginal spirituality, on the relative importance of such services to Aboriginal people, on the different practices and beliefs likely to be encountered, on how those practices and beliefs can and should be

accommodated by correctional staff and on how to handle traditional items of spiritual significance to Aboriginal people.

d) Provides for the hiring of knowledgeable personnel within each institution who can advise corrections staff on how to deal with cultural issues arising within the institution's Aboriginal population.

e) Provides for the attendance of Aboriginal inmates at spiritual ceremonies outside jail.

- Culturally appropriate education, trades training and counselling programs, particularly those having to do with the treatment of alcohol abuse, family violence, anger management and culturally appropriate ways for inmates to cope with their problems, be provided in every Manitoba correctional institution.

Separation of Pre-Trial and Sentenced Persons

- Adults on remand be kept in physically separate institutions from those who have been convicted.
- The Manitoba Youth Centre and the Agassiz Youth Centre no longer be used as open custody facilities or as remand facilities, except for those youth who present a danger to themselves or others.

Only home-type facilities or camps be used for open custody sentences.

In the city of Winnipeg, the Corrections Branch seek out and develop alternatives to the use of the Manitoba Youth Centre as a remand facility. This should include the greater use of non-institutional settings such as group and foster homes.

Staffing Issues and Discipline Procedures

- The number of Aboriginal people employed in correctional facilities and correctional programs be at least proportionate to the population of Aboriginal people in the province of Manitoba.

At least one-half of the Aboriginal staff of each institution be able to speak an Aboriginal language.

Cross-cultural training programs and ongoing refresher courses be mandatory for all corrections staff.

- Rules for disciplinary hearings in correctional institutions be clarified and enforced to permit an inmate to have a friend or lawyer present to assist at the hearings and to guarantee the opportunity to make full answer and defence to a charge.

Disciplinary hearings in correctional institutions provide for fair adjudication by having an independent third party preside over the hearing and ensure the rules of natural justice are followed.

An independent tribunal be established to adjudicate inmate complaints about the treatment they receive within a correctional system; and that the tribunal have appropriate resources and authority to investigate complaints, mandate change and enforce compliance with its orders.

Work Programs

Correctional officials develop work programs both inside and outside institutions which allow inmates to engage in meaningful activities and earn income.

Corrections Branch develop written guidelines on the appropriate use of inmate work details.

Parole

The Evolution of Canada's Parole System

- The National Parole Board accept 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.

Any offence now giving rise to loss of earned remission be dealt with by loss of privileges or other penalty while in the institution.

The Parole System and Aboriginal Parole

- An Aboriginal Parole Board be established to deal with inmates incarcerated by Aboriginal courts.

Every Aboriginal inmate be provided with a culturally appropriate information session upon admission to a correctional institution. Such a session should explain the parole eligibility rules. Further sessions should be given when the inmate becomes eligible to apply for parole.

Parole be considered automatically and no inmate be allowed to waive his or her right to apply for parole.

The Composition of the Parole Board

- The federal parole service establish minimum and optimum targets for the employment of Aboriginal people. The minimum target must be no less than the percentage of Aboriginal people in Manitoba; the optimum target is the percentage of Aboriginal people served by the parole service.

The National Parole Board, in conjunction with Aboriginal groups, establish release guidelines which take into account the cultural and social circumstances unique to Aboriginal people.

There be Aboriginal parole officers in each Aboriginal community.

The National Parole Board be given authority to transfer jurisdiction over a case to the Aboriginal Parole Board.

The Solicitor General name an additional number of Aboriginal persons as National Parole Board members, in consultation with Aboriginal organizations.

The National Parole Board ensure that all applications involving Aboriginal inmates, including applications for the revocation of parole, be heard by panels which have at least one Aboriginal member.

The membership profile for National Parole Board members be changed to permit greater representation of Aboriginal people.

A program of cross-cultural awareness be developed and implemented for all correctional and parole staff who are involved in making parole decisions about Aboriginal offenders; and that any such cross-cultural awareness program specifically take into account Aboriginal living conditions, Aboriginal values and customs, and the resources available in Aboriginal communities to support the reintegration of offenders.

The separate roles of parole officer and probation officer be combined in Aboriginal communities.

Release Planning and Conditions of Parole for Aboriginal People

- Community assessments of parole applicants be done by Aboriginal parole officers who understand the applicant's community.
- Aboriginal parole officers be hired in Aboriginal communities.
- The National Parole Board, working through its Aboriginal parole officers, make practical arrangements, including provision for financial assistance, to ensure the effective reintegration of Aboriginal inmates into their own communities.

The National Parole Board, in consultation with Aboriginal organizations, develop and adopt more culturally sensitive release criteria and processes for reviewing conditional release applications from Aboriginal inmates.

- The National Parole Board not require that guilt be admitted prior to an inmate's obtaining parole.
- The practice of placing special parole conditions on Aboriginal inmates, such as abstention from the consumption of drugs or alcohol as a matter of course, cease.

Where parole conditions are imposed, they be ones that, among other things, can reasonably be adhered to, that are in accord with the inmate's cultural standards, and that will positively benefit both the inmate and the community.

The National Parole Board not prohibit the return of parolees to their home community.

