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of Canada

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du Canada

REPORT

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aboriginal peoples and criminal justice

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Canada.

Report on aboriginal peoples
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equality, respect and the
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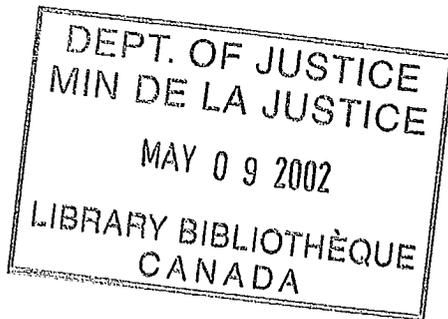
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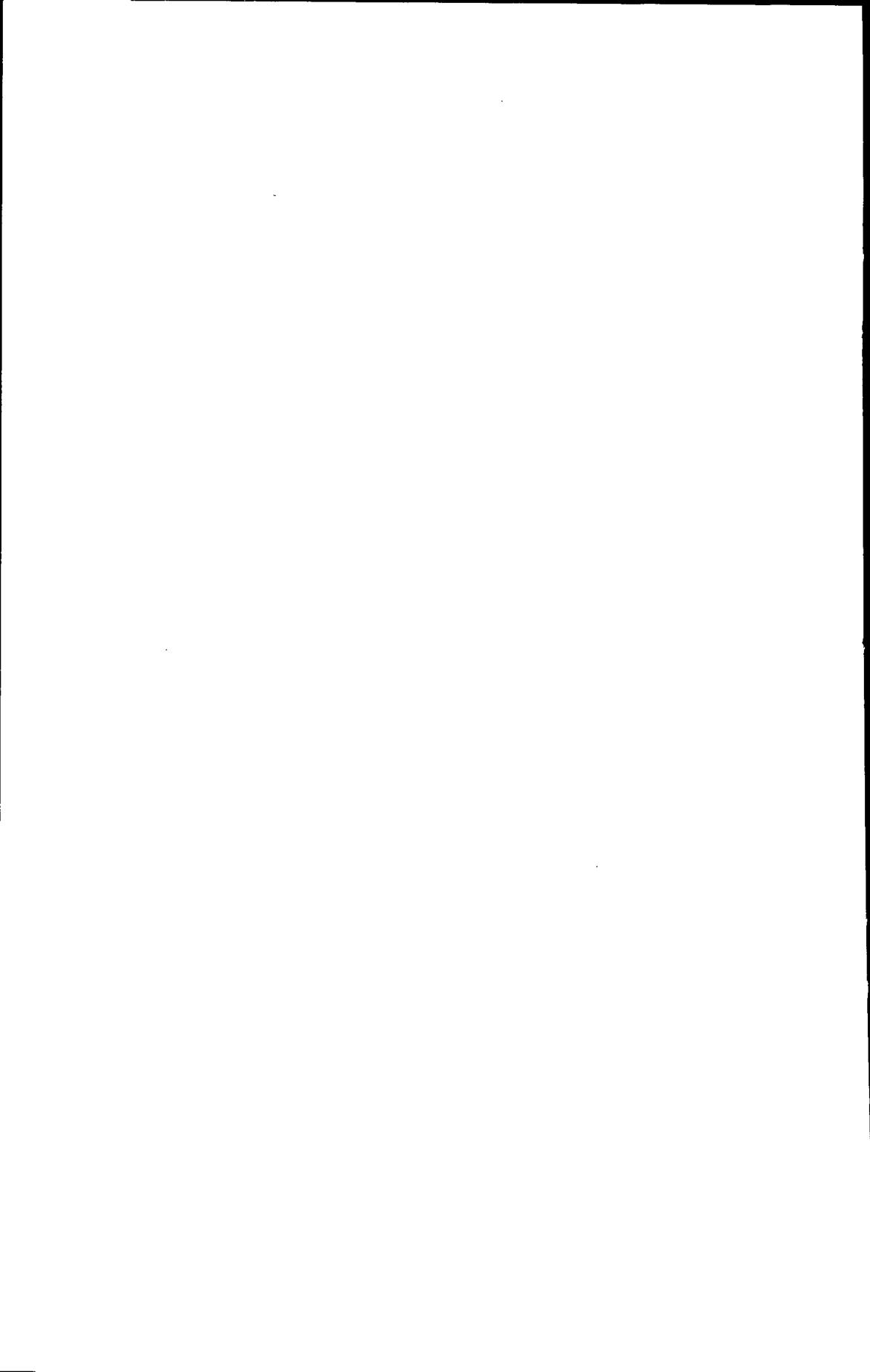
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REPORT 34

ABORIGINAL PEOPLES
AND CRIMINAL JUSTICE





REPORT
ON
ABORIGINAL PEOPLES
AND CRIMINAL JUSTICE

Equality, Respect and the Search for Justice

As Requested by the Minister of Justice
under Subsection 12(2) of the
Law Reform Commission Act

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December, 1991

The Honourable A. Kim Campbell, P.C., M.P.,
Minister of Justice
and Attorney General of Canada,
Ottawa, Canada

Dear Ms. Campbell:

Pursuant to your request under subsection 12(2) of the *Law Reform Commission Act* and in accordance with section 16 of that Act, we have the honour to submit herewith this Report on Aboriginal peoples and criminal justice undertaken by the Law Reform Commission of Canada.

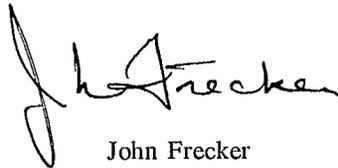
Yours respectfully,



Gilles Létourneau
President



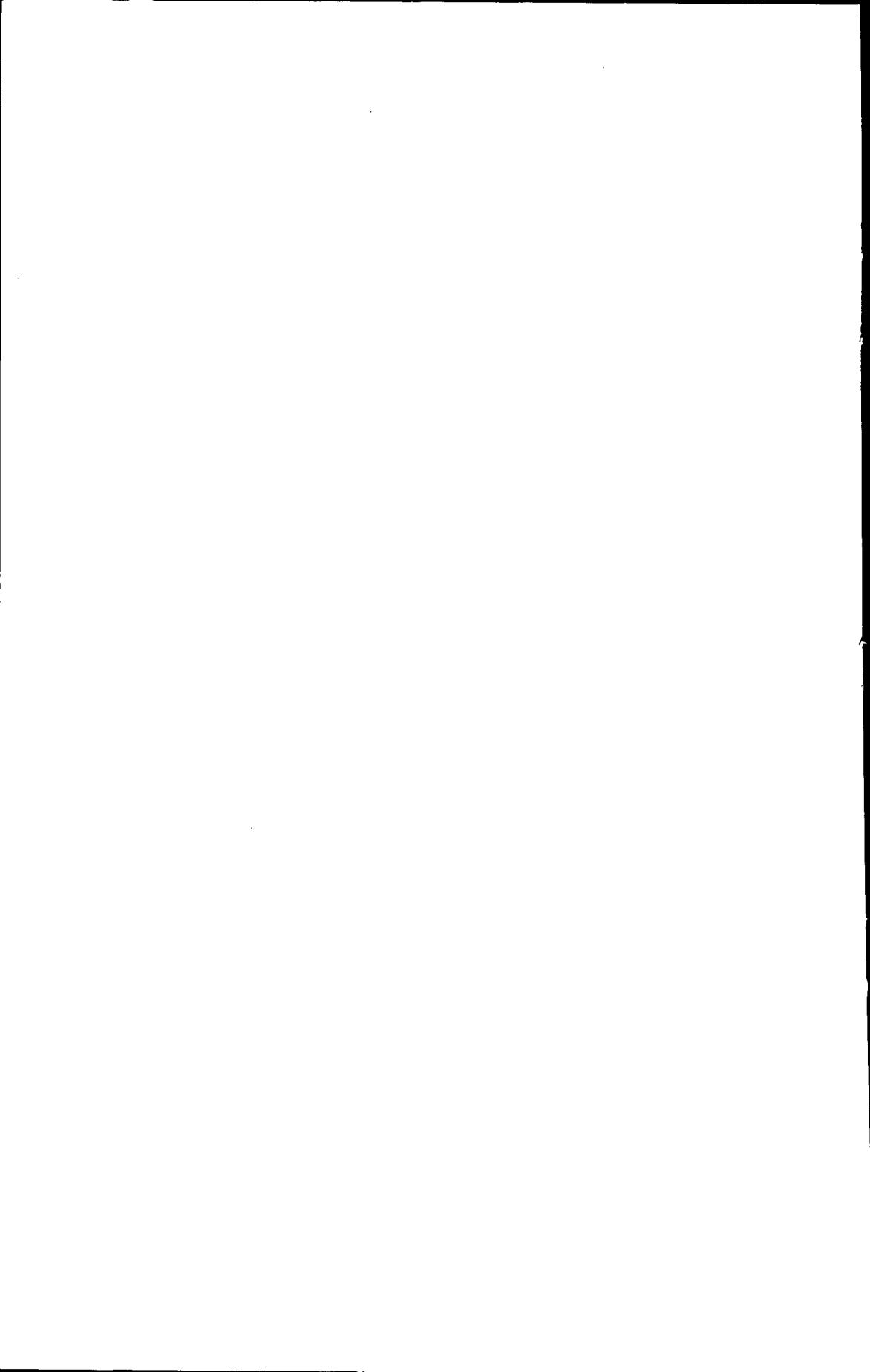
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** was appointed to the Commission after the consultations in preparation for this Report were held.

Editor's Note

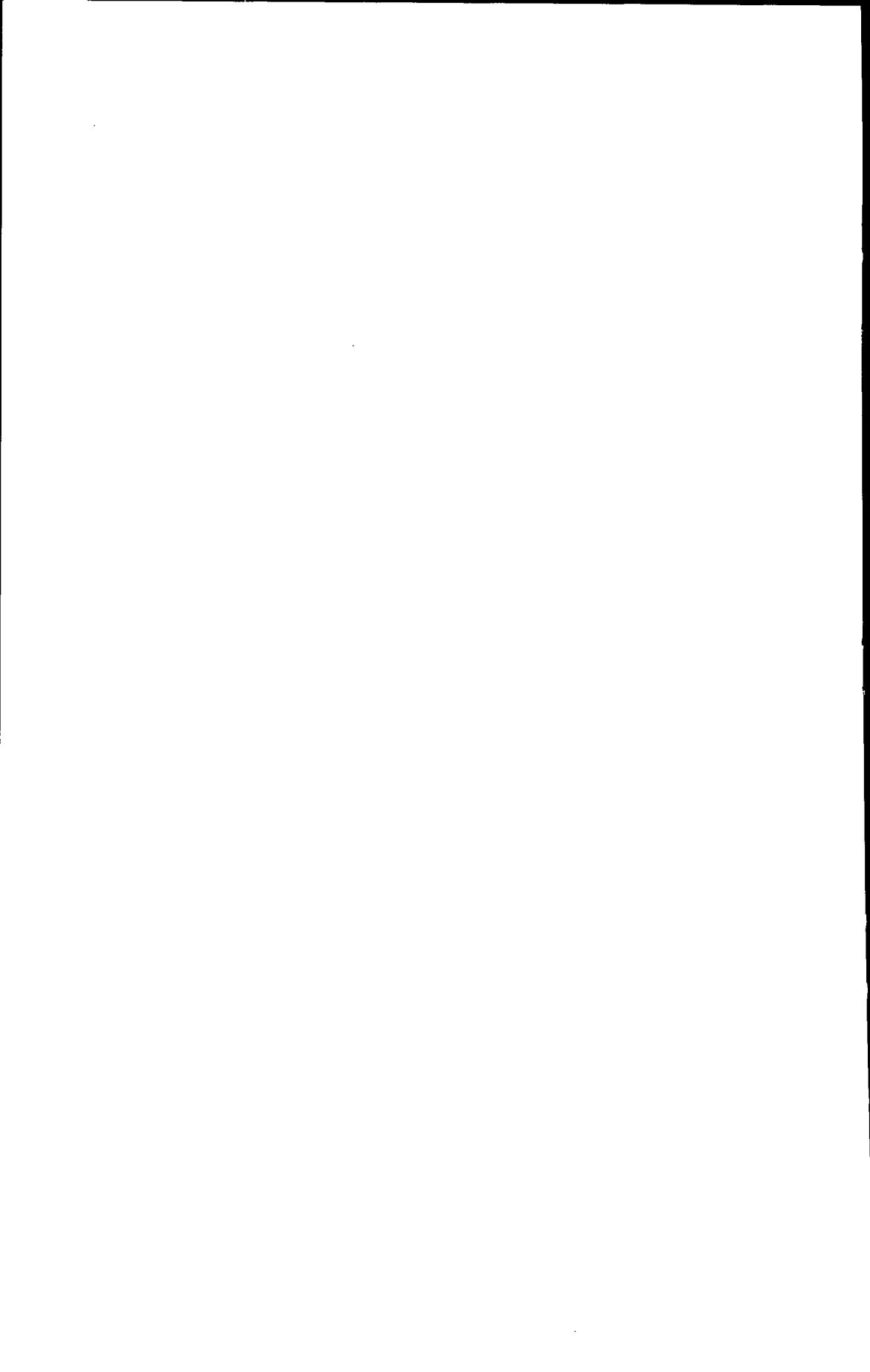
In keeping with the proposal advanced in *Equality for All: Report of the Parliamentary Committee on Equality Rights*, we have conscientiously endeavoured to draft this Report in gender-neutral language. In doing so, we have adhered to the standards and policies set forth in *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights* pertaining to the drafting of laws, since the Commission's mandate is to make proposals for modernizing Canada's federal laws.

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Acknowledgements

During the course of preparing this Report, we were fortunate enough to have consulted with persons having a wide experience within the Aboriginal community who are committed to preserving and enhancing Aboriginal rights. As well, we benefitted from the opinions and advice of experienced individuals in the fields of policing and law enforcement, law teaching, the practice of law, the judiciary and corrections. Also consulted were various federal and provincial government representatives and members of provincial inquiries into Aboriginal justice. We gratefully acknowledge the significant contribution to our work of all these groups.

Although it is not possible to name everyone consulted with respect to this Report, we especially wish to thank those persons listed in Appendix B.

CHAPTER ONE

Introduction

I. The Nature of the Minister's Reference

In a letter dated June 8, 1990, the Minister of Justice, pursuant to subsection 12(2) of the *Law Reform Commission Act*,¹ asked the Commission to study, as a matter of special priority, the *Criminal Code*² and related statutes and to examine the extent to which those laws ensure that Aboriginal persons and persons who are members of cultural or religious minorities have equal access to justice and are treated equitably and with respect. In carrying out its general mandate, the Commission was requested by the Minister to focus on "the development of new approaches to and new concepts of the law in keeping with and responsive to the changing needs of modern Canadian society and of individual members of that society."³

The nature of the Minister's request in our view necessitated the division of the work into two components: an Aboriginal justice review, and a cultural or religious minorities justice review. This Report is thus the first of two which we are submitting in response to the Minister's request.

Those who are familiar with the Commission's work and its orientation to the reform of the criminal process may feel that this Report marks a point of departure. Throughout our work we have extolled the virtues of a uniform, consistent and comprehensive approach to law reform. This Reference calls for us to examine, in specific detail, one group of persons and its interaction and unique difficulties with the criminal justice system. It asks us to propose reforms that will offset the sorry results of a history of disadvantage and suffering within the system — reforms that can be proceeded with as a matter of special priority. In fact, many of the proposals in the pages that follow could be implemented throughout the justice system, although they might first be carried out to respond to the particular plight of the Aboriginal peoples. Other proposals in this Report, however, are specific to Aboriginal peoples. While we remain committed to the principles of uniformity and consistency, distinct treatment might be constitutionally justified on the basis of sections 25 and 35 of the *Canadian Charter of Rights and Freedoms*,⁴ which put Aboriginal peoples in a unique constitutional position with pre-existing legal rights, or else under the affirmative action clause of the *Charter's* equality provision.

1. R.S.C. 1985, c. L-7.

2. R.S.C. 1985, c. C-46.

3. *Law Reform Commission Act*, *supra*, note 1, s. 11(d).

4. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

We believe that this Report does no violence to our work in the field of criminal law. Rather, it expresses our basic commitment to the creation of a criminal justice system that pursues the values of humanity, freedom and justice.

In this Report we have consciously employed the designation "Aboriginal" when referring to those persons encompassed by the terms of this Reference. Throughout our consultations, it was emphasized that words such as "natives," "members of first nations" or "Indians" would not reflect the diversity of peoples within Canada who are encompassed by the expression "Aboriginal peoples." Furthermore, labels that incorporate the designation "Indian" are not entirely satisfactory, since many Aboriginal peoples regard that word as pejorative.

Finally, our choice of terminology is consistent with section 35 of the *Constitution Act, 1982*,⁵ which refers to the "Indian, Inuit and Métis" peoples as comprising the Aboriginal peoples of Canada.

II. Limitations on This Study

Any undertaking, let alone one to cover a subject as broad and complex as this, must struggle with inherent limitations. Such factors as time, organization and available resources constrain the research and, ultimately, the product. These limitations, for example, had a bearing on the Commission's ability to conduct meaningful consultations: had there been fewer operational constraints, we would have employed a markedly different consultation strategy, including travelling to various Aboriginal communities. Instead, we met in focused sessions with selected Aboriginal representatives in both Eastern and Western Canada.

We see this limited Report as a first step in a much larger enterprise. While it contains much that can be acted upon immediately, our Report also attempts to set out an agenda for the kind of future work necessary if the problems we have identified are to be adequately responded to in the coming years.

III. The Consultation Process

We began our work with a broad general mailing to interested parties, organizations and experts. We sent letters to and established liaison with various government departments and agencies and with all of the currently operating provincial commissions of inquiry.

5. *Canada Act 1982* (U.K.), 1982, c. 11, Sch. B.

From the outset it was apparent to us that, at a minimum, we would have to solicit the views of representatives of the affected communities and recognized experts, as well as government ministries and institutions having direct responsibilities with respect to Aboriginal peoples and the justice system. In all, we convened three consultation sessions with Aboriginal representatives. We sought out the opinions and reactions of individuals who were in a position to provide the Commission with unique Aboriginal perspectives on the operation of the present system. We also commissioned a series of background studies, a list of which appears in Appendix A.

IV. The Law Reform Context

The Aboriginal representatives with whom we consulted voiced strong reservations regarding this Reference. In the Reference's focus on the *Criminal Code* and related statutes, they saw an unacceptable emphasis on "patching up" the current system. In their eyes, no new catalogue of particular deficiencies in the *Criminal Code* or in the practice of the criminal law was required. What they believed was needed was not more study but more action. Also, they conveyed a deep sense of the futility in attempting to change the face of the criminal justice system when broader, more fundamental social change is necessary. *Criminal Code* amendments do not address the socio-economic plight of the Aboriginal peoples and fail to redress long-held grievances concerning the land.

The cold reality, nevertheless, is that the *Criminal Code* and related statutes are defective and do require change. We at the Commission have devoted much of the past twenty years to exploring many of these deficiencies.

Fundamental change of the kind advocated will not be accomplished overnight. Meanwhile, injustice should still be confronted and vanquished in every dark corner where it lurks. The suffering of Aboriginal peoples continues unabated; they tire of being referred to as a "national tragedy" and call for action now. Our laws and practices must be adjusted: we should not be obliged to await the coming of a new age.

We propose two tracks of reform. One track is short-term and ameliorative but, admittedly, may not address the more fundamental issues. The other stakes out a course that ultimately arrives at a destination far removed from the present reality. This parallel-path approach may leave some readers confused, at least initially. Proposed short-term solutions, such as increasing the number of Aboriginal criminal justice personnel, may seem antithetical to the accomplishment of the kind of fundamental change that the proposals for the creation of Aboriginal justice systems entail.

Central to a proper understanding of our approach is the notion of legal pluralism — of multiple systems coexisting within the legal order. We envision Aboriginal communities opting for the creation of a variety of systems of justice, all of which may be described as Aboriginal justice systems. These may be located on a continuum stretching

from approximations of the present system through various systems and processes incorporating distinctly Aboriginal features (such as alternative methods of dispute resolution and the use of Elders and peacekeepers) and ultimately on to a profoundly transformed system.

In each of the contemplated reform tracks, we hope to promote conditions of reform that are conducive to the creation of systems that Aboriginal peoples and other Canadians will accept and respect.

CHAPTER TWO

The Aboriginal Perspective on Criminal Justice

Aboriginal communities number in the several hundreds and each has had a distinctive experience of the Canadian criminal justice system. Given this diversity, there is necessarily some oversimplification in the following general description of Aboriginal perceptions and aspirations. Nevertheless, we have been struck by the remarkably uniform picture of the system that has been drawn by Aboriginal speakers and writers.

I. Aboriginal Perceptions

From the Aboriginal perspective, the criminal justice system is an alien one, imposed by the dominant white society. Wherever they turn or are shuttled throughout the system, Aboriginal offenders, victims or witnesses encounter a sea of white faces. Not surprisingly, they regard the system as deeply insensitive to their traditions and values: many view it as unremittingly racist.

Abuse of power and the distorted exercise of discretion are identified time and again as principal defects of the system. The police are often seen by Aboriginal people as a foreign, military presence descending on communities to wreak havoc and take people away. Far from being a source of stability and security, the force is feared by them even when its services are necessary to restore a modicum of social peace to the community.

For those living in remote and reserve communities, the entire court apparatus, quite literally, appears to descend from the sky — an impression that serves to magnify their feelings of isolation and erects barriers to their attaining an understanding of the system.

The process is in reality incomprehensible to those who speak only Aboriginal languages, especially where little or no effort is made to provide adequate interpretation services. Even the English- or French-speaking inhabitants of these communities find the language of the courts and lawyers difficult to understand. Understanding is more than a problem of mere language. Aboriginal persons contend that virtually all of the primary actors in the process (police, lawyers, judges, correctional personnel) patronize them and consistently fail to explain adequately what the process requires of them or what is going to happen to them. Even those who are prepared to acknowledge certain well-intentioned aspects of the present system nevertheless conclude that the system has utterly failed.

Such efforts as have been made to involve the community in the administration of justice are seen as puny and insignificant, and there is little optimism about the future. Elders see the community's young people as the primary victims of the system — cut adrift by it and removed from the community's support as well as from its spiritual and cultural traditions. They recount experiences of children taken from their communities at an early age who later emerge, hardened from the court and correctional processes and ultimately beyond the reach of even imaginative initiatives designed to promote rehabilitation.

Evident and understandable weariness and frustration attend any discussion of approaches to fixing the system or setting it right. For Aboriginal persons, the system presents an unending course of barriers and obstacles, with no avenues of effective complaint or redress. Their sense of injustice is bottomless. They have little or no confidence in the legal profession or in the judiciary to bring about justice or to effect a just resolution of any particular dispute in which they are involved. If the truth be told, most have given up on the criminal justice system.

II. Aboriginal Aspirations

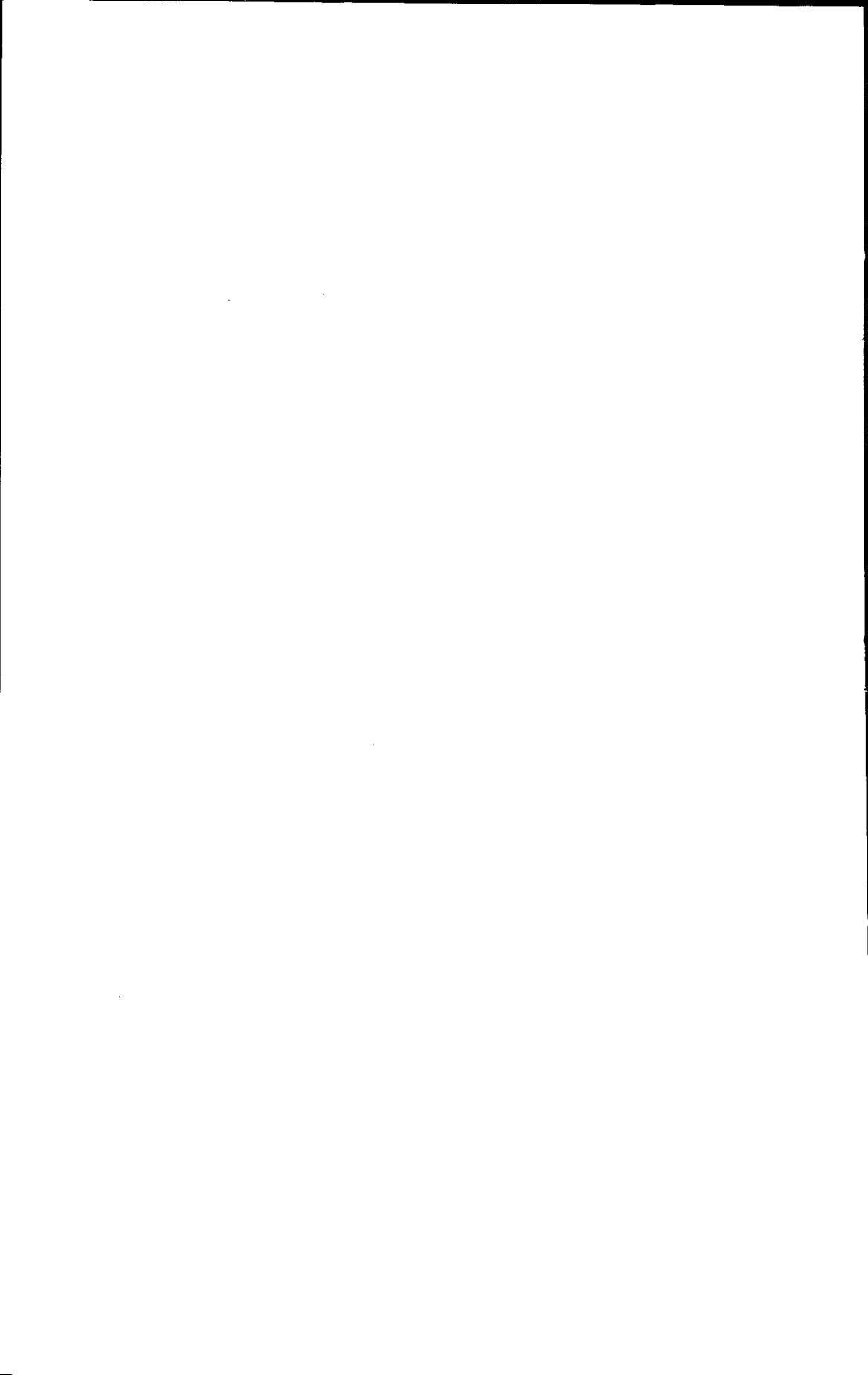
Aboriginal people have a vision of a justice system that is sensitive to their customs, traditions and beliefs. This vision is a natural outgrowth of their aspirations to self-government and sovereignty. They desire a criminal justice system that is Aboriginal-designed, -run and -populated, from top to bottom.

Undoubtedly there are many contrasting visions as to what constitutes an Aboriginal justice system, but fundamental is the belief that the system must be faithful to Aboriginal traditions and cultural values, while adapting them to modern society. Hence, a formal Aboriginal justice system would evince appropriate respect for community Elders and leaders, give heed to the requirements of Aboriginal spirituality and pay homage to the relation of humankind to the land and to nature.

The Aboriginal vision of justice gives pre-eminence to the interests of the collectivity, its overall orientation being holistic and integrative. Thus, it is community-based, stressing mediation and conciliation while seeking an acknowledgement of responsibility from those who transgress the norms of their society. While working toward a reconciliation between the offender and the victim, an Aboriginal justice system would pursue the larger objective of reintegrating the offender into the community as a whole.

The Aboriginal vision challenges both common and civil law concepts. Statute law becomes less important. Within an Aboriginal justice system, laws would not be uniform or homogeneous; they would vary from community to community, depending on customary practices. Customary law would be the binding force promoting harmony within the community.

While possessing common general characteristics, an Aboriginal justice system would of necessity be pluralistic. What such a system would actually look like is unclear. This haziness is a source of frustration. Much essential detail is missing, and Aboriginal people are hesitant to provide that detail, not because they are incapable of providing it — some communities have well-developed and well-articulated models — but because, in their view, they should not have to do so. They aspire to local control. Their contention is essentially: “Give us the keys. Let us control the system. We can hardly do worse than you have.”



CHAPTER THREE

The Meaning of Equal Access to Justice, Equitable Treatment and Respect

Highlights

The criminal justice system must provide the same minimum level of service to all people. Further, the criminal justice system must treat Aboriginal persons equitably and with respect. These objectives require that cultural distinctiveness be recognized, respected and, where appropriate, incorporated into the criminal justice system.

One goal of this Reference must be to provide ways to achieve formal equality in respect of access to justice. Mere formal equality is satisfied if Aboriginal persons receive treatment not worse than that received by anyone else. Aboriginal persons must be equally able to obtain legal counsel, or to have the police respond to their complaints. The criminal justice system must not be more likely to arrest, lay charges against, convict or refuse parole to Aboriginal persons. No one would challenge this modest goal.

However, “access to justice” is a broad term. It includes the simple ability to receive adequate services but, more importantly, it speaks of justice. Further, this Reference looks beyond equality, and talks of Aboriginal persons’ being treated “equitably and with respect.” Criminal law and procedure generally impose the same demands on everyone: in contrast, the concepts of equitable treatment and respect invite a recognition of differences between cultures. “Equitable treatment” raises questions of ultimate fairness. “Respect” requires an acknowledgement that other values can be worthy of protection. In addition, the Reference seeks ways not merely to allow for such differences, but to “ensure” equitable treatment and respect: this wording imposes a high burden.

The traditional perspective of substantive criminal law has been that formal equality is sufficient: as long as everyone is treated identically, then everyone is treated equally. Indeed, this is the meaning of the saying, Justice is blind — differences between people are to be ignored. We believe that the terms of this Reference require a departure from that principle. It is useful first, therefore, to consider the extent to which that principle has shaped criminal law.

The criminal law applies in precisely the same way to everyone. Thus, the differences in values among cultures are not relevant: everyone is held to the same standards, whatever their personal beliefs.⁶ This principle applies also to the enforcement of the law by the Attorney General's agents.⁷ The same perspective frequently applies in criminal procedure. Trial by jury, for example, is in part intended to allow an accused to be judged by people who are likely to understand the accused's motivations and who perhaps share common attitudes and expectations. However, it is sufficient for the jury panel to be randomly chosen from the community in which the accused is tried. This may result in a jury none of whose members share the accused's race or ethnic association, even though that race or ethnic group is well represented in the community as a whole. Even so, if no deliberate exclusion can be shown, the courts will recognize no cause for complaint.