- The practice of automatically requiring supervision of parolees by a parole officer be ended, and supervision only be required when necessary for the rehabilitation of the inmate and the protection of society.

Aboriginal Women

The Abuse of Woman and Children

- The Indian Act be amended to provide for the equal division of property upon marriage breakdown.
- Aboriginal leaders establish a local government portfolio for women and children, with responsibility to develop educational and support programs in the area of spousal and child abuse.
- Police forces establish family abuse teams which include police officers and social workers trained in dealing with domestic disputes. Such teams should make extensive use of electronic record-keeping and community resources.
- Shelters and safe homes for abused women and children be established in Aboriginal communities and in urban centres. These shelters should be controlled by Aboriginal women who can provide culturally appropriate services.
- The provincial government implement the recommendations found in the report of the Child Advocacy Project entitled A New Justice for Indian Children.
- Community mediation programs such as the one operated by the Hollow Water Resource Group be expanded to Aboriginal communities throughout the province. Such programs must be designed and operated by Aboriginal people.

The Sentencing of Aboriginal Women

- Alternatives to incarceration appropriate to Aboriginal cultures be developed for Aboriginal women.
- The Portage Correctional Institution be closed.

All women who are now sent to a federal penitentiary outside the province be permitted to serve their sentences in Manitoba.

Culturally appropriate group homes be established in urban areas by Aboriginal women's organizations where urban Aboriginal women can serve any term of incarceration to which they may be sentenced, with access to programs of recovery from substance abuse, recovery from victimization and dependency, academic upgrading and training, and parenting skills.

Aboriginal women living in isolated or rural communities be held in open custody facilities in their home communities. Such women would be free to attend to their families, to work or to obtain education during the day, to attend counselling sessions in the evenings, and remain in the facility each night until their sentence is served.

The Milner Ridge Correctional Centre be converted to a co-correctional institution as a pilot project.

When facilities for men and women are established near northern communities, Aboriginal women from the North be allowed to serve their sentences in the facility nearest to their home community.

Arrangements be made for children to have frequent visits with their mother.

Child and family service agencies provide necessary support to Aboriginal mothers in jail and their children to ensure that the family is kept together.

Where children need to be taken into care following the incarceration of an Aboriginal mother, child and family service agencies make culturally appropriate foster arrangements for the children of such inmates.

Parole and Post-Release Issues

Aboriginal women be appointed to the National Parole Board.

Funding be provided to Aboriginal women to establish a halfway house for Aboriginal female inmates.

The National Parole Board give direction that release plans for female inmates with children pay close attention to the need for family reintegration, and in particular to living and income security arrangements required for family reintegration. We further recommend that the federal and provincial governments ensure that income and housing support programs be developed for released female offenders with young children, designed to facilitate family reintegration.

Child Welfare

Aboriginal Peoples and the Child Welfare System in Manitoba

The provincial government establish the Office of Child Protector, responsible to the Legislature, as recommended in the Kimelman Report. This office's responsibilities would be, among other things:

- To ensure that children involved with the child welfare system have their interests and rights protected.

- To receive and investigate complaints about the manner of treatment of children by child welfare agencies.

Manitoba's Child and Family Services Act

Aboriginal and non-Aboriginal child and family service agencies be provided with sufficient resources to enable them to provide the communities they serve with the full range of direct service and preventive programs mandated by the Child and Family Services Act.

The federal and provincial governments provide resources to Aboriginal child and family service agencies for the purpose of developing policies, standards, protocols and procedures in various areas, but particularly for the purpose of developing computer systems that will permit them to communicate quickly and effectively with other agencies, to track cases and to share information.

Principle 11 of the Child and Family Services Act be amended to read: "Aboriginal people are entitled to the provision of child and family services in a manner which respects their unique status, and their cultural and linguistic heritage.

- The Province of Manitoba in conjunction with the Manitoba Metis Federation develop a mandated Metis child and family service agency with jurisdiction over Metis and non-status children throughout Manitoba.
- The jurisdiction of the reserve-based Indian child and family service agencies be extended to include off-reserve band members.

Indian agencies be provided with sufficient resources to ensure that this expanded mandate be effectively carried out.

- A mandated Aboriginal child and family service agency be established in the city of Winnipeg.

Young Offenders

Aboriginal Youth and the Young Offenders Act

- The police consider alternatives to the laying of charges in all cases involving Aboriginal youth and, when appropriate, exercise their discretion to take no legal measures or to take measures other than laying a charge.

Police departments designate youth specialists and provide specialized training to all officers involved in the administration of the Young Offenders Act.

Section 56(4) of the Young Offenders Act be amended to remove the provision which allows young offenders to waive their right to have a parent or guardian present during questioning by the police.

- When a youth court judge denies bail, the judge consider releasing the young offender into the custody of his or her parents, or another responsible person, as contemplated by section 7.1(1)(a) of the Young Offenders Act.

The Ma Mawi Chi Itata Centre be given adequate funds and resources to expand its bail supervision program.

Aboriginal communities be provided with resources to develop bail supervision and other programs that will serve as alternatives to detention.

Accused youth who must be held in pre-trial detention be held in detention facilities in their own communities.