In sentencing as well, the notion of formal equality has a significant impact. Sentencing judges do take account of the individual circumstances of an accused;⁸ at the same time, however, offenders are to be treated "equally," which in the circumstances means that they should be treated more or less identically. Although a fine will be less of a deterrent to a rich person than a poor one, that does not justify jailing the rich person.⁹

While treating everyone identically might seem to imply that external values or considerations would not affect the objective application of rules, we believe that such a view would be mistaken. Any decision enforces some value. When the value enforced is that of the dominant group in society, however, it is easy for members of that dominant group to look upon the decision not as value-based, but as neutral.

Identical treatment does not achieve equality in result. Consider, for example, sentencing: judges apply various factors in "fitting the sentence to the offender." Even when applied even-handedly, however, these factors themselves incorporate certain attitudes and necessarily cause unequal results. Whether the offender might lose a job if imprisoned may legitimately be a consideration in sentencing. The background and prospects of an offender are also relevant — for example, that he or she has been a good student, or is about to embark on a promising career. However, applying these factors means that the poor, the unemployed and those from groups unlikely to maintain stable employment or pursue a university education are likely to be treated more harshly.¹⁰ Similarly, consider sentences that include imprisonment in the event of fine default: the threatened incarceration is only a means of enforcing payment. However, the sentence assumes "that the convicted person has more money than time to spare. This assumption in turn rests upon

6. See *Re Church of Scientology and The Queen (No. 6)* (1987), 31 C.C.C. (3d) 449 at 450 (Ont. C.A.): "The criminal law of Canada does operate to limit religious practices even when based upon sincerely or genuinely held religious beliefs."

7. See *R. v. Catagas* (1977), 38 C.C.C. (2d) 296 (Man. C.A.).

8. In order to "fit the sentence to the offender rather than to the crime" — *R. v. Gardiner*, [1982] 2 S.C.R. 368 at 414.

9. See, e.g., *Johnson v. The Queen* (1971), 5 C.C.C. (2d) 541 (N.S.C.A.).

10. The same or similar factors will also be relevant to decisions concerning bail, and concerning absolute or conditional discharges.

the assumption that the individual is an active participant in the cash-economy.”¹¹ In the case of groups for whom this assumption is not true — many Aboriginal persons, for example — the result is over-representation in prison.

However, despite the historical tenor of criminal law, it has begun to be acknowledged that mere formal equality is not always sufficient. Canadian governments and courts have recognized that the right to counsel, for example, cannot — like the right to a suite at the Ritz — be left available equally to all who can afford it. Rather, steps have been taken to guarantee that the right is genuinely available to everyone, regardless of means. The equality provision in the *Charter* has also had a significant impact: the Supreme Court has held that discrimination can arise from “a policy or practice which is on its face neutral but which has a disproportionately negative effect on an individual or group.”¹² The court also noted that “identical treatment may frequently produce serious inequality,” and that “the promotion of equality under s. 15 has a much more specific goal than the mere elimination of distinctions.”¹³ Accordingly, proposing recognition of a goal beyond mere formal equality is not introducing a completely new concept to the criminal justice system.

In determining whether various groups in society have equal access to justice and whether they are treated equitably and with respect, therefore, we must first ask whether criminal law and procedure provide the same minimum level of service to all members of society. Although that goal may be achieved much of the time, it is also not met in many instances: studies have found racism in the criminal justice system,¹⁴ and even without racism the goal may not be met. The inequities must be addressed.

However, simply to direct our attention to those inequities is not sufficient. Rather, our substantive and procedural law must see to it that relevant differences are not ignored or treated as irrelevant.¹⁵ Instead, our law must recognize that those differences are sometimes crucial and, moreover, that true equality is more than mere formal equality.

The criminal justice system must provide the same minimum level of service to all people. In practice, the system sometimes fails to achieve this goal. The level of service in interaction with police, in access to legal aid and in assisting with comprehension of the court process, among other areas, is not equal among all groups in society, and in particular among Aboriginal people. To the extent that formal equality does not exist, it must be brought about.

11. Paul Havemann, Lori Foster, Keith Couse et al., *Law and Order for Canada's Indigenous People* (Regina: Prairie Justice Research, 1985) at 173.

12. *Canadian National Railway Co. v. Canada* (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114 at 1137.

13. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 171, McIntyre J.

14. See, e.g.: Nova Scotia, Royal Commission on the Donald Marshall, Jr., Prosecution, *Findings and Recommendations*, vol. 1 (Halifax: The Commission, 1989) at 162 (Chair: T. A. Hickman) [hereinafter *Marshall Inquiry*, vol. 1]; Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Métis People of Alberta*, vol. 1 (Edmonton: The Task Force, 1991) at 12-3 (Chair: R. A. Cawsey) [hereinafter *Justice on Trial*].

15. Note the observation of Chief Judge Lilles, quoted in *Justice on Trial*, *supra*, note 14 at 5-5, that “[t]he concept of equality in court proceedings is based on the premise that any law is equally applicable to, understood by and concurred in by all those subject to it. It is, in fact, an assumption of cultural homogeneity; it operates to maintain the existing sociological order. In non-legal terms, this assumption is patently false.”

Further, the criminal justice system must treat Aboriginal persons equitably and with respect. These objectives require that cultural distinctiveness be recognized, respected and, where appropriate, incorporated into the criminal justice system. Differences between members of various groups must be considered by police, prosecutors, defence lawyers, judges, legislators and all other participants in the criminal justice system. Indeed, the structure of the criminal justice system itself must be adjusted to allow greater recognition of those differences. Justice can no longer be blind: Justice must open her eyes to the inequities in society and see to it that they are not mirrored in the criminal justice system.

RECOMMENDATION

1. The criminal justice system must provide the same minimum level of service to all people and must treat Aboriginal persons equitably and with respect. To achieve these objectives, the cultural distinctiveness of Aboriginal peoples should be recognized, respected and, where appropriate, incorporated into the criminal justice system.

CHAPTER FOUR

The Desirability of Aboriginal Justice Systems

Highlights

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

In the course of our consultations on this Reference, one participant, Ovide Mercredi, eloquently expressed a view that was widely shared by others with whom we met:

One of the problems that I see is the perception that the criminal justice system is near-perfect but can maybe be made a little more perfect by making some changes to it over a period of time to allow for the concerns and the rights of Aboriginal people. The real issue is what some people have called cultural imperialism, where one group of people who are distinct make a decision for all other people If you look at it in the context of law, police, court and corrections, and you ask yourself: "Can we improve upon the system?" well, my response is, quite frankly, you can't. Our experiences are such that, if you make it more representative, it's still your law that would apply, it would still be your police forces that would enforce the laws, it would still be your courts that would interpret them, and it would still be your corrections system that houses the people that go through the court system. It would not be our language that is used in the system. It would not be our laws. It would not be our traditions, our customs or our values that decide what happens in the system. That is what I mean by cultural imperialism. So a more representative system, where we have more Indian judges, more Indian lawyers, more Indian clerks of the court, more Indian correctional officers or more Indian managers of the correctional system is not the solution. So what we have to do, in my view, is take off that imperial hat, if that's possible, and find alternatives to the existing system. . . .¹⁶

New, imaginative solutions offer a brighter promise of enlisting the support and respect of Aboriginal people as well as ensuring equal access and equitable treatment. The time has come to co-operate in the creation of Aboriginal-controlled systems of justice, for which many possible models exist.¹⁷

16. Ovide Mercredi, Remarks (Law Reform Commission of Canada Consultation, Edmonton, Alberta, March 1991).

17. One description of the spectrum of possible court models for Aboriginal persons in Canada is offered in *Justice on Trial*, *supra*, note 14 at 11-2 to 11-5.

We recognize that the call for completely separate justice systems is part of a political agenda primarily concerned with self-government. We need not enter that debate. Aboriginal-controlled justice systems have merits quite apart from political considerations.

It is often contended that Aboriginal crime arises from the marginalization of Aboriginal societies as a result of colonization.¹⁸ According to that theory, as control of their own destinies has been removed from Aboriginal people, suicide rates have climbed, crime has increased and their societies have broken down. The steps necessary to solve these problems go well beyond criminal justice reform. As LaPrairie has noted: "Deflecting responsibility to the criminal justice system rather than addressing fundamental problems of social and economic disparity as reflected in reserve life, almost assures the continuation of the problems."¹⁹

Nonetheless, the criminal justice system itself has contributed to the process of marginalization. In traditional Aboriginal societies, "[l]eaders remained leaders only as long as they held the respect of their community."²⁰ Respect for Elders was "the social glue holding people together in relatively peaceful obedience to commonly accepted rules."²¹ However, we are told that "the very presence of our courts has taken away a critical forum in which wisdom can be demonstrated and respect earned."²² Increasingly, participants in the criminal justice system are questioning whether this cultural hegemony is necessary.

Broadly speaking, we believe that criminal law and procedure should impose the same requirements on all members of society, whatever their private beliefs. However, we also feel that the distinct historical position of Aboriginal persons justifies departing from that general principle. As a general rule, all those coming to or residing in Canada should

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18. See, e.g., Mary Hyde and Carol LaPrairie, *Amerindian Police Crime Prevention*, Working Paper No. 1987-21 (Ottawa: Solicitor General Canada, 1987), which characterizes Aboriginal crime as a product of social disorganization derived from colonization and dependency. To the same effect, see Michael Jackson, "Locking up Natives in Canada" (1989) 23 U.B.C. L. Rev. 215 at 218-19; Lawrence J. Barkwell, David N. Chartrand, David N. Gray et al., "Devalued People: The Status of the Métis in the Justice System" (1989) 9:1 Can. J. of Native Studies 121; Havemann et al., *supra*, note 11; Nova Scotia, Royal Commission on the Donald Marshall, Jr., Prosecution, *The Mi'kmaq and Criminal Justice in Nova Scotia: A Research Study* by Scott Clark, vol. 3 (Halifax: The Commission, 1989), especially General Finding 2 at 69 (Chair: T. A. Hickman) [hereinafter Marshall Inquiry, vol. 3]; *Northern Frontier, Northern Homeland: The Report of the MacKenzie Valley Pipeline Inquiry*, vol. 1 (Ottawa: Supply and Services Canada, 1977) at 152 (Commissioner: Thomas R. Berger).
 19. Carol LaPrairie, *If Tribal Courts Are the Solution, What Is the Problem?* (Consultation Document prepared for the Department of the Attorney General, Province of Nova Scotia, January 1990) at viii [unpublished].
 20. Michael Coyle, "Traditional Indian Justice in Ontario: A Role for the Present?" (1986) 24 Osgoode Hall L.J. 605 at 614.
 21. Rupert Ross, "Cultural Blindness and the Justice System in Remote Native Communities" (Address to the "Sharing Common Ground" Conference on Aboriginal Policing Services, Edmonton, May 1990) at 13. Our consultants have made similar observations from their own experience.
 22. Ross, *ibid.* In Nova Scotia, Royal Commission on the Donald Marshall, Jr., Prosecution, *Consultative Conference on Discrimination against Natives and Blacks in the Criminal Justice System and the Role of the Attorney General*, vol. 7 (Halifax: The Commission, 1989) at 27 (Chair: T. A. Hickman) [hereinafter Marshall Inquiry, vol. 7], Judge Coutu, Co-ordinating Judge for the Itinerant Court of the District of Abitibi, stated: "What is important is not the system we adopt, but that the Native communities regain the social control they have lost because of the changes they have suffered since the coming of Europeans in America."

accept Canadian rules, and the outer limit of allowable behaviour should be set by the criminal law. However, the Aboriginal peoples did not come to Canada. Canada came to them. They have constitutional recognition and treaty rights that set them apart from all other Canadians.

The Algonquins have lived in the valley of the Ottawa River at least as long as the French have lived in France or the English have lived in England. Before there was a Canada, before Cartier sailed his small ship up the great river, Algonquins lived in, occupied, used, and defended their home in the Ottawa Valley.²³

To the reality of different constitutional status may be added the feature of cultural difference. Many Aboriginal cultures are essentially non-adversarial. As a result of this different cultural orientation, we are told that they are less likely to be able to use the protections of our justice system, such as the presumption of innocence:

Amongst the Mohawk, one of the most serious of crimes is lying, which would include not acknowledging those acts of which you were properly accused . . . [I]t is likely that the offence with which they are charged is less serious to them than lying about their involvement in it, precisely what a "not guilty" plea would represent for them.²⁴

The effects of cultural difference may be noted at various stages. In the preparation of pre-sentence reports, or in consideration of parole applications, Aboriginal offenders often fare poorly:

What we may be missing is the fact that the offender behaves as he does because our *techniques* of rehabilitation, of "healing", may not only be very different, but also traditionally improper. His refusal may stem not from indifference or from amorality but from *allegiance* to ethical precepts which we have not seen.²⁵

Some Aboriginal communities, we are told, wish to be given the opportunity to rehabilitate offenders and reincorporate them into their societies. They contend that, as constituted, our justice system interferes with that process and our criminal courts cannot serve as a substitute for the community: "Since a person can only be shamed by someone who is respected and looked up to, this cannot be effected by a travelling court."²⁶ For these

23. Chief Greg Sarazin, "220 Years of Broken Promises" in Boyce Richardson, ed., *Drumbeat: Anger and Renewal in Indian Country* (Toronto: Summerhill, 1989) at 169 [hereinafter *Drumbeat*].

24. Rupert Ross, "Leaving Our White Eyes Behind: The Sentencing of Native Accused" [1989] 3 C.N.L.R. 1 at 9. Further, "[t]he traditionally minded Aboriginal person is predisposed to avoid conflict and argument and will shy away from confrontation. Even if a not guilty plea has been entered, the Aboriginal person may not provide the court or even his counsel with evidence unfavourable to the opposing witnesses": Indigenous Bar Association, *The Criminal Code and Aboriginal People* (Paper prepared for the Law Reform Commission of Canada, 1991) at 21 [unpublished] [hereinafter IBA]. Similarly, Aboriginal persons may make bad witnesses, either in their own defence or for the prosecution, because "it is perceived as ethically wrong to say hostile, critical, implicitly angry things about someone *in their presence*": Ross, *ibid.* at 6.

25. Ross, *supra*, note 21 at 10.

26. Submission of the Sandy Lake Band to the Ontario Ministry of the Attorney General, quoted in Ross, *supra*, note 21 at 12.

communities, sending an offender to jail delays the time when reintegration with the community can start. It may also cause an offender to become isolated from the community and more defiant;²⁷ indeed, imprisonment can allow the offender to avoid more distasteful options.²⁸

These Aboriginal desires may be difficult for some observers to square with the squalid reality that exists in the most depressed, demoralized and crime-ridden reserve communities. Such an analysis, however, is ultimately self-defeating. We believe that, where suitable conditions exist, new approaches should be adopted.

Upon examination, we have concluded that the present system fails the Aboriginal peoples and contributes to their difficulties. The problems with the criminal justice system, for the most part, are obvious and long-standing. It is a system that, for Aboriginal people, is plagued with difficulties arising from its remoteness — a term that encompasses not only physical separation but also conceptual and cultural distance. Cultural distance is also manifest in different attitudes to legal control and to the legal environment. Aboriginal peoples continue to believe in the superiority of their traditional methods for resolving disputes and maintaining social order. It is those ancient ways that, ironically, provide the new approaches and concepts of law that the Minister has urged us to explore.

RECOMMENDATION

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

I. Implementation

Necessarily, some basic issues need to be resolved to implement this recommendation. Because of the great diversity among Aboriginal communities, the specific arrangements entailed by this proposal would have to be negotiated on a community-by-community basis. The parties themselves, through the negotiation process, would resolve the outstanding issues in a mutually satisfactory manner. Since no one Aboriginal justice system can satisfy the needs and desires of all communities, no single answer exists to the important questions that must be answered. This, again, is a reason for a proposal that is based upon negotiation. Negotiation, after all, is the primary method by which virtually all major Aboriginal issues should be addressed.

27. Submission of the Alexander Tribal Government to *Justice on Trial*, *supra*, note 14 at 6-43.

28. See Michael Jackson, *In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities* (Paper prepared for the Law Reform Commission of Canada, 1991) at 82-83 [unpublished].

Reserves and Inuit villages are clearly identifiable as Aboriginal communities; many, if not most, Métis settlements ought also to be considered Aboriginal communities, even though there may be non-Aboriginal persons living there. But what of Aboriginal people in urban centres? Do they form a community?²⁹ Is such a community cohesive enough to support control over significant aspects of the justice system? Our proposal is that Aboriginal people themselves should initially make those determinations. Other important questions of this sort remain, to which we now turn.

At first glance, instituting distinct Aboriginal systems of justice might seem a radical suggestion. In fact, Aboriginal peoples in various places throughout Canada already control significant aspects of the justice system and have put in place parallel processes for achieving social peace and harmony within their communities. This proposal, examined in light of those developments, can be looked on as simply a logical extension of advances that have already been made.

The present justice system can also be seen as moving to incorporate Aboriginal innovations. This appears most dramatically where alternative dispute resolution practices are employed.³⁰ A few examples will illustrate this direction.

The South Island Tribal Council on Vancouver Island has become involved in the local criminal justice system to a remarkable extent. An Elder's Council has been established, the members of which act at various stages in the criminal process. Elders are involved in diversion, bail supervision, preparing pre-sentence reports and speaking to sentence. They also supervise open custody and probation, as well as acting as advisers and healers in correctional facilities.³¹ Projects such as these are now essentially integrated parts of the criminal justice system. In each case, Aboriginal persons act in advisory capacities while actual authority rests elsewhere. In other communities, different proposals giving Aboriginal persons a greater measure of actual control have been instituted or proposed.

On the Kahnawake reserve, the community has established a force of "peacekeepers" to perform the police role, although their exact legal status is uncertain.³² In addition,

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29. The term "community" has been defined elsewhere as "a group of aboriginal people having a sense of solidarity, a common identity and tradition, forms of organization and a determination to preserve itself as a distinct entity. As such, the term refers to both local and regional groupings": Ontario Native Affairs Directorate, "Guidelines for the Negotiation of Aboriginal Self-Government," tabled in the Ontario Legislature on December 14, 1989.
 30. In terms of criminal justice, alternative dispute resolution embraces such concepts as diversion and victim-offender reconciliation. See below, our discussion of sentencing; see especially the discussion in Jackson, *supra*, note 28. See also the Marshall Inquiry, vol. 1, *supra*, note 14, quoting the Minister of Indian Affairs at 167: "The many alternative means of resolving disputes . . . are the very methods which are part of customary law."
 31. IBA, *supra*, note 24 at 38-39. Another well-known experiment in greater community control is the juvenile justice program on Christian Island in Northern Ontario, which achieved a dramatic drop in delinquencies. See Rick H. Hemmingson, "Jurisdiction of Future Tribal Courts in Canada: Learning from the American Experience" [1988] 2 C.N.L.R. 1 at 50; Jackson, *supra*, note 18; and Coyle, *supra*, note 20.
 32. See *R. v. Norton* (27 September 1982), Longueuil 2286-81 (C.S.P.), holding that the peacekeepers are peace officers in accordance with s. 2 of the *Criminal Code*. Their status has not been determined by any higher level at court, or by legislation. An even stronger example of autonomous policing arrangements is evolving with the Cree of James Bay pursuant to the James Bay Agreement. Cree police will have virtually total, legal independence within the next few years.

justices of the peace appointed under the *Indian Act*³³ sit in the community twice a week, hearing and deciding summary conviction matters. This jurisdiction is relatively minor, but does give the community direct control over some aspects of local justice.

Very recently, the Government of Ontario announced the creation of an alternative justice program for adult Aboriginal persons charged with criminal offences. Under this program, candidates selected by Aboriginal courtworkers, the Native Community Council Co-ordinator and the Crown Attorney will be given the option of appearing before the Native Community Council for a traditional form of hearing. The Council, made up of Elders and other respected members of the community, will determine the appropriate disposition.

Similarly, the Marshall Inquiry proposed a "community-controlled Native Criminal Court."³⁴ The Government of Nova Scotia is also considering various other pilot projects, including a community-based court, a community youth court and community advisory committees.³⁵

Initiatives such as these are valuable only when they meet the desires of the community. Some communities will want to control a system that more closely conforms to their notions of justice. The Gitksan and Wet'suwet'en societies suggest, for example, that they cannot accommodate a hierarchical court system or the specialized enforcement powers of the police. Rather, they wish to "explore how the two legal cultures might co-exist with dignity rather than try to thrust large parts of one system onto the other."³⁶ Our position, in keeping with the Minister's request that new approaches and concepts responsive to the changing needs of Canadian society be explored, is that where Aboriginal communities so desire, the federal and provincial governments should co-operate in establishing Aboriginal justice systems based on traditional models.

We believe that, initially at least, many communities may wish to create alternatives that bear a strong resemblance to our current justice system. Others may advance more distinctive models. It is difficult to describe these latter systems precisely because they may differ from community to community and because traditional Aboriginal methods also differ from community to community.³⁷ Basic distinctions, such as that between

33. R.S.C. 1985, c. I-5.

34. Marshall Inquiry, vol. 1, *supra*, note 14, Rec. 20 at 168. This project would involve an *Indian Act* justice of the peace, diversion and mediation projects, community work projects as alternatives to fines and imprisonment, after-care services on the reserve, community input into sentencing, and courtworkers.

35. LaPrairie, *supra*, note 19. See also *Justice on Trial*, *supra*, note 14, chap. 11, which at 11-2 sets out seven possible models for alternative justice systems, ranging from models broadly parallel to the present system, to a model which "includes the right of Indians to have their own justice system in whichever way they choose to organize it."

36. *Unlocking Aboriginal Justice*, quoted in Jackson, *supra*, note 28 at 92.

37. "One cannot forcefully demand to know rules when the legal system is not expressed in terms of rules": James W. Zion, "Searching for Indian Common Law" in Bradford W. Morse and Gordon R. Woodman, eds, *Indigenous Law and the State* (Providence: Foris Publications, 1988) 120 at 136. See also Coyle, *supra*, note 20 at 615.

criminal and civil law, might not be recognized.³⁸ Communities may wish to safeguard rights and secure fairness in different ways than our system does.³⁹

It is important not to overstate these differences. As a practical matter, not every community will want to establish its own justice system. Other systems would be roughly parallel to those existing now. Also, even in traditional Aboriginal models, differences may appear to be greater than they really are. The type of behaviour that our criminal justice system seeks to suppress is, by and large, also unwelcome in Aboriginal communities. The overall goals of our justice system (deterrence and rehabilitation, for example) and of any system based on traditional Aboriginal models will be similar.⁴⁰ Understood this way, it should be clear that Aboriginal justice systems can be readily accommodated within Canadian society.

Finally, it should be borne in mind that the proposal to provide for the establishment of an Aboriginal justice system is not one that calls for the creation of huge, costly and monolithic structures and institutions. Aboriginal justice systems should not be imagined as being on the same scale as the Canadian criminal justice system. These systems would be scaled to the communities themselves and would reflect their needs and priorities.

II. Objections

Important issues arise with regard to establishing Aboriginal justice systems. None are insoluble.

There are constitutional questions concerning whether the federal government has the authority to allow Aboriginal justice systems to be created. Those issues are pursued at length in a recent study commissioned by us.⁴¹ The clear position of that study is that the purported constitutional impediments are not substantial. This view finds implicit support in the endorsement of Aboriginal-controlled systems by the Ontario and Nova Scotia governments, and is reinforced by the calls for the establishment of such systems in the Marshall, Cawsey and Osnaburgh/Windigo Reports, as well as by the opinion of the Canadian Bar Association.⁴² Clearly, the prevailing view of those who have closely examined

38. Note the observation in Jackson, *supra*, note 28 at 77, that "in the Coast Salish way a breakdown in family or community harmony requires restoration without attaching labels of criminal or family law to the dispute." See also *Justice on Trial*, *supra*, note 14, chap. 9, "An Aboriginal Perspective on Justice."

39. In so doing, these communities may develop new laws and procedures which will prove worthy of emulation within the Canadian system. *E.g.*, *The Code of Offenses and Procedures of Justice for the Mohawk Territory at Akwesasne* (a Proposal to the Mohawk Nation Council of Chiefs, Mohawk Council of Akwesasne, Saint Regis Mohawk Tribal Council, August 1989) [unpublished], is an example of an initiative meriting close examination.

40. Coyle, *supra*, note 20 at 627, and IBA, *supra*, note 24 at 7.

41. Patricia A. Monture and Mary Ellen Turpel, eds, *Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice* (Paper prepared for the Law Reform Commission of Canada, 1991) [unpublished].

42. The conclusion of the Canadian Bar Association Native Law Subsection, reproduced by the Cawsey Task Force, is that "there is a sound constitutional basis for the development of parallel native justice systems": *Justice on Trial*, *supra*, note 14 at 11-5; see also *infra*, note 43.

these questions is that the legal issues, while important, "should not interfere with the practical, social reasons for the development of an autonomous native justice system if that is what the First Nations desire."⁴³ Having considered these perspectives as well as other literature on the subject, we are of the view that, depending on the specifics of the system that is settled upon, this proposal can largely be accommodated without alteration of the existing Canadian constitutional structure.

One basic difficulty involved in the creation of Aboriginal justice systems arises out of the need to balance the rights and interests of the accused against the rights and interests of the community that chooses to operate under a separate system. In such cases, can and must the rights of the person involved disappear in the face of an assertion of the collective rights of the Aboriginal community? A method must be found to reconcile the legitimate rights of the individual with those collective rights.

Some may see the *Charter* as an obstacle to the establishment of an Aboriginal justice system and those who negotiate these arrangements must remain sensitive to the *Charter's* demands. Certain Aboriginal people, we are told, do not accept that there should be a right to silence or even that a trial is the appropriate method for resolving disputes. One reserve contends that its judicial process has no place for lawyers.⁴⁴

The possibility of differently conceived notions of rights means that any Aboriginal justice system must be carefully constructed and needs widespread community support. Those persons who would be subject to the new system must truly want the change. The challenge is to find a way in which desired departures from the *Charter* can be accommodated. The question of determining to what extent *Charter* rights are negotiable can hardly be avoided. The Government of Canada, as a party to these negotiations, will wish to be sure of its constitutional position, and may even wish to seek a clarification of its position by means of a Reference to the Supreme Court of Canada. Aboriginal representatives seeking to convince federal negotiators of the correctness of their positions may also wish to obtain such a clarification; their access to the courts in this regard should be as generous as the Government's.

Some commentators assert that no special steps need to be taken.⁴⁵ Aboriginal rights are protected in section 25 of the *Constitution Act, 1982*, which guarantees that the other rights and freedoms in the *Charter* do not abrogate or derogate from Aboriginal rights, and also in section 35, which recognizes and affirms existing Aboriginal and treaty rights.

43. Osnaburgh/Windigo Tribal Council Justice Review Committee, *Tay Bway Win: Truth, Justice and First Nations* (Report prepared for the Ontario Attorney General and Solicitor General, 1990) at 38 [unpublished], [hereinafter Osnaburgh/Windigo Report]. See also that report's treatment of four major, commonly held misconceptions about Aboriginal rights and their status in Canadian society, at 38-41.

44. Although one may bring a lawyer to the court to relate facts, no cross-examination is permitted: Grand Chief Michael Mitchell, "An Unbroken Assertion of Sovereignty" in *Drumbeat*, *supra*, note 23 at 125, referring to Akwesasne.

45. See, e.g., Monture and Turpel, eds, *supra*, note 41.

Aboriginal rights can be pre-existing rights, not created by any legislative action.⁴⁶ These commentators argue that a traditional Aboriginal law system is contemplated under existing Aboriginal rights, and that the legal rights in the *Charter*, to the extent that they become implicated, give way in the face of Aboriginal rights.⁴⁷

Another way in which provision can be made for Aboriginal systems is through use of the override power in *Charter* section 33, although its use can be controversial and politically difficult. Therefore, resort to that section should not be embarked upon lightly.

In addition, it is theoretically possible for each member of the community to waive *Charter* rights. This approach sounds impractical, but if jurisdiction for the Aboriginal system is determined in part by the agreement of the accused, then waiver on a case-by-case basis can be obtained: opting for the Aboriginal system conceivably could be a waiver of *Charter* rights. What is unclear, and may require guidance from the courts, is whether it is possible for a person to make a blanket waiver of all individual rights under the *Charter*.⁴⁸

Conceivably, the negotiations contemplated by the proposal may yield agreement to a certain minimum level of compliance with *Charter* rights. This will depend on the willingness of the parties to make this accommodation, but is unlikely to pose much difficulty for what we believe are the many communities that merely wish to take over greater control of aspects of the criminal justice system, or that choose to institute systems broadly parallel to the present one.

Also, the *Charter* should not be thought of as being inhospitable to Aboriginal justice systems. The right to counsel need not be equated with the right to a lawyer; the right to a fair hearing does not necessarily mean the right to a trial before a robed judge; jury trials are largely optional and, in any event, need not be held for any offence carrying liability to imprisonment for less than five years; and so on.

Some may wonder whether the jurisdictional complexity entailed by this proposal can be readily accommodated. In fact, legal pluralism, in the form of Quebec's control over civil law, and divided jurisdiction are already features of Canadian law. An offence committed by a young person brings into play different rules (the *Young Offenders Act*⁴⁹) than

46. *Guerin v. The Queen*, [1984] 2 S.C.R. 335. See the further discussion of this point in Monture and Turpel, eds, *supra*, note 41.

47. Further force is given to this argument by the fact that the legal rights in the *Charter*, those in ss 7-15, are subject to s. 33, but Aboriginal rights are immune to that override clause. A different but related question involves s. 96 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3. That question asks whether, short of a constitutional amendment, it is possible to circumvent the requirements of s. 96 in the establishment of an Aboriginal justice system.

48. For discussion of waiver of *Charter* rights generally, see: *Korponay v. Attorney General of Canada*, [1982] 1 S.C.R. 41; *Clarkson v. The Queen*, [1986] 1 S.C.R. 383; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *R. v. Askov*, [1990] 2 S.C.R. 1199.

49. R.S.C. 1985, c. Y-1.

does the same offence committed by an adult. Similarly, in military matters, a separate jurisdiction for trying offences is created: the offender is dealt with by a different court system having different rules of procedure. Our military justice system also demonstrates that jurisdiction can be divided by means of the type or seriousness of the offence committed.⁵⁰

Jurisdiction could be based on the offender, the offence or the location of the offence: any of these criteria might be appropriate. An Aboriginal system might automatically acquire jurisdiction where the offender is an Aboriginal person, or jurisdiction might be optional in that case. If optional, there are any number of workable methods for deciding which system will deal with the offender: the decision could be made by a panel of Elders, a Crown prosecutor, the victim, the offender or some combination. Jurisdiction might also be simply divided on the basis that any offence committed on a reserve or designated territory (or perhaps by an Aboriginal person on a reserve) will be dealt with by a local Aboriginal justice system. Thus, although we have not devised precise jurisdictional rules — and it would be inappropriate for us to do so — it is clear to us that a workable formula can be achieved through the process of negotiation that is contemplated by our proposal.⁵¹

Another difficulty has to do with the relationship between the Aboriginal justice systems and the general criminal justice system. For instance, will prerogative writs be available to accused or condemned persons? Will a convicted person be able to appeal any conviction or sentence, and to whom? Such problems are by no means easy to resolve and will require a serious examination of the issues at stake.