Young offenders be removed from their community only as a last resort and only when the youth poses a danger to some individual or to the community.

- The Young Offenders Act be amended to rescind those provisions which allow a youth to be transferred to adult court for trial.

If Parliament considers it necessary, the Young Offenders Act be amended to give youth court judges the option of imposing lengthier sentences on youth convicted of serious offences.

If Parliament considers it necessary, the Young Offenders Act be amended to allow judges to order that the trial of youth be open to the public and the media in appropriate cases.

- The Young Offenders Act be amended to allow judges to designate the specific place of custody for young offenders.

The Young Offenders Act be amended to prohibit the mixing of closed custody facilities with open custody.

Open custody facilities and wilderness camps be established for Aboriginal youth throughout the province and, especially, in Aboriginal communities.

- The Young Offenders Act be amended to allow a judge dealing with a criminal case to commit a youth to the care of a child and family service agency as an alternative to incarceration or custody.
- Child and family service agencies be directed to continue to provide services to youth clients charged with an offence.

Child welfare and youth justice services be more fully integrated and coordinated so that all their services are available to young people charged with offences.

Youth probation for Aboriginal youth be made a part of the responsibility of Aboriginal child and family service agencies.

Diversion and Alternative Measures

- Adequate administrative and financial support be provided to youth justice committees.

The Young Offenders Act be amended to remove the provision prohibiting members of youth justice committees from being remunerated.

Manitoba's alternative measures guidelines be amended to allow any young offender to be referred to an alternative measures program. The police, lawyers, Crown attorneys and judges should consider such measures in every case.

The authority for the creation of alternative measures guidelines be shifted from the provincial government to the judiciary. The provincial government establish Aboriginally focussed diversion and alternative measure programs which incorporate the following principles:

a) Aboriginal culture must be integrated into the program. Diversion schemes which involve the use of Aboriginal elders, peacemakers and other aspects of Aboriginal culture appear to have the greatest potential for success. In the context of Manitoba's urban Aboriginal communities, the program decision-makers could be drawn from the Aboriginal community within the urban environment.

b) Judges must allow the community to become involved in sentencing but they must retain ultimate responsibility for sentencing.

c) The program should attempt to involve all those who have a direct interest in the case, including the victim and the community.

d) Programs should be able to accept referrals at any stage of the criminal justice process. They should also be able to accept referrals from the community before any charges have been laid and, if possible, before the authorities become involved.

e) The community's respect for the program is vital. This means that one primary goal of the program must be to seek reconciliation and the restoration of peace in the community.

f) The establishment of a range of innovative options that can be used by the decision-makers will be critical to the success of alternative measures programs based in Aboriginal communities. An appropriate plan for an Aboriginal youth might, for example, involve participation in an Aboriginally operated wilderness program, an education program, an employment training program, or a treatment program.

g) Aboriginal supervisors from the community must monitor the disposition. The community must see sanctions that originate from, and are enforced by, the community, and not some outside force.

h) These programs should be formally designated and recognized as Young Offenders Act programs so that their role has official recognition and official support.

Aboriginal Youth and the Justice System — General Issues

- Aboriginal communities throughout Manitoba be encouraged and adequately funded to develop crime prevention programs for youth, based on the development of a full range of employment, cultural, social and recreational opportunities.

The funding for the Northern Fly-In Sports Camp be firmly established and that the camp be expanded to provide its services to all northern Aboriginal communities.

- The Aboriginal Court Worker Program provide a court worker wherever Youth Court sits.

Policing

The Role of Police in Society

- Police forces adopt a community policing approach, particularly in Aboriginal communities.

Employment Equity Programs

- Police forces immediately institute employment equity programs to achieve Aboriginal representation equivalent to the Aboriginal proportion of the Manitoba population

Cross-Cultural Training

- Cross-cultural education components of all police training courses be reviewed and strengthened, and this process actively involve members of the Aboriginal community, resource persons and recognized experts.

All police officers be rotated through cross-cultural education programs, and periodic refresher programs be provided as part of the regular professional development programs of all police departments.

Any police recruits displaying racist attitudes be screened out of training, and police officers who display such conduct after joining the force be required to take further training or, if necessary, be formally disciplined or dismissed.

- The 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.

- All statements taken by police officers be either audio- or video-recorded. If the contents of a transcribed statement are challenged, or some tribunal wishes to hear how certain words were expressed, the tape or video can be played.

Video equipment be used to record the statements of all suspects in cases involving deaths and other serious cases. We suggest that the taping record the totality of each interview, including all introductory comments and explanations and warnings given by the police, and including any formal statement or other comments that result.

The videotape will be of great value. The impact would be reduced if accused persons could allege that promises or inducements were offered or pressure was applied to them before the taping began.

Where video equipment is not available, all statements be audio-recorded. The RCMP has tape-recorded some statements for years. We recommend that all police make that practice mandatory in all cases, with the use of video where statements are taken in an office with that equipment.

Police Forces in Manitoba

- As soon as possible, Aboriginal police forces take over from the RCMP the responsibility for providing all police services in Aboriginal communities.

The RCMP support the establishment of Aboriginal police forces and develop a policy of cooperation with such forces.