It bears remembering that the calls for these systems come primarily from Aboriginal communities. The doctrine of formal legal equality, of treating everyone identically, has been tried unsuccessfully for many years. Given the problems this approach has created, an insistence on one uniform justice system seems to be an insistence on the appearance of equality at the expense of real, substantial equality.

Our proposal, then, is for the creation of Aboriginal justice systems through a process of negotiation and agreement. While we expect significant variations in approach from community to community, we suggest that participants in these negotiations in many cases may wish to explore the merits of:

- (a) relying on customary law;
- (b) traditional dispute resolution procedures with dispositional alternatives stressing mediation, arbitration and reconciliation;
- (c) the involvement of Elders and Elders' Councils;
- (d) the use of Peacemakers;

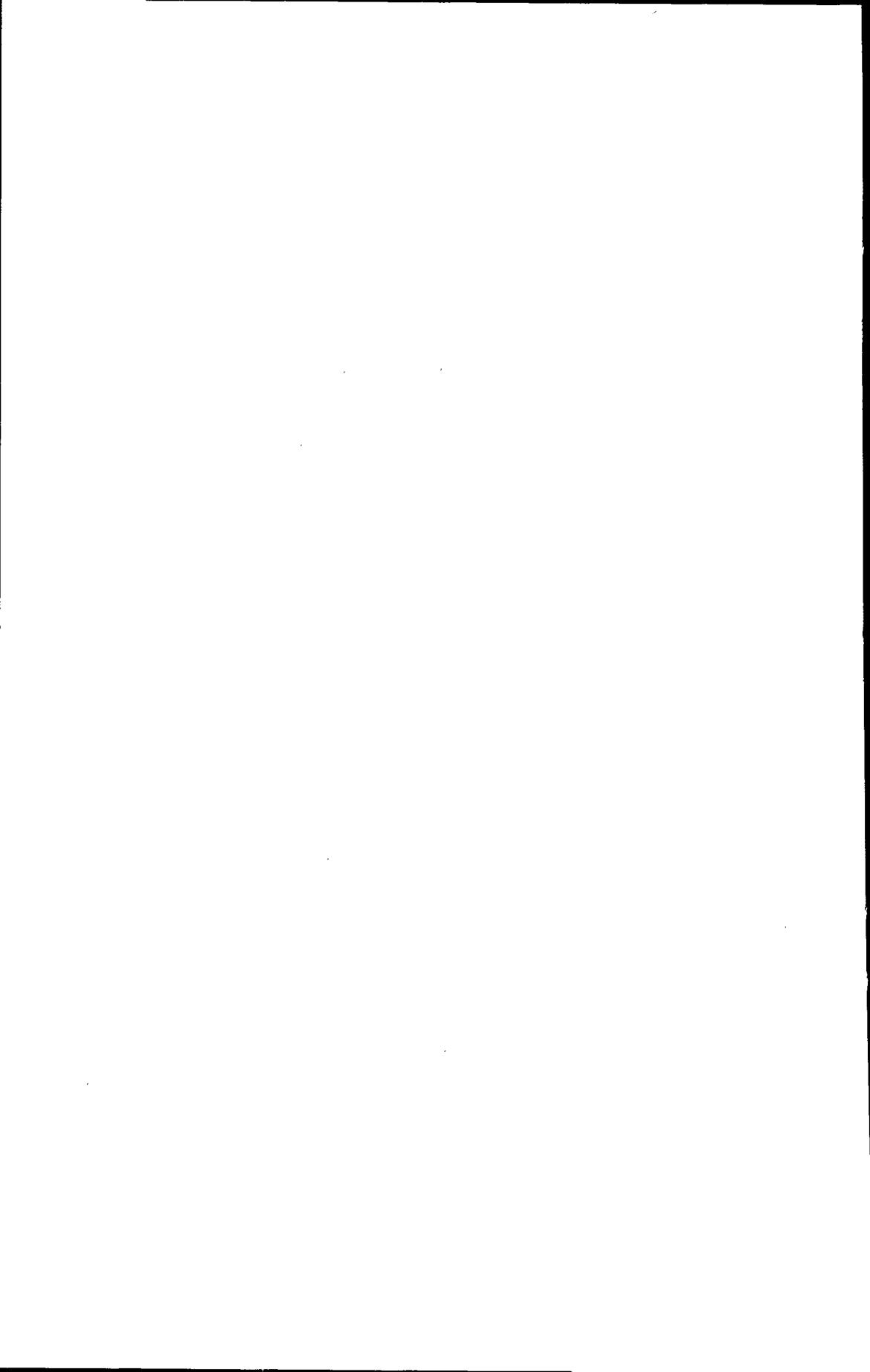
50. Some offences are unique to the *National Defence Act*, R.S.C. 1985, c. N-5.

51. This is not to minimize the practical difficulties involved in settling questions of jurisdiction. If plural systems evolve, having a variety of bases for asserting jurisdiction could create confusion. *E.g.*, a Cree person coming initially before a court in Toronto might have options different from those of a Mohawk in the same circumstances.

- (e) tribal courts having Aboriginal judges and Aboriginal personnel in other mainstream justice roles;⁵²
- (f) autonomous Aboriginal police forces with police commissions and other accountability mechanisms;
- (g) community-based and -controlled correctional facilities, probation and after-care services; and
- (h) an Aboriginal Justice Institute.

We must also face the objections that Aboriginal systems will not be able to cope — in effect, that they will not work. This is clearly a premature judgment. There is no question that the challenge is great. However, let us not establish an unreasonable standard of comparison. It is despair with the way that the present system operates in practice that has led Aboriginal people to call for change. An Aboriginal system could fall well short of perfection and still respond to the needs of Aboriginal persons more effectively than the present justice system. As Donald Marshall, Jr., knows only too well, sometimes the police arrest innocent people, prosecutors pursue them and courts convict them. We do not conclude that our system is unworkable; we strive to improve it. Let us approach Aboriginal justice systems in the same spirit.

52. This option, when defined to mean the specific type of court system in place primarily in the American Southwest, has its share of detractors. The Osnaburgh/Windigo Report, *supra*, note 43 at 37, describes the U.S. tribal courts as “a pale mirror of the U.S. court system” and as something “to be avoided in Canada.” Jonathan Rudin and Dan Russell, *Native Alternative Dispute Resolution Systems: The Canadian Future in Light of the American Past* (Toronto: Ontario Native Council on Justice, 1991), concluded, at i, that “simply importing the U.S. Tribal Court system into Canada would not accomplish a great deal” (see especially chap. 5). Also, see generally, the discussion in Jackson, *supra*, note 18 at 225-29.



CHAPTER FIVE

Fostering Understanding and Building Bridges

Highlights

Aboriginal persons should occupy posts in all aspects and at all levels of the criminal justice system, including posts as police, lawyers, judges, probations officers and correctional officials. Aboriginal persons should be recruited, trained and promoted, through affirmative action if necessary.

Cross-cultural training for all participants in the criminal justice system, including police, lawyers, judges, probation officers and correctional officials, should be expanded and improved.

Linguistic and cultural barriers between the criminal justice system and Aboriginal societies must be removed.

Permanent, effective liaison should be established between the police, the prosecutorial, judicial and correctional systems and Aboriginal communities.

The right of Aboriginal peoples to express themselves in their own languages in all court proceedings should be statutorily recognized. Qualified interpreters should be provided to all Aboriginal persons who need assistance in court proceedings or during the pre-trial stage of a police investigation.

Governments should develop clear and public policies concerning the interpretation of Aboriginal and treaty rights.

I. Difficulties in Providing Justice to Aboriginal Communities

We have called for the creation and recognition of Aboriginal justice systems, but we realize that these systems cannot be implemented everywhere immediately. Indeed, some communities may not choose to establish them. Further, even with Aboriginal justice systems in place, there will continue to be circumstances under which Aboriginal persons are involved with the present system. Accordingly, although they would be insufficient on their own in the view of many Aboriginal communities, steps to make the current system more equitable are necessary. This chapter and the next deal with those steps.

We have had the advantage of considering the Reports of several provincial inquiries into the criminal justice system and Aboriginal persons.⁵³ However, we face one obstacle not faced by those provincial inquiries: our recommendations concern not just local practice, but national laws. Where provincial inquiries have generally only had to concern themselves with the situation of a few communities, our Report is necessarily much more wide-ranging.

This situation creates a pitfall which was brought to our attention by our consultants: once a problem is identified as a way in which the criminal law or the criminal justice system interacts with Aboriginal persons, the problem is seen to be a near universal in Aboriginal communities. Obviously, that assumption must be avoided: Aboriginal persons find themselves in a wide variety of situations. Their experiences and problems, and the appropriate solutions, will vary accordingly.

One can immediately distinguish at least three distinct situations: isolated Aboriginal communities, Aboriginal communities located near non-Aboriginal centres and Aboriginal persons living in non-Aboriginal centres. The problems in each of these circumstances are not the same.⁵⁴

Physical isolation is likely to cause certain problems, among them inadequate police services, limited access to counsel and the release of arrested persons far from the community. Remote communities are also especially likely to suffer from delay. The Cawsey (*Justice on Trial*)⁵⁵ and Osnaburgh/Windigo⁵⁶ Reports have both noted that courts, particularly itinerant courts, are often cancelled owing to weather. Cases are also delayed because of the non-appearance of accused or witnesses at trials some distance from the community. Equally, the need to find interpreters can cause delay.⁵⁷

53. This Report was written and approved, however, before the publication of Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, vols 1, 2 (Winnipeg: Queen's Printer, 1991) (Commissioners: A. C. Hamilton and C. M. Sinclair).

54. It is desirable to establish a more sophisticated division between types of communities. One study has divided aboriginal communities into four categories, and analysed the types of crime and policing needs in each: see Carol Pitcher LaPrairie, "Community Types, Crime, and Police Services on Canadian Indian Reserves" (1988) 25:4 J. Research in Crime and Delinquency 375.

55. *Supra*, note 14.

56. *Supra*, note 43.

57. To the best of our knowledge, no *Charter* case concerning these issues has been brought, but it seems clear in light of the *Askov* decision, *supra*, note 48, that the lack of adequate resources for conducting trials in or near Aboriginal communities will not justify these delays.

Delay is particularly unfortunate in physically isolated communities. First, holding a trial after a delay might actually interfere in a situation that has been resolved. Equally, the delay could result in the situation's not being adequately resolved in the existing system.⁵⁸ As well, the practical difficulty of leaving an offender in the community pending trial can be exacerbated when that community is small and relatively isolated. Already inappropriate bail conditions are more difficult to comply with over a long time, and the offender and the victim are likely to come into contact with each other, with potentially unfortunate results.⁵⁹

At the same time, some solutions to the problems facing isolated communities, such as local supervision of persons on bail or parole or increased cross-cultural training, may be more easily implemented in remote communities. Isolated communities may also be more able to reintegrate offenders into their society.

It has also been suggested to us that, even if not physically isolated, Aboriginal communities can be "culturally remote" from the society around them. Certainly, some communities located very near urban centres have nonetheless been able to retain their distinctiveness. Such communities will also often have greater resources to draw upon in making improvements to the current system or creating their own.

Aboriginal persons in non-Aboriginal communities may also face great difficulties. They have all of the problems associated with not understanding the judicial system, but do not have most of the support that Aboriginal communities are able to offer.

These differences may affect many of our recommendations, and we have tried to bear them in mind throughout. Some of our recommendations are relevant only to isolated communities, some will affect all Aboriginal communities and others should benefit all Aboriginal persons. In each case, we expect that the scope of the recommendation will be clear.

II. Criminal Justice System Recruitment and Training

Numerous studies and reports have shown a pervasive lack of knowledge about Aboriginal peoples on the part of justice system personnel — a lack that makes the justice system less capable of operating equitably and with respect. There are two major ways to address this problem: hiring more Aboriginal persons as justice system personnel and increased cross-cultural training.

58. Ross, *supra*, note 24 at 4, speaks of an Aboriginal teenaged rape victim who refused to testify at a trial over a year after the event: "For her, it was simply too late to put him through it. The past was the past."

59. We are told that, in some areas, accused are routinely ordered to leave the community when released pending trial for certain offences: although this result may be preferable to incarceration, it is not necessarily satisfactory.

A. Increasing System-wide Aboriginal Representation

Hiring more Aboriginal persons might make the system seem less alien to Aboriginal people and create a greater sense of "ownership." Further, the justice system might become more sensitive to Aboriginal culture: Aboriginal officers or judges are less likely to suffer cultural misunderstandings in dealing with Aboriginal persons, and other officials would have exposure to Aboriginal persons among their colleagues.

However, objections have been raised to greater representation. First, Aboriginal persons will not necessarily be more sensitive to Aboriginal culture: "Some very tough attitudes may be engendered in the person who has had to struggle and 'make it the hard way'."⁶⁰ Similarly, Aboriginal persons might be "pushed towards the same practices in the exercise of discretion as those now followed in the administration of the criminal law," and therefore might be viewed "as having 'sold out' to the non-Aboriginal ways."⁶¹ Some of our consultants suggested that involving more Aboriginal persons in the present system merely diverts resources, personnel and attention in the wrong direction, away from the creation of Aboriginal justice systems.

We agree that hiring more Aboriginal persons is not a panacea, but neither is it as destructive as some have claimed. On balance, we favour programs to bring more Aboriginal persons into all aspects of the criminal justice system, including as police, lawyers, judges, probations officers and correctional officials. Also, police forces and correctional services⁶² should hire Aboriginal persons, through affirmative action if necessary. In addition, an affirmative action policy should be carried over into access to training and promotion decisions. If standards that were recognized as inappropriate for hiring are insisted upon for promotion,⁶³ Aboriginal persons will not be able to advance and are unlikely to remain.

Aboriginal lawyers are under-represented.⁶⁴ Recruitment programs to draw more Aboriginal persons into law schools should be financially supported to a greater extent than they are at present. In addition, Aboriginal persons should be appointed as judges at all levels of the judiciary, based on consultation with Aboriginal communities to identify appropriate candidates. To the best of our knowledge, no Supreme or Superior Court justice is an Aboriginal person, and the number of Aboriginal provincial court judges remains embarrassingly small.

60. Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 165.

61. IBA, *supra*, note 24 at 13, 32. The Paper concludes, at 32, that "[d]espite these problems, it is certainly preferable to employ Aboriginal people to serve in Aboriginal communities as police officers."

62. See Barkwell et al., *supra*, note 18 at 139, describing community programs in Manitoba which have involved greater employment of Aboriginal persons.

63. As appears to be the case within the RCMP, for example: see Robert H. D. Head, *Policing for Aboriginal Canadians: The R.C.M.P. Role* (Report prepared for the RCMP, 1989) [unpublished].

64. "Report of the Special Committee on Equity in Legal Education and Practice" (15 February 1991) Law Society of Upper Canada Proceedings of Convocation 16 at 21-22, notes that aboriginal persons make up only 0.8% of lawyers in Ontario, though they represent 1.5% of the adult population.