- While they continue to police Aboriginal communities, the RCMP and all other Manitoba police forces develop and make public an integrated strategy to strengthen their capacity to provide culturally appropriate policing services, and the strategy include the development of a process of regular communication with Aboriginal organizations and communities, and the annual publication of reports which indicate progress in meeting the goals of the strategy.
- The Dakota Ojibway Tribal Council Police Force be provided with sufficient resources so that it can increase staff training and development in modern police methods, and gradually assume full responsibility for all law enforcement duties within its geographic jurisdiction.

Aboriginal communities be encouraged to form regional police forces and regional police commissions following the model of the Dakota Ojibway Tribal Council Police Force. These should be established under Aboriginal control and management.

- Metis and non-status communities consider the development of a regional police force, with a police commission.
- The Liquor Control Act be amended to place limits on the amount of alcohol an individual can purchase at any one time without a permit.

The transport of large quantities of alcohol without a permit be made illegal. Transporters of illegal shipments should not only be subject to fines, but should also face the loss of their licences and vehicles.

Police forces, in conjunction with local Aboriginal governments that have prohibited the importation of alcohol to their reserves, undertake special enforcement programs designed to halt any illegal importation.

- New targets be set by the RCMP to bring appropriate numbers of Aboriginal men and women into the force as full officers more quickly than is currently contemplated.

The RCMP employ Aboriginal police and civilian staff in their detachments in proportion to at least the Aboriginal population of the province and preferably in proportion to the Aboriginal population being served.

- The Winnipeg Police Department prepare and table with the city council and the Minister of Justice, no later than December 31, 1991, an employment equity plan which has clear targets, target dates and remedies should targets not be achieved.

The City of Winnipeg Police Department set an initial target of 133 Aboriginal police officers. The first step in reaching that goal should be to designate the next recruiting class as entirely Aboriginal. Thereafter, 50% of each recruit class be dedicated to Aboriginal recruits until the target has been met.

The Winnipeg Police Department be required to report publicly the progress of its employment equity program to the Minister of Justice.

A portion of the funding provided by the Province to the City of Winnipeg for police salaries be conditional on the Winnipeg Police Department's using that funding only for the hiring of Aboriginal police officers.

The assignment of Aboriginal police officers not be restricted to the core area or other Aboriginal areas of the city of Winnipeg

The Winnipeg Police Department no longer rely on the grade 12 educational criterion for police recruitment and develop approaches which more appropriately test recruits' ability to perform the functions required of police officers.

- The City of Brandon Police Department prepare and table with Brandon City Council and the Minister of Justice an employment equity plan no later than December 31, 1991, which will increase the numbers of Aboriginal people on the City of Brandon Police Department to a level equal to their proportion of the Manitoba population. The plan should include target dates by which to achieve that proportion and remedies should those targets not be met.

The Brandon Police Department set an initial target of nine Aboriginal police officers and that the City of Brandon Police Department dedicate that number of positions for Aboriginal recruits in its next recruit class.

Both the City of Winnipeg Police Department and the City of Brandon Police Department consider hiring Aboriginal police officers who already have policing experience with an Aboriginal force or with the RCMP.

Aboriginal people be represented among the civilian members of both the City of Winnipeg Police Department and the City of Brandon Police Department in the same proportion as their presence in the province's population.

The City of Brandon Police Department, in cooperation with the Brandon Friendship Centre, develop a program to reach out to and inform Aboriginal people living in Brandon about policing issues.

The Provincial Police Act and the Manitoba Police Commission

- The Provincial Police Act make explicit provision for the recognition of any police commission or committee which is established to provide police services in any municipality, unorganized territory, or Aboriginal community in Manitoba.

The Manitoba Police Commission prepare and enforce a wide range of regulations covering recruitment, training, equipment, procedures, supervision of, and support for, police forces in Manitoba.

Aboriginal Systems of Policing

- The Provincial Police Act be amended to provide for the establishment of a provincial Aboriginal Police Commission with authority to prepare and enforce a wide range of regulations covering recruitment, training, equipment, procedures, supervision of, and support for, Aboriginal police forces in Manitoba.

Final decisions concerning the size, composition and manner of appointment to the Aboriginal Police Commission be made by Aboriginal people.

The Provincial Police Act be amended to provide for the appointment of an Aboriginal Police Commissioner, to serve the Aboriginal Police Commission, with any such person being selected by Aboriginal organizations responsible for Aboriginal police forces.

Agreements be developed between the provincial Aboriginal Police Commission, local police commissions, the RCMP and the provincial Justice department for Aboriginal police forces to provide full police services to Aboriginal communities, with a firm timetable for achieving this goal, including training, equipping and supporting the local forces with appropriate back-up services as required.

- The Minister of Justice establish a plan of action to deal with any incident where possible criminal acts are alleged against the police, or where a person dies or suffers serious injury in an incident involving a police officer.

This plan of action include either the creation of a standing special investigations unit, or a plan to quickly assemble a special investigations team for a particular incident, able to take control of the investigation immediately following report of the incident. The unit or team should not include officers from the police department under investigation. The plan should include independent counsel to give advice concerning the laying of criminal charges. This counsel should not be a Crown attorney. The unit or team should report directly to the Minister of Justice.

The police forces in the province be required to provide all available assistance and cooperation to the special investigations team.

- The Law Enforcement Review Board be reconstituted and the Law Enforcement Review Act be amended to approximate the Ontario model.

The board appoint independent counsel to have conduct of each case and be responsible for presenting the evidence.

Where the complaint is from an Aboriginal person, one member of a panel be Aboriginal.

The test to be applied by the board be proof by clear and convincing evidence, rather than beyond a reasonable doubt.

If the board decides that the complaint is proven, it have full power to impose whatever penalties it deems appropriate.

In addition to what is now in the Law Enforcement Review Agency reports, the agency report annually on the nature of complaints, how many were found to have merit, how many were dismissed and the type of penalty applied.

Police officers, including the officer against whom the complaint is made, be compellable witnesses.

Aboriginal justice systems establish and maintain an agency to receive, investigate and resolve complaints against Aboriginal police officers similar to what we recommend for provincial police forces.

Complaints against the RCMP in Manitoba, when acting as a provincial police force, be investigated and heard by the Law Enforcement Review Board.

A Strategy For Action

Aboriginal Justice Commission

- An Aboriginal Justice Commission of Manitoba be established by legislation and by appropriate processes of the Aboriginal people of Manitoba, with a board of directors made up of equal numbers of Aboriginal and government representatives, and an independent chairperson. The commission should be provided with all necessary staff and resources.

The position of Aboriginal Justice Commissioner be established as the chief executive officer of the Aboriginal Justice Commission. The commissioner's tasks will include monitoring and assisting government implementation of the recommendations of this Inquiry.

Aboriginal Justice College

- The Aboriginal Justice Commission establish an Aboriginal Justice College with its own Aboriginal board of directors, and staffed by Aboriginal people, to provide training and continuing education for Aboriginal people who wish to assume positions of employment within both the existing justice system and Aboriginal justice systems.

Training provided by the Aboriginal Justice College include preparation for such positions as judges, attorneys, police officers, correctional officers, court clerks, administrators, interpreters, court workers, peacemakers, youth justice committee directors, social workers, probation and parole officers, and others, as exist within the present justice system and as are needed to establish and maintain Aboriginal justice systems.

The Aboriginal Justice College organize courses in cross-cultural understanding for non-Aboriginal personnel.

Cross-Cultural Issues

- Federal, provincial and municipal governments, individually or in concert, with the assistance and involvement of Aboriginal people, establish formal cross-cultural educational programs for all those working in any part of the justice system who have even occasional contact with Aboriginal people.

Affirmative Action

- The Province of Manitoba legislate the establishment of an Employment Equity Commission with appropriate Aboriginal representation on its governing body.

The Employment Equity Commission have two arms: an investigative arm responsible for examining any matter covered by the legislation, and an adjudicative arm responsible for hearing any complaint made under the legislation. Those on the

adjudicative side who sit as hearing panels to determine a complaint should include an Aboriginal person if the complaint involves an Aboriginal issue or complainant.

The mandate of the commission be:

a. To develop employment equity targets for employers within the legislative jurisdiction of the Province of Manitoba, including any department of the government of Manitoba and any municipality, town or city within the province.
b. To ensure that employers set policies and programs for the advancement and promotion of Aboriginal people.
c. To monitor compliance with established employment equity targets.
d. To require employers in receipt of government grants or contracts to establish an acceptable employment equity plan with appropriate time frames, within which Aboriginal people will be hired.
e. To hear and determine complaints against any person or employer who fails to comply with an established employment equity plan.

Hearing panels called upon to determine complaints be entitled to make orders requiring compliance with an employment equity plan acceptable to the commission, or make such other order as may appear appropriate to it, such as financial compensation either to an individual or to a group of individuals.

- The federal government strengthen its employment equity legislation to establish an Employment Equity Commission similar to that which we recommend for the Province of Manitoba.
- Federal and provincial government positions which require or will inevitably result in high contact with Aboriginal people be designated as "Aboriginal bilingual positions."
- The University of Manitoba Faculty of Law establish a recruitment program whereby Aboriginal students (including those in high schools) throughout Manitoba and Northwestern Ontario are encouraged to attend law school.

The Faculty of Law review the manner in which it makes use of the Law School Admission Test scores and grade point averages of law school applicants to ensure that Aboriginal students capable of successfully completing law school are not thereby unfairly eliminated.

The Faculty of Law increase the number of Aboriginal law students it accepts into first-year law. The minimum number of students it should be accepting would be 12% of each class, the same proportion as the proportion of Aboriginal people in the general population. Entrance levels should also include an additional number to overcome historical imbalances.

The Faculty of Law engage an Aboriginal person as a member of its faculty with the primary responsibility of providing support services to Aboriginal students and with the secondary role of developing materials on, and teaching, Aboriginal law.

The Faculty of Law undertake the development of a full credit course or courses in Aboriginal legal issues, and ensure that Aboriginal issues are included as part of the core courses taught to each law student.