Aboriginal courtworkers are already a fixture in urban centres and remote communities in many parts of Canada, and can help bridge the gap between Aboriginal offenders and the justice system. They fulfil a wide range of services, including: providing information and explaining procedures to accused persons, justice officials and court personnel; facilitating the use of other agencies; providing out-of-court interpreter and translation assistance; assisting in obtaining lawyers, arranging bail and preparing pre-sentence reports; speaking on behalf of unrepresented Aboriginal persons; and aiding in probation and parole supervision. Ideally, courtworkers should perform more functions⁶⁵ and be available in more jurisdictions but, unfortunately, owing to government cutbacks their use is diminishing.⁶⁶ In our view, Aboriginal courtworker programs should be expanded, and their functions should include involvement with the Aboriginal accused person at all stages of the investigation and prosecution process, particularly where a lawyer is not immediately and continuously available.

RECOMMENDATIONS

3. (1) Programs should be established to bring more Aboriginal persons into all aspects of the criminal justice system, including as police, lawyers, judges, probation officers and correctional officials. More specifically, the following steps should be taken:

- (a) police forces and correctional services should hire Aboriginal persons through affirmative action if necessary, and an affirmative action policy should be carried over into access to training and promotion decisions;**
- (b) recruitment programs to draw more Aboriginal persons into law schools should be financially supported to a greater extent than is presently the case; and**
- (c) Aboriginal persons should be appointed as judges at all levels of the judiciary, based on consultation with Aboriginal communities to identify appropriate candidates.**

(2) Aboriginal courtworker programs should be expanded, and their functions should include involvement with Aboriginal accused persons at all stages of the investigation and prosecution process, particularly where a lawyer is not immediately and continuously available.

65. *E.g.*, the courtworker could be involved in police interrogations, consultations with lawyers, explaining Aboriginal customs to the court and developing strategies and submissions for the court.

66. See Jackson, *supra*, note 18 at 256: programs in four provinces — Prince Edward Island, Nova Scotia, New Brunswick and Saskatchewan — have been discontinued. Following recommendations by the Marshall Inquiry, vol. 1, *supra*, note 14, discussions concerning re-establishing the program in Nova Scotia are taking place.

B. Cross-cultural Training

Greater cross-cultural training was proposed at the 1975 National Conference on Native Peoples and the Criminal Justice System.⁶⁷ Despite this, fifteen years later the Cawsey Task Force observed that in general "court personnel know little about the culture of the Aboriginal people of Alberta."⁶⁸ Lack of cultural sensitivity operates in a subtle way: we all make assumptions based on our own experience about the way that people behave, and we judge others based on those assumptions. When those other people are from a different culture, however, our assumptions can be mistaken: as one prosecutor has noted: "I had been reading evasiveness and insincerity and possible lies when I should have been reading only respect and sincerity."⁶⁹ These mistakes, if made by police, lawyers, judges or correctional officials, can have devastating consequences.

Some cross-cultural training already exists. RCMP officer training includes information about Aboriginal culture,⁷⁰ and various judicial educational programs have taken place.⁷¹ Further, cross-cultural training alone may not be sufficient. Although it can provide greater information about Aboriginal customs and behaviour, cross-cultural training is not generally designed to change underlying attitudes. Training aimed directly at those attitudes — generally called racism awareness or "anti-racism" training — should be investigated further (see the discussion of this issue in Chapter 8 under "I. Agenda for Future Action"). Nevertheless, the pace of change is slow and programs need to be adequately entrenched and institutionalized.

RECOMMENDATION

3. (3) Cross-cultural training for all participants in the criminal justice system, including police, lawyers, judges, probations officers and correctional officials, should be expanded and improved. This training should be mandatory and ongoing for those whose regular duties bring them into significant contact with Aboriginal persons. Local Aboriginal groups should be closely involved in the design and implementation of the training.

67. *Native Peoples and Justice: Reports on the National Conference and the Federal-Provincial Conference on Native Peoples and the Criminal Justice System*, both held in Edmonton, February 3-5, 1975 (Ottawa: Solicitor General Canada, 1975). The failure to take effective action on these proposals has been the subject of academic criticism and commentary (see Curt T. Griffiths and Simon N. Verdun-Jones, *Canadian Criminal Justice* (Toronto: Butterworths, 1989) at 573, for a selective review of the literature).

68. *Justice on Trial*, *supra*, note 14 at 5-1. See also Osnaburgh/Windigo Report, *supra*, note 43 at 59.

69. Ross, *supra*, note 24 at 2. Similarly, there is a danger of reading an Aboriginal person's "unwillingness or inability to employ *our* techniques [of rehabilitation] as clear signs of an unwillingness or inability to employ *any* techniques": Ross, *supra*, note 21 at 10.

70. Recommendations for improvement have been made: Head, *supra*, note 63, recommends at 88-89 that more time should be devoted to Aboriginal rights and that cross-cultural training should be given to those responsible for policy development. See also *Justice on Trial*, *supra*, note 14 at 2-36 to 2-40; and the discussion in Manitoba Métis Federation, *Submission to the Aboriginal Justice Inquiry* (1989) at 28 [unpublished].

71. See, e.g., Papers of the Western Workshop, Alberta, co-sponsored by the Western Judicial Education Centre and the Canadian Association of Provincial Court Judges in conjunction with the Canadian Judicial Centre, at Lake Louise, Alberta, May 12-18, 1990 [unpublished]. See also remarks of Associate Chief Provincial Judge Diebolt to a conference sponsored by the Affiliation of Multi-cultural Societies and Service Agencies of British Columbia (Vancouver, June 3-5, 1991) describing cross-cultural training and sensitization courses for British Columbia provincial court judges.

The programs will need to be offered by a variety of bodies — judicial education centres, provincial bar associations, correctional institutions, and so on. Information concerning Aboriginal culture should be incorporated into law school programs. Steps toward this end have been taken in some, although not all, law schools.⁷² Similarly, legal aid services should make arrangements to allow some lawyers to specialize in representing Aboriginal persons. Lawyers who deal regularly with Aboriginal persons will be familiar with the unusual legal issues that may arise.⁷³

RECOMMENDATIONS

3. (4) Information concerning Aboriginal culture should be incorporated into law school programs.

(5) Legal aid services should make arrangements to allow some lawyers to specialize in representing Aboriginal persons.

III. Overcoming Language Difficulties and Cultural Barriers

In principle, problems with translation for Aboriginal persons ought not to exist, even under the current law. Section 14 of the *Charter* guarantees an interpreter to anyone who does not understand the language of proceedings, a guarantee that existed at common law in any event.⁷⁴ As in many areas, the problem here is ensuring that Aboriginal persons actually receive the rights to which they are entitled.

Language-related problems for Aboriginal persons that have been remarked upon to us include suggestions that: judges tend to deny requests for an interpreter if the accused can speak some English; interpreters are often not neutral, in the sense that they are familiar with the accused; interpreters are not adequately trained; many legal concepts have no equivalent words in Aboriginal languages;⁷⁵ and, even where assistance is available, it is not sought, nor is the need for it appreciated by counsel and other personnel.⁷⁶

72. "Report of the Special Committee on Equity in Legal Education and Practices," *supra*, note 64 at 21, notes that "[t]here were also concerns expressed about the lack of sensitivity shown by law schools and the Law Society in course curricula." It was suggested to us that information about Aboriginal culture and history ought to be introduced into school curricula generally, a suggestion which seems sensible, although outside the terms of this Reference.

73. See a similar recommendation (Rec. 26) in the Marshall Inquiry, vol. 1, *supra*, note 14.

74. See *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549.

75. A variety of problems in translating the fundamental word "guilty" have been reported, including translating the request for a plea as "Did you do it?" and "Are you being blamed?": see Marshall Inquiry, vol. 3, *supra*, note 18 at 47-48, *R. v. Koonungnak* (1963), 45 W.W.R. (N.S.) 282 (N.W.T. Terr. Ct), or Ross, *supra*, note 24 at 9-10.

76. On these problems generally, see *Justice on Trial*, *supra*, note 14 at 4-14 to 4-18; Marshall Inquiry, vol. 1, *supra*, note 14 at 171-73; Monture and Turpel, eds, *supra*, note 41 at 11-12; John Bayly, "Unilingual Aboriginal Jurors in a Euro-Canadian Criminal Justice System: Some Preliminary Views of the Northwest Territories Experience" in Commission on Folk Law and Legal Pluralism, *Proceedings of the VIIth International Symposium, Ottawa, August 14-18, 1990*, vol. 1 (Ottawa: The Commission, 1990) at 305 (President: Harald W. Finkler).

Even Aboriginal persons with a command of English or French can be at a disadvantage. The Marshall Inquiry, for example, noted that Donald Marshall, Jr., appeared more comfortable when testifying in Mi'kmaq than in English, a language in which he is fluent.⁷⁷ Matters of nuance can make the difference between giving an inculpatory or exculpatory statement to the police, between being believed or disbelieved, between being convicted or acquitted and between receiving a harsh or lenient sentence.

Making adequate provision for those who speak other languages is a major way in which the justice system can show respect for Aboriginal persons: "It is little wonder that the First Nations find the legal system alien when the system does so little to foster an understanding of its processes, practices and procedures in the language of the majority of the residents."⁷⁸ Solutions proposed elsewhere, such as greater cross-cultural training and greater recruitment of Aboriginal persons as justice system personnel, could help alleviate these problems. However, specific recommendations regarding language are also required.

RECOMMENDATION

4. (1) The right of Aboriginal peoples to express themselves in their own Aboriginal languages in all court proceedings should be statutorily recognized. Qualified interpreters should be provided at public expense to all Aboriginal persons who need assistance in court proceedings.

The right to an interpreter under *Charter* section 14 is available only to a "party or witness" — that is, at the trial stage. There is an argument that a similar right exists at the investigative stage,⁷⁹ but the matter is not entirely clear. We suggest that legislation should provide that interpreters are required to be available during the pre-trial stage of a police-conducted investigation, including questioning, to any suspect who needs assistance. Any investigation carried out through an interpreter should ideally be recorded, so that no questions about the adequacy of translation could arise later.

In addition, the Cawsey Report heard complaints that accused persons had been required to pay for the cost of an interpreter. Such an order could "effectively undermine the right guaranteed by the *Charter*,"⁸⁰ and we expect that the order is unusual. Nonetheless, if there is any doubt on the issue, the *Criminal Code* and the *Canada Evidence Act* should provide that the costs of interpreter services rendered to accused persons at any stage of the criminal process must be borne by the state.

Further, the *Charter* does not specifically require that accused or witnesses be informed of their rights under section 14. However, persons who do not speak English or French are especially unlikely to be aware of the *Charter* right, while some accused, particularly

77. Marshall Inquiry, vol. 1, *supra*, note 14 at 171-72.

78. Osnaburgh/Windigo Report, *supra*, note 43 at 58-59.

79. See *Charter* s. 10(a) and (b), and *R. v. Evans* (18 April 1991), File No. 21375 (S.C.C.).

80. André Morel, "Certain Guarantees of Criminal Procedure" in Gérald-A. Beaudoin and Edward Ratushny, eds, *The Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Carswell, 1989) 497 at 536 n. 177; see also *Justice on Trial*, *supra*, note 14.

those with some command of the language, may be reluctant to raise the issue. As well, the contact between the accused and the court — or even with defence counsel in some cases — may be too limited to reveal that the accused's command of the language is less than sufficient.

RECOMMENDATIONS

4. (2) Legislation should provide that interpreters be provided during the pre-trial stage of a police-conducted investigation, including questioning, to any suspect who needs assistance.

(3) The *Criminal Code* and the *Canada Evidence Act* should provide that the costs of interpreter services rendered to accused persons at any stage of the criminal process must be borne by the state.

(4) Notices should be prominently posted, in languages frequently used in the community, in each court house or preferably outside of each courtroom, explaining the section 14 *Charter* right to an interpreter. These notices should set out:

- (a) the requirements for obtaining an interpreter;**
- (b) that an accused or witness who speaks some English or French may still be entitled to an interpreter; and**
- (c) that, if an interpreter is ordered, the accused or witness will not be required to pay for it.**

(5) Duty counsel should be instructed to pay particular attention to the language abilities of Aboriginal accused.

If necessary, counsel should use interpreters to conduct their own interviews with the accused and make applications to the court for interpreters to assist the accused during proceedings. This may require that legal aid plans establish mechanisms for quickly providing interpreters to be present at interviews when needed, and for postponing the calling of cases until an interpreter-assisted interview has taken place.

RECOMMENDATION

4. (6) Unless advised by counsel that it is unnecessary, judges should satisfy themselves on first appearance that Aboriginal accused or witnesses speak and understand the language in which the proceedings are to be conducted.

The needs of the accused or witness on the issue of language should be noted in court documents so that once ordered, an interpreter will be present for subsequent appearances.

One should also consider the situation of members of the community who are neither accused nor witnesses but who are present in court. Court hearings are intended publicly to reinforce values and condemn misbehaviour, but members of Aboriginal communities "are often left in ignorance of what is transpiring since the proceedings are neither conducted nor translated in a language known to the majority of them."⁸¹

81. Osnaburgh/Windigo Report, *supra*, note 43 at 58.

RECOMMENDATION

4. (7) **The need for, the feasibility and the cost of providing simultaneous translation services to members of the Aboriginal public attending court hearings on or near reserves should be examined.**

The final problem relates to the qualifications of interpreters: the evidence suggests that the quality of translation is generally not high. The difficulty of translating some legal concepts into Aboriginal languages makes it important that interpreters have special training: in fact, interpreters "are often called upon, in an *ad hoc* fashion from those available in court, irrespective of their understanding of local dialects."⁸² Our consultants tell us that anyone available, even persons related to the accused, may be asked to interpret, without having had any training. The need for more trained interpreters has also been noted elsewhere.⁸³

Case law requires that interpreters should be competent and impartial,⁸⁴ but there is good reason to doubt that this standard is met routinely in cases involving Aboriginal persons.

RECOMMENDATION

4. (8) **A system should be established to train independent, competent professional interpreters for criminal cases. As a general rule, only such interpreters should qualify to assist in criminal cases.**

IV. Increasing Community Involvement with the Justice System

Understanding, respect and a sense of control can be engendered only if the Aboriginal community is involved at all key points of interaction with the system:

Court officials must know what each community considers serious, how it should be dealt with, and the kind of sentence the community expects. Court officials do not act in a void: their acts, deliberations, and results affect not only the offender but the victims and communities as well. Judges and prosecutors must know the people and communities on whose behalf they are acting. They too must be accountable to the people.⁸⁵

In most instances, the community will have the best understanding of its own problems and how those problems should be handled.

82. *Ibid.*

83. See Bayly, *supra*, note 76 at 305, reporting the lack of trained interpreters in the Northwest Territories.

84. *Unterreiner v. The Queen* (1980), 51 C.C.C. (2d) 373 (Ont. Co. Ct).

85. Gift Lake Council, Joint Submission to the Task Force on the Criminal Justice System and Its Impact on the Indian and Métis People of Alberta, quoted in *Justice on Trial*, *supra*, note 14 at 5-2.

Community involvement in the criminal justice system is crucial to effective reform. We see this participation as taking a variety of forms — advising on general policy, having greater input into particular cases, even serving as an alternative to the criminal justice system in some cases. The potential benefits include decreasing the number of Aboriginal accused persons, increasing the likelihood that decisions will have community support and decreasing the extent to which the community sees the court as imposing an alien system upon it. Of course, community involvement at any stage will only be possible when the community has the human resources to make a contribution and chooses to do so.

One way to gain community acceptance of the system is to facilitate the use of customary practices in resolving disputes.

RECOMMENDATION

5. (1) Consideration should be given to making “Peacemakers” a formal aspect of the justice system to mediate disputes.

The Peacemakers,⁸⁶ who function in a customary informal mediation process, draw their members from the family, Elders and elected community leaders. The Peacemaker role includes teaching and enforcing values and traditions, counselling, placing children in foster homes and resolving disputes.⁸⁷ The Dakota Ojibway Tribal Council has proposed using Peacemakers in a self-governing Native justice system to:

- (a) determine whether they will deal with a particular situation or refer it to a Crown attorney;
- (b) appoint persons within the community to deal with specific situations, offences or problems;
- (c) appoint persons to exercise protective functions within the community to maintain social order;
- (d) call for ceremonies, celebrations or other events to keep relationships within the community healthy; and
- (e) settle disputes between persons or families, or provide assistance to persons experiencing problems. Peacemakers might also speak at community functions to remind members of their obligations, standards and values and to call for necessary discipline.⁸⁸

86. “Peacemakers” should not be confused with the peacekeepers at Kahnawake, who act essentially as a police force.

87. *Reflecting Indian Concerns and Values in the Justice System: Joint Canada-Saskatchewan-FSIN Justice Studies of Certain Aspects of the Justice System as They Relate to Indians in Saskatchewan*, vol. 6 (1985) at 29 [unpublished].

88. Dakota Ojibway Tribal Council, *Submission to the Commission of Inquiry on the Administration of Justice for Aboriginal Peoples* (Paper presented at a public meeting in Brandon, Manitoba, April 27, 1989) at 8-9 [unpublished].

There is great scope, we believe, for involving the community in specific aspects of the current justice system. For example, formally incorporating Peacemakers into a recognized diversion program would move the system much closer to the conciliation and mediation traditions of Aboriginal communities and away from the adversarial methods of courts.⁸⁹

RECOMMENDATION

5. (2) Permanent liaison mechanisms should be established between local Crown prosecutors and Aboriginal communities and leaders.

These meetings would provide an opportunity for Crown attorneys and community leaders to discuss criteria for laying charges, the suitability of cases for diversion, the adequacy of community resources and other criminal justice issues of concern to the community. Regular reports should be submitted to the Attorney General, the Deputy Attorney General and the concerned Aboriginal communities.

For example, section 518 of the *Code* sets out the evidence that may be heard at a bail hearing. In Australia, courts have taken traditional Aboriginal punishments into account in determining bail.⁹⁰ However, the *Code* contains no express procedure allowing a community to make submissions in this regard. We suggest that representatives of the accused's community should be allowed to give evidence, at bail hearings, of available alternatives to custody pending trial. One must, of course, ascertain accurately who speaks for the community, but we see no reason that a representative group should not be able to offer evidence.⁹¹ By the same token, lay assessors (Elders or other respected members of the community) ought to be permitted by express statutory provision to sit with a judge to advise on appropriate sentences. They should be present during the trial or recitation of facts upon which a guilty plea is made. Their duties would include consulting those involved and recommending an appropriate disposition to the judge. Similar programs already exist⁹² or are being created⁹³ in some communities. The advisers' recommendations may

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89. See also: Brad Morse and Linda Lock, *Native Offenders' Perceptions of the Criminal Justice System* (Ottawa: Dept. of Justice, 1988); Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws: Summary Report*, Report No. 31 (Canberra: Australian Government Publishing Service, 1986); and Jackson, *supra*, note 18 at 242-55.
 90. In *R. v. Jungarai* (1981), 9 N.T.R. 30 (N.T. Supreme Ct), an accused charged with murder was released on bail, on condition that he suffer a traditional form of corporal punishment. Part of the purpose served by this unusual order was to prevent the accused's family from being attacked by the members of the victim's family. For a brief summary of this case, see Jackson, *supra*, note 18 at 270-71.
 91. We recognize that this proposal will not always benefit the accused personally, but it will benefit Aboriginal communities as a whole.
 92. The South Island Tribal Council (B.C.) has such a program, as does the community on Christian Island (Ont.): see Hemmingson, *supra*, note 31 at 50 and Coyle, *supra*, note 20. Similar programs exist in Australia: see Australian Law Reform Commission, *supra*, note 89, para. 142 at 68.
 93. The Ontario government has initiated Elders programs in two Northern Aboriginal communities, to participate in provincial court sentencing, to "provide paraprobationary services and be involved in the administration of traditional justice measures, counselling, legal education and cross-cultural training for non-Natives" ("Natives Get \$200,000 to Study Justice System" *Law Times* (23-29 April 1990) 3).

differ from the range of sentences established by case law, or may be contrary to general court of appeal jurisprudence. We see no real difficulty in this: indeed, it is because such guidelines are on occasion inappropriate to Aboriginal communities that we make this recommendation.

We also suggest that a process of ongoing consultation between Aboriginal service providers and officials of the Correctional Service of Canada and the National Parole Board should be established. This consultation should occur with a body representative of Aboriginal groups generally rather than with individual communities. More frequent meetings would facilitate the exchange of information, more effective development and delivery of programming and greater uniformity and consistency in the application of correctional programs for Aboriginal offenders. In this regard, Aboriginal communities should be involved in the preparation of release plans for Aboriginal offenders and the supervision of those persons in their communities following release. Aboriginal communities have a stake in the release plans and supervision of offenders returned to their communities. The appropriateness of returning a particular offender to the community, or the adequacy of parole supervision and its impact on community resources, are questions that the communities concerned are best able to answer.

RECOMMENDATIONS

5. (3) Representatives of the accused's community should be allowed to give evidence, at bail hearings, of available alternatives to custody pending trial.

(4) Lay assessors (Elders or other respected members of the community) should be permitted by express statutory provision to sit with a judge to advise on appropriate sentences.

(5) A process of ongoing consultation between Aboriginal service providers and officials of the Correctional Service of Canada and the National Parole Board should be established.

(6) Aboriginal communities should be involved in the preparation of release plans for Aboriginal offenders and the supervision of those persons in their communities following release.

However, concerns regarding all of these proposals must be raised. Human resources are scarce. Ideally, Elders would fill the advisory and decision-making roles we propose, since their decisions are most likely to give legitimacy to the process. Yet in many communities, there will not be enough people available to fill these roles,⁹⁴ and in others, the community may simply not be interested in this type of involvement. Also, while we hope to give legitimacy to the present system by virtue of the involvement of Elders, it is possible that those Elders who become closely involved in this kind of process

94. We have been advised that even administering a fine option program can strain the resources of a community (see IBA, *supra*, note 24 at 48-49), and that the number of Elders available for friendship centres or to offer counselling in prisons is insufficient.

will be seen as having been co-opted, and will lose their own legitimacy. Having considered this, we nevertheless suggest that these options should be available to any Aboriginal community. Some communities may be unable to take advantage of them all, while others may reject them as counter-productive. Nonetheless, each community should have the option of greater involvement at every stage of the process.

V. Applying Customary Law and Practices

For many years, it was felt that Aboriginal persons should be assimilated rather than encouraged to retain their own culture. Owing to assimilation efforts, some knowledge of "traditional" ways has been lost or is in danger of being lost. Given the interest in more traditional ways in some communities, the need for information about the past has become important.

Customary law can be just as effective a mechanism of social control as statutory law:

It is unfortunate that the term "custom" implies something that is somehow less or of lower degree than "law." There are connotations that a "custom" is somehow outside the "law" of government, which is powerful and binding. This is an ethnocentric view. . . .⁹⁵

Sentencing decisions might be affected by customary law. Courts have been inconsistent in reconciling Aboriginal custom with the criminal law. In *R. v. Fireman*,⁹⁶ for example, the Ontario Court of Appeal considered the appropriate sentence for an accused from an isolated Aboriginal community. The community at first ostracized Fireman but, by the end of the preliminary inquiry, it was once again prepared to accept him. The court of appeal concluded that it was not the length of the sentence but the fact of condemnation and the separation from his community that would deter this accused. Indeed, the court acknowledged that too long a sentence could interfere with the reintegration of Fireman into his community, which would diminish the effectiveness of deterrence.

In contrast, the Northwest Territories Court of Appeal in *R. v. Naqitarvik* gave very little emphasis to traditional Aboriginal methods of dealing with social problems. The court held that counselling received by the accused from the Inumarit Committee of Arctic Bay, a community on the northern coast of Baffin Island, was not from a "traditional governing and counselling body of early time . . . [or] a remnant of ancient culture" but was "the usual . . . counselling service"⁹⁷ that exists within the criminal justice system. Seemingly, Arctic Bay was not sufficiently linked to past customs and practices to justify a modification of ordinary sentencing practices: the presence of electricity, telephones and

95. Zion, *supra*, note 37 at 123-24.

96. (1971) 4 C.C.C. (2d) 82.

97. *R. v. Naqitarvik* (1986), 26 C.C.C. (3d) 193 at 196.

record players militated against the use of custom. *Naqitarvik* appears to demand that Aboriginal cultural institutions remain frozen in time, and that cultures and their customs cannot evolve.

We believe that modern practices can be reflections of traditional methods. Judges must be better sensitized to the customary practices of Aboriginal communities.

Information about Aboriginal customary law could affect many procedural decisions within the current criminal justice system. Such information might influence a trier of fact's decision about the behaviour of a "reasonable person," which would be relevant to many decisions about criminal intent, including questions of recklessness, criminal negligence and provocation. Aboriginal customary law might also affect various defences allowed under the *Criminal Code*,⁹⁸ such as whether one acted with legal justification or excuse (subsection 429(2)) under colour of right (section 322 and subsection 429(2)) or in obedience to *de facto* law (section 15). Before specific proposals can be made in this area, more information is necessary.⁹⁹

RECOMMENDATION

6. The federal government should provide funding for research into Aboriginal customary law.¹⁰⁰

VI. Asserting Treaty Rights in Criminal Courts

As the ability to control their own destiny has been removed from Aboriginal peoples, their societies have broken down. The introduction of our British-inspired justice system into Aboriginal communities undermined their traditional, informal methods of social control. But our justice system has been an unsuccessful substitute. As a result, over time many Aboriginal communities have been left largely without real methods of discouraging anti-social behaviour.¹⁰¹

The conflict between Aboriginal values and the values expressed in the present justice system does not, to any significant extent, relate to deciding what behaviour is objectionable. It has been suggested that "for the most part 'our' crimes are crimes to them as

98. The Australian Law Reform Commission, *supra*, note 89 at 43, has proposed legislating a partial customary law defence. Such a defence would not exonerate an accused but would, like the defence of provocation, reduce the level of liability.

99. Some work is being done — see, e.g., E. Jane Dickson-Gilmore, "Resurrecting the Peace: Traditionalist Approaches to Separate Justice in the Kahnawake Mohawk Nation" in Commission on Folk Law and Legal Pluralism, *supra*, note 76 at 259.

100. Further to this recommendation, see our Rec. 15(2) to create an Aboriginal Justice Institute, below at 89. Moreover, although Aboriginal justice systems would not simply involve a readoption of methods used hundreds of years ago, information about customary law is necessary if Aboriginal justice systems are to be established.

101. This situation is often described as the product of colonization: see the discussion above in chap. 4 at 14 and below in chap. 6 at 67, under "VI. Sentencing."

well.”¹⁰² Rather, the conflict arises in determining the appropriate response to objectionable behaviour.

That being said, one specific area of conflict is worth special consideration: the assertion of treaty rights in criminal courts. Some of our consultants expressed dissatisfaction that the criminal courts are the primary forum in which Aboriginal persons are called upon to assert their treaty rights. This procedure, they feel, is demeaning. Treaty rights define the relationship of Aboriginal persons to the rest of Canada. However, the primary circumstance in which these rights are given meaning is when they are raised in court as a defence to a criminal charge. The effect, Aboriginal people contend, is that they become “contingent persons,” having no rights save those declared by criminal courts. Further, there is the practical difficulty that such a defence may be raised by any Aboriginal individual, no matter how ill-prepared, thereby binding all others party to the same treaty. While others who litigate their rights must also do so in the criminal courts (for example, free expression may be determined in criminal cases involving obscenity), the Supreme Court of Canada offers support to the Aboriginal claim, noting that “the trial for a violation of a penal prohibition may not be the most appropriate setting in which to determine the existence of an aboriginal right.”¹⁰³

In our view, a criminal court is not necessarily the most appropriate forum for determining Aboriginal and treaty rights. Indeed, the courts generally are not the best setting for giving substance to treaty rights, which ought really to be determined through negotiation where possible, and through litigation only where necessary. This approach shows greater respect for Aboriginal sensitivities in this area.

RECOMMENDATION

7. Governments should develop clear and public policies concerning the preferred methods for determining Aboriginal and treaty rights. These policies should encourage identifying areas of conflict through discussion with Aboriginal communities, for the purpose of negotiating agreements about those issues with the affected parties. Where litigation is necessary, declaratory relief or court references should be preferred to the laying of charges, but if prosecutions are commenced, multiple proceedings should be vigorously discouraged and only a single test case pursued.¹⁰⁴

102. Ross, *supra*, note 24 at 13. IBA, *supra*, note 24 at 41, notes that most Aboriginal concerns “address questions relating to criminal justice processes rather than the substantive offences prescribed by the Criminal Code and related statutes.”

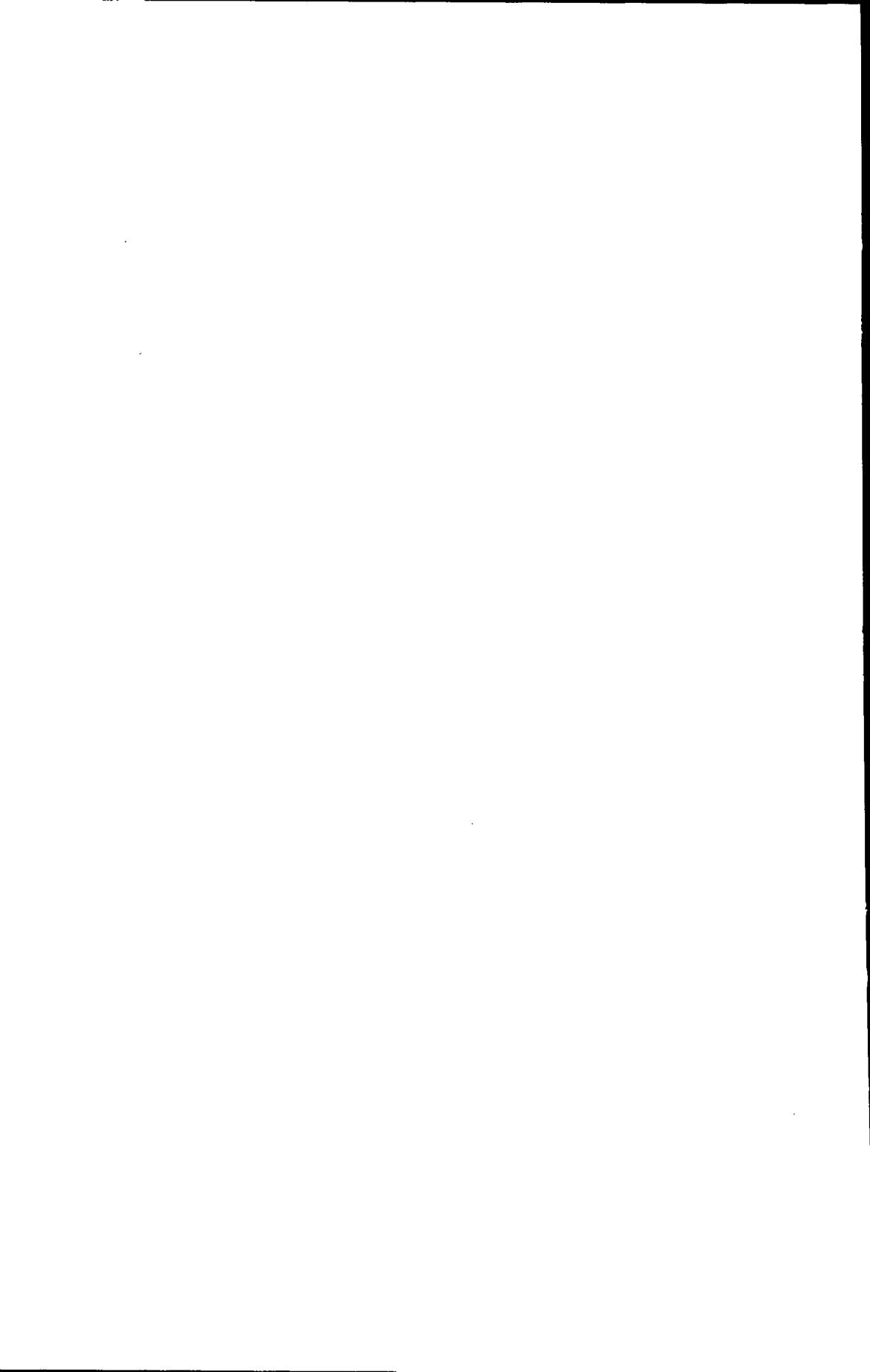
103. *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1095.