The Faculty of Law organize and sponsor a conference of law schools from across Canada, to be held for the purpose of addressing the issue of increasing the numbers of Aboriginal law graduates in Canada so as to accomplish two objectives:

a. To overcome historical imbalances in Aboriginal under-representation in the legal profession.
b. To establish entry levels of Aboriginal law students that will ensure that the Aboriginal presence in the legal profession reflects the Aboriginal presence in the population generally.

The Faculty of Law and the Aboriginal Justice College establish a pre-law program for Aboriginal students wishing to enter law school.

Information Gathering and Statistics

- Governments consult with Aboriginal groups to design and implement a data collection system that will provide detailed information to compare the impact on, and treatment of, Aboriginal and non-Aboriginal persons by the justice system, to evaluate the success of programs dealing with Aboriginal offenders and to provide information to help identify needed reforms.

Resources

- As a matter of urgent importance, governments and Aboriginal people, with the assistance of the Aboriginal Justice Commission, negotiate an acceptable process to provide ongoing funding for Aboriginal governments to undertake the initiatives we suggest, in a manner consistent with:

a. The need of Aboriginal people for an ongoing, consistent revenue base.
b. The right of Aboriginal people, as original owners of the land, to a fair share of revenue resources from both levels of government.
c. The greater access to the revenue-generating powers and sources available to federal and provincial governments.

Aboriginal Justice Implementation Commission (AJIC) Final Report Recommendations

2.1
The Government of Manitoba place the issue of recognition and reconciliation policies and actions on the agenda of a new Roundtable on Aboriginal Issues, Aboriginal Justice Commission, or such other implementation institution that may be agreed upon between the Province and representatives of the Aboriginal peoples in Manitoba, including in particular the Assembly of Manitoba Chiefs and the Manitoba Metis Federation.

2.2
The Interpretation Act of Manitoba be amended to provide that all legislation be interpreted subject to Aboriginal and treaty rights.

2.3
The Government of Manitoba formally renounce its half interest in minerals within Indian reserves.

2.4
The Government of Manitoba place the issue of the establishment of an Aboriginal Justice System on the agenda of the Aboriginal Justice Commission or such other institution as may be set up to implement the recommendations of the Aboriginal Justice Inquiry.

3.1
The Government of Manitoba develop and adopt, with the full participation of the Manitoba Metis Federation, a comprehensive Métis policy on matters within its jurisdiction.

3.2
The Government of Manitoba cooperate with the federal government and other provinces, where appropriate, on the implementation of the Aboriginal Justice Inquiry and the RCAP recommendations.

3.3
Representatives of the Province enter forthwith into discussions with the MMF to begin the process of addressing matters within the jurisdiction of Manitoba that have been the subject of recommendations by the AJI and the RCAP.

4.1
Any future, major, natural resource developments not proceed, unless and until agreements or treaties are reached with the Aboriginal people and communities in the region, including the Manitoba Metis Federation and its locals and regions, who might be negatively affected by such projects, in order to respect their Aboriginal, treaty, or other rights in the territory concerned.

5.1
The Government of Manitoba commit to reducing the number of young people held in pretrial detention in Manitoba from one of the highest in Canada to at least the national average, and put in place the services to accomplish this.

5.2
As part of a demonstrated commitment to reducing the number of young people held in pretrial detention, the Department of Justice should, as often as possible, publish comparative statistics on its website. If statistics comparing Manitoba with other provinces are only available annually the department should publish its own statistics quarterly with comparative numbers annually.

5.3
The police consider alternatives to the laying of charges in all cases involving Aboriginal youth and, when appropriate, exercise their discretion to take no legal measure or to take measures other than laying a charge.

5.4
Police departments continue to designate youth specialists and provide specialized training to all officers involved in the administration of the Young Offenders Act.

5.5
When a youth court judge denies bail, the judge consider releasing the young offender into the custody of his or her parents, or another responsible person, as contemplated by section 7.1(1)(a) of the Young Offenders Act.

5.6
Aboriginal communities be provided with resources to develop bail supervision and other programs that will serve as alternatives to detention.

5.7
Young offenders be removed from their community only as a last resort and only when the youth poses a danger to some individual or to the community.

5.8
Child and family service agencies be directed to continue to provide services to youth clients charged with an offence.

5.9
Child welfare and youth justice services be better integrated and co-ordinated so that all their services are available to young people charged with offences.

5.10
The adequacy of administrative and financial resources provided to youth justice committees be assessed.

5.11
The provincial government establish Aboriginal focussed diversion and alternative measures programs which incorporate the following principles:

- Aboriginal culture must be integrated into the program. Diversion schemes which involve the use of Aboriginal elders, peacemakers and other aspects of Aboriginal culture appear to have the greatest potential for success. In the context of Manitoba's urban Aboriginal communities, the program decision-makers could be drawn from the Aboriginal community within the urban environment.
- Judges must allow the community to become involved in sentencing but they must retain ultimate responsibility for sentencing.
- The program should attempt to involve all those who have a direct interest in the case, including the victim and the community.
- Programs should be able to accept referrals at any stage of the criminal justice process. They should also be able to accept referrals from the community before any charges have been laid and, if possible, before the authorities become involved.
- The community's respect for the program is vital. This means that one primary goal of the program must be to seek reconciliation and the restoration of peace in the community.

5.12
The establishment of a range of innovative options that can be used by the decision-makers will be critical to the success of alternative measures programs based in Aboriginal communities. An appropriate plan for an Aboriginal youth might, for example, involve participation in an Aboriginal operated wilderness program, an education program, an employment training program, or a treatment program.

5.13
Aboriginal supervisors from the community must monitor the disposition. The community must see sanctions that originate from, and are enforced by, the community, and not some outside force.

5.14
These programs should be formally designated and recognized as Young Offenders Act programs so that their role has official recognition and official support.

5.15
The Aboriginal Court Worker Program provide a court worker wherever Youth Court sits.

5.16
The Department of Justice collect and publish monthly statistics showing the number of young people in custody who have been transported from their home community to another location, the reason for the movement, and the time the young person spent away from his or her community.

6.1
The Government of Manitoba, in consultation with Aboriginal communities, implement the recommendations of the First Nations Justice Strategy Evaluation Report to expand the strategy to all other MKO communities that wish to participate.

6.2
The Government of Manitoba review its policy on volunteers working in the justice system, in particular in remote communities, with a view to ensuring, at the least, that volunteers are not out-of-pocket for expenses.

6.3
The Government of Manitoba, in consultation with Aboriginal communities in southern Manitoba and the City of Winnipeg, consider whether the First Nations Justice Strategy approach would be useful in the southern parts of the province.

6.4
The Government of Manitoba establish community justice initiatives that provide for community involvement, alternative measures, and culturally appropriate services where communities express an interest in developing such a program.

Such a program should include:

- The adoption by the Attorney General of an alternative measures policy that could provide guidance to Crown attorneys, police, and others on the types of cases eligible for alternative measures.
- A system to refer and to track referred cases and to ensure results are reported to the appropriate authorities.
- Ensuring that adequate community resources are catalogued and available to handle referred cases. Such resources may be alcohol or addiction counsellors; mediators; facilitators for various alternative approaches, such as conferencing, talking circles, healing circles, and reintegration circles; community justice workers or probation officers to supervise restitution, etc.

6.5
Service indicators be developed for each circuit court by the Department of Justice. These indicators might include some or all of the following:

- Number of matters on a docket
- Number of remands
- Number of remands per case
- Number of guilty pleas
- Number of trials
- Total time of sitting
- Average or median time from charge to trial for each court location

This data should be collected for each sitting of court in each location, and published on the department's website.

The department should indicate what it considers to be minimum service standards for Winnipeg and locations outside Winnipeg. The department and the Judiciary should then commit to meeting these standards.

Where the standards cannot be met, the department should be required to explain why it is unable to meet the standards.

6.6
The Government of Manitoba, in consultation with the appropriate First Nation governments, work to establish circuit court sittings on the Sandy Bay, Peguis, Sagkeeng, and Little Saskatchewan First Nations, should these First Nations desire this. This option should be offered to other First Nations whose members constitute the majority of persons appearing in a circuit court held near, but not on, the particular First Nation. Implementing this option will require negotiating appropriate agreements to ensure acceptable and continuing service, and to address concepts of community participation.

6.7
The Government of Manitoba consult with Aboriginal organizations with a view to creating regional, Aboriginal-controlled probation services to serve Aboriginal communities.

6.8
The Government of Manitoba seek to increase significantly the number of Aboriginal probation officers so that probation services to Aboriginal offenders are delivered primarily by Aboriginal probation officers.

6.9
The Portage Correctional Institution be closed.

6.10
The Government of Manitoba establish a new correctional facility for women that provides them with adequate treatment, training, and cultural and spiritual supports, and provides the greatest possible number of opportunities for community integration.

7.1
The Government of Manitoba initiate a process involving all stakeholders (with Aboriginal representation that includes the Assembly of Manitoba Chiefs and the Manitoba Metis Federation) to review policing issues in Manitoba with a goal of a new Provincial Police Act within three years. The review should deal with, among other things,

- The role of the province in encouraging the adoption and delivery of effective community policing
- Whether current mechanisms to fund police services are equitable
- The role of the province in ensuring adequate and effective levels of policing
- Complaints and discipline mechanisms for alleged criminal and non-criminal conduct
- Establishing training and performance standards
- Crime prevention
- Victim services
- The role and responsibilities of bodies charged with providing general supervision of police
- The distribution of powers between municipal governments, police supervisory bodies, and the chief of police
- The role of the Royal Canadian Mounted Police as a provincial police force, and arrangements for provision of specialized services by the provincial police force to other forces, such as First Nation police forces and municipal forces, both RCMP and non-RCMP
- What, if any, legislative provisions are required to deal with Aboriginal police forces

7.2
The Government of Manitoba and Aboriginal communities adopt a process through which Aboriginal communities could choose the most appropriate type of police structure; such a process should include:

- A needs assessment
- Option assessment
- Monitoring and evaluation

7.3
The Government of Manitoba work with Dakota Ojibway Police Service (DOPS) to explore ways to improve the efforts of DOPS to provide a community-based police service.

7.4
The Government of Manitoba work with the Royal Canadian Mounted Police to determine whether the RCMP is sufficiently responsive to community needs and concerns, and whether its degree of responsiveness can be improved.