104. This approach was adopted in Ontario and Quebec during the currency of the constitutional challenges to the *Criminal Code's* abortion provisions arising out of the prosecution of Dr. Henry Morgentaler.

Under this proposal, many issues now decided on a case-by-case basis could be determined on a broader scale. For example, although the *Indian Act* gives treaty rights priority over provincial laws,¹⁰⁵ Aboriginal persons are still sometimes convicted of provincial offences.¹⁰⁶ Negotiation could resolve important general issues far more readily, and save much needless litigation.

105. See *supra*, note 33, s. 88.

106. Various decisions have disagreed, *e.g.*, over whether an Aboriginal person using a night light to hunt is guilty of an offence (compare *Prince v. The Queen*, [1964] S.C.R. 81, and *Myran v. The Queen*, [1976] 2 S.C.R. 137) or whether it is an offence for Aboriginal persons to have loaded weapons in a vehicle (compare *R. v. Anderson and Beardy*, [1983] 2 C.N.L.R. 117 (Man. Cty. Ct) and *R. v. Polchies*, [1982] 4 C.N.L.R. 132 (N.B. Prov. Ct)).



CHAPTER SIX

Changing Roles and Reforming the Process

Highlights

The police must be more involved in and accountable to the communities they serve. This objective should be promoted through the use of community-based policing in Aboriginal communities that desire external police services. Also, the federal and provincial governments should facilitate autonomous Aboriginal police forces wherever local communities desire them.

Although police officers should retain the discretion to decide when to lay charges, they should routinely seek advice from Crown prosecutors, including advice about whether it is appropriate to lay charges at all. Prosecutors should be clearly instructed, by directives and through the training they receive, that they are to exercise their discretion independent of police influence or pressure and that their advice to the police must remain dispassionate and impartial.

Special interrogation rules governing the taking of statements from Aboriginal persons should be created, including rules concerning the presence of counsel during questioning.

Provincial bar associations and legal aid societies should make public legal education materials, especially information about how to obtain legal aid, readily available to Aboriginal persons.

Wherever possible and desired by the community, court sittings should be held in or near the Aboriginal community where the offence was committed.

Criminal procedures, such as those concerning swearing an oath, bail or requiring the attendance in court of Aboriginal persons, should be adapted in ways that are sensitive to Aboriginal needs, culture and traditions.

Alternatives to imprisonment should be used whenever possible. Such alternatives should be given first consideration at sentencing.

A list of factors should be enunciated which, in conjunction with other circumstances, would mitigate sentence where the offender is an Aboriginal person.

Incarceration for non-payment of fines should only occur upon a refusal or wilful default to pay a fine, not upon an inability to pay.

A review of the design and cultural relevancy of all programs that are used as part of diversion, probation or parole should be undertaken in co-operation with Aboriginal persons and organizations. There must be appropriate education of the judiciary, Crown prosecutors and defence counsel concerning the purposes and availability of these programs.

The criteria governing eligibility for probation should be formulated and probation reports should be prepared so as to have proper regard for cultural differences and to meet the needs of Aboriginal offenders and communities.

Aboriginal spirituality should, by legislation, be given the same recognition as other religions, and Aboriginal Elders should be given the same status and freedom as prison chaplains.

The National Parole Board and the Correctional Service of Canada should develop a national policy and guidelines concerning waiver of parole and review hearings. Information concerning waiver should be made available to correctional staff and inmates.

Smaller, local correctional facilities under community control should be created.

I. The Police

The police are charged with enforcing the law. However, their actual responsibilities extend much further. The police are also a residual social service. "When [the police] are called, unless they can recommend a more appropriate agency, they are expected to respond. The police do not say, 'Sorry, that's not our job'."¹⁰⁷ This broad level of service accounts for the largely good reputation of the police with the general public.

Unfortunately, the same observation cannot be safely made about police relations with Aboriginal persons.¹⁰⁸ Although the situation must vary from community to community, the complaint is frequently made and was certainly heard by us during our consultations

107. Lloyd L. Weinreb, *Denial of Justice* (New York: Free Press, 1977) at 15. See also André Normandeau and Barry Leighton, *A Vision of the Future of Policing in Canada: Police-Challenge 2000*, Background Document (Ottawa: Solicitor General Canada, 1990) at 43 [hereinafter *Police-Challenge 2000*].

108. See Douglas Skoog, Lance W. Roberts and Edward D. Boldt, "Native Attitudes toward the Police" (1980) 22 Can. J. Crim. 354, where favourable White attitudes towards the police in Manitoba are contrasted with "ambivalent" Native attitudes.

that the police are only seen in Aboriginal communities when they come to make an arrest. In terms of mere reactive policing, Aboriginal communities may not be underserved: indeed, one reasonable interpretation of the higher charge rate on reserves is that, in some respects, those communities are overpoliced. However, to the extent that Aboriginal communities do not receive the same type of service from the police as does the majority of society, Aboriginal persons do not enjoy equal access to the law and are not treated equitably and with respect.

Further, even with respect to the reactive enforcement function of the police, a large gap exists between the values and culture of members of the police force and of Aboriginal people. Suspicions arise based on simple misunderstanding owing to culture but, even worse, the cultural gap can engender intolerance and overt racism.

A. Structural Changes Regarding Police Forces

RECOMMENDATION

8. (1) The police must be more involved in and accountable to the communities they serve.

This goal can be accomplished in two main ways: arrangements concerning existing police forces can be changed; alternatively, existing police forces can be replaced by Aboriginal police forces, directly answerable to, run by and created in consultation with the community.

B. Community-based Policing

“ ‘Community’ policing is the most appropriate response by policing to the challenges and problems of the next decade.”¹⁰⁹ Although community-based policing is not a complete solution for Aboriginal communities, it is a step in the right direction.¹¹⁰ It decreases the emphasis on reaction to complaints, seeking rather “a police-community partnership in dealing with crime and related problems.”¹¹¹ Greater emphasis is given to identifying problems through consultation with the community and addressing their underlying causes. Accountability to the community is created through both informal public consultation and legal means such as review bodies. This approach allows for Aboriginal community priorities to be more accurately determined.

109. *Police-Challenge 2000*, *supra*, note 107 at 41.

110. *Policing in Relation to the Blood Tribe: Report of a Public Inquiry, Commissioner's Report: Findings and Recommendations*, vol. 1 (Edmonton: Alberta Solicitor General, February 1991) (Commissioner: C. H. Rolf) at 189 [hereinafter *Policing in Relation to the Blood Tribe*], where community policing is endorsed as “appropriate to meet the cultural needs of the Bloods.”

111. *Police-Challenge 2000*, *supra*, note 107 at 43.

At present, assessments of detachment needs, and ultimately budget allowances, are based on statistics that reflect reactive policing of crime.¹¹² Equally, the established criteria for measuring the performance of individual officers emphasize the reactive model of policing. Community-based policing, however, entails new evaluative techniques, including new criteria by which to evaluate an officer's performance.¹¹³

RECOMMENDATION

8. (2) Community-based policing should be facilitated to the fullest extent in Aboriginal communities that wish to continue to have external police services.¹¹⁴

Increased community involvement by police, and greater advice by the community concerning the behaviour of the police, should decrease the perception that the police are mere outsiders enforcing an externally imposed law.

However, advising on priorities and having some role in review of behaviour do not amount to control. Also, community-based policing will sometimes be difficult to implement, especially in isolated Aboriginal communities.¹¹⁵ Certain communities may wish to establish autonomous, rather than external, community-based police forces. Clearly, approaches other than community-based policing are thought necessary by at least some Aboriginal communities.¹¹⁶

C. Aboriginal Police Forces

At present, policing on reserves is governed by a wide variety of arrangements.¹¹⁷ Although one might initially think it desirable to bring about greater uniformity in police

112. *Justice on Trial*, *supra*, note 14 at 2-17. This creates a dilemma: less reactive policing means a smaller complement, making community involvement more difficult. As less time is spent on community involvement, more is spent on reactive policing, leading to an increase in the complement, and commencement of the cycle again. See also *Policing in Relation to the Blood Tribe*, *supra*, note 110 at 151.

113. See *Police-Challenge 2000*, *supra*, note 107 at 48.

114. According to Solicitor General Canada, *1988-1989 Annual Report* (Ottawa: Solicitor General Canada, 1989) at 25, community-based policing has been successfully introduced on eight of a possible 355 reserves with additional detachments planned.

115. According to the Department of Indian Affairs and Northern Development, *Indian Policing Policy Review: Task Force Report* (Ottawa: DIAND, 1990) at 4 [hereinafter *Indian Policing Policy Review*], there are 599 Indian bands, of which approximately 135 are in remote or isolated areas.

116. See also the discussion in Manitoba Métis Federation, *supra*, note 70 at 27-33.

117. *Indian Policing Policy Review*, *supra*, note 115, describes 12 different Aboriginal-specific policing programs. At least 14 funding arrangements exist, in which funding is provided either exclusively by federal, provincial and tribal governments, or shared between them: Head, *supra*, note 63 at 150. Most reserves are served by the RCMP (for detailed descriptions of these programs see Head, *supra*, note 63 or *Indian Policing Policy Review*, *supra*, note 115). Some have autonomous police forces, with constables generally deriving their authority from provincial Police Acts, and often reporting to police commissions with federal and provincial, as well as tribal, representatives. One exceptional arrangement is the Kahnawake peacekeepers, who are not appointed as peace officers under any federal or provincial Act, and report to a police committee appointed by the tribal council.

services, in these circumstances we see no problem with diversity *per se*. Different communities have different requirements, aspirations and needs.

RECOMMENDATION

8. (3) The federal and provincial governments should facilitate autonomous Aboriginal police forces wherever local communities desire them. No single structure or role for that police force should be demanded. If the force is to be autonomous, then its structure and its role must be determined by the community.

Many possible structures could fall within the scope of this recommendation, including agencies parallel to those currently available, but with community control. However, the functions an Aboriginal community will wish to see the police perform are not necessarily the same as those in other communities.¹¹⁸ The most appropriate response to social problems on a reserve, and the response most in keeping with traditional Aboriginal justice systems, may not be a body operating as what we think of as a police force, but something that performs a much broader social service function — counselling, advising, conciliating and resolving disputes. Although there are no legal impediments preventing any community from proceeding to establish such an agency immediately, there are practical ones, especially financial obstacles. Governments should bear in mind that these agencies can, to some extent, serve as an alternative to policing services.

RECOMMENDATION

8. (4) Funding for autonomous police services should not be limited to programs that are directly analogous to existing agencies.

D. Overcharging

As we noted previously, Aboriginal communities, whether remote or urban, are often the subject of intense police scrutiny. One result can be the laying of unjustified charges or too many charges where merely the formal requirements for a charge exist. Discretion, in such cases, is poorly exercised or not exercised at all. This condition is sometimes termed overcharging.

RECOMMENDATION

8. (5) Although police officers should retain the discretion to decide when to lay charges, they should routinely seek advice from Crown prosecutors, including advice as to whether it is appropriate to lay charges at all.¹¹⁹

118. Robert Depew, *Native Policing in Canada: A Review of Current Issues*, Working Paper No. 1986-46 (Ottawa: Solicitor General Canada, 1986) at 125.

119. See Law Reform Commission of Canada [hereinafter LRC], *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor*, Working Paper 62 (Ottawa: The Commission, 1990) Rec. 19 at 73.

Such supervision, where properly practised, would provide a valuable second look and should have salutary effects on the exercise of official discretion.

To supplement this proposal, we recommended at page 36 that Crown prosecutors should seek general policy advice from Aboriginal communities about charging policy. In addition, we proposed at pages 35 and 36 that Peacemakers, Elders or other community members should be consulted concerning the diversion of some offenders away from the criminal justice system. The combined effect of these recommendations, we believe, will be to offset in some measure any tendency to overcharge Aboriginal persons.

E. Appearance Notices

Aboriginal persons, particularly in remote areas, often do not understand the significance of the appearance notice given to them by an arresting officer securing their release. They may not understand that they are required to appear in court, or appreciate the consequences of failing to do so. This problem is compounded by the appearance dates themselves, which are set in a routine manner and may conflict with times when Aboriginal persons must be hunting or trapping in order to support themselves. The resulting non-appearances simply multiply the problems faced by Aboriginal persons, who then find additional charges laid against them.

This situation is not unique to Aboriginal persons, but their needs and difficulties are especially troublesome. Provided there is some good reason, police or prosecutors are able to postpone initial court appearances to a more convenient time: no one benefits from wasted court time or the issuance of unnecessary arrest warrants. However, postponement will only be granted on request. Aboriginal persons, especially those in remote communities who have difficulty gaining access to counsel, are not likely to make that request.

To alleviate the problem of non-appearance, therefore, and to place Aboriginal persons in effectively the same position as everyone else, we suggest the following.

RECOMMENDATIONS

8. (6) **The police should take special care, when presenting an Aboriginal person with an appearance notice, to confirm that that person understands the significance of failing to appear in court and is clearly made aware of the appearance date; in particular, the officer should inquire whether there is any reason the person will be unavailable and make reasonable accommodations concerning the date. Instruction manuals and training courses should be altered so as to give effect to this recommendation. It should be emphasized, however, that no accused should be unnecessarily detained simply to comply with this recommendation.**

(7) **Police forces should be encouraged to use forms translated into the language of the relevant community where possible and where the nature and extent of police contact with the community justifies the practice.**

II. Prosecutors

A. The Attorney General and the Crown Prosecutor

The Attorney General is the Minister responsible for the proper administration of criminal justice. The Attorney General (both informally and through guidelines and directives) establishes the general tenor of the relationship between the Crown Prosecution Service and Aboriginal communities. The Service, over which the Attorney General has general direction and control, is personified in the office of the local Crown prosecutor.¹²⁰

The prosecutor acts as the agent of the Attorney General and, for all practical purposes, exercises nearly all of the Attorney General's enormous discretionary prosecutorial powers. The Crown prosecutor occupies a unique position in our legal tradition. The prosecutor's role, sometimes characterized as "quasi-judicial," "excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility."¹²¹ In Canada, the prosecutor is distinct from and independent of the police. This separation is crucial and must be zealously guarded against encroachment lest the utility of the office be compromised and its importance undermined.¹²²

Elsewhere in this Report we discuss issues intimately bearing on the prosecutor