8.1
The Government of Manitoba adopt, in consultation with the Assembly of Manitoba Chiefs and the Manitoba Metis Federation, a five-year Aboriginal employment strategy. The government must make annual reports to the public on its progress in implementing this program.

The Commission believes the employment strategy should incorporate the following elements:

- A commitment from both the political and administrative leadership to increasing the number of Aboriginal employees in accordance with the recommendations of the AJI. This commitment must spell out political and administrative accountability, and identify and detail the appropriate financial resources. There must be goals, a timeline, and responsibility for meeting the goals within the designated time frame.
- A review of current employment systems to identify barriers.
- An increase in Aboriginal human resource capacity within government departments. This should include the hiring of Aboriginal Human Resource Officers.
- Formal initiatives to improve Aboriginal recruitment, retention, and advancement. This would include, but not be limited to, outreach and preparatory training; restating occupational qualifications to provide recognition of those positions for which knowledge of Aboriginal languages and culture is a qualification; culturally sensitive marketing mechanisms to recruit applicants; and monitoring of program effectiveness.
- A review, improvement, and expansion of the Aboriginal Management Development program.
- Development mechanisms to ensure Aboriginal access to career-advancement and employee-support services.
- Establishment of a union-management partnership to identify, address, and eliminate employment barriers within government.

8.2
The Government of Manitoba make a public commitment to appoint forthwith a significant number of Aboriginal people to the positions of Provincial Court judge, magistrate, hearing officer, referee, and master.

8.3
The Government of Manitoba appoint forthwith a significant number of Aboriginal people to the Board of Directors of Legal Aid Manitoba.

8.4
The Government of Manitoba adopt a policy requiring appropriate representation of Aboriginal people on all provincial boards, commissions, agencies, and other institutions.

8.5
The Government of Manitoba, through the Manitoba Department of Education and the Manitoba Department of Justice, work with the Manitoba Metis Federation and the Association of Manitoba Chiefs to establish an Aboriginal Justice Institute with an appropriate tripartite governance structure. The institute would use existing courses and would develop new culturally appropriate training programs to assist Aboriginal people to work in the current justice system and in evolving approaches such as community and restorative justice.

8.6
The Government of Manitoba solicit the views of the Manitoba Metis Federation and the Assembly of Manitoba Chiefs to ensure the appropriateness of spiritual and cultural programming in correctional institutions.

8.7
The Government of Manitoba continue at all levels of government to employ cross-cultural training programs and to conduct regular evaluations of the effectiveness of such training.

8.8
The Government of Manitoba adopt a policy that prefers Aboriginal people to deliver cross-cultural training programs.

9.1
The Department of Justice, in conjunction with representatives of the Assembly of Manitoba Chiefs, the Manitoba Metis Federation, Aboriginal women's organizations, and other interested groups, review whether increased Crown discretion, in appropriate domestic violence cases, subject to appropriate guidelines, could be used to encourage counselling and other intervention programs. Any new approach should be carefully monitored and evaluated.

9.2
The Government of Manitoba support continued research and evaluation of domestic violence policies and programming, which includes analysis by ethnicity of accused and victims.

9.3
The Government of Manitoba expand availability of culturally appropriate Aboriginal treatment and support programs for family members involved in domestic violence cases.

9.4
Aboriginal leaders work with the Government of Canada and the Government of Manitoba to ensure that safe options for victims of domestic violence are available within communities.

9.5
The Department of Justice work with local authorities to seek options that, in domestic violence cases, would preserve the victim's safety but allow the accused to remain in the community while on bail.

9.6
The Government of Manitoba increase the number of Aboriginal persons employed by the Women's Advocacy Program so that advocacy services delivered to Aboriginal victims are delivered primarily by Aboriginal service providers.

9.7
The Department of Justice review recommendations made by Dr. Jane Ursel in her paper prepared for the Aboriginal Justice Implementation Commission regarding dual charging to determine if they would assist in dealing with the question of dual arrests.

9.8
The Government of Manitoba investigate whether there is an appropriate Aboriginal agency now providing a range of family violence programming, and, if so, whether the development of a 24-hour response capacity, available to men and women, in this agency would be effective in dealing with family violence issues.

9.9
The Government of Manitoba monitor the Winnipeg Police Services Early Intervention Pilot Project and consider the expansion of the program, should an evaluation so warrant.

9.10
The departments of Justice, and Family Services and Housing, together with the appropriate child welfare agencies review, and report publicly on the status of implementation of the recommendations of the report, A New Justice for Indian Children.

10.1
The Government of Manitoba seek to enter into agreement with the Assembly of Manitoba Chiefs and the Manitoba Metis Federation to develop a plan that would result in First Nations and Métis communities developing and delivering Aboriginal child welfare services.

14.1
The Government of Manitoba develop a comprehensive Aboriginal policy.

14.2
The Government of Manitoba enter into discussion with the Government of Canada and Manitoba Aboriginal organizations with the goal of establishing an Aboriginal Justice Commission.

14.3
As part of a public commitment to implementing the Aboriginal Justice Inquiry recommendations, the Government of Manitoba work with Aboriginal organizations in Manitoba to establish a Roundtable on Aboriginal Issues.

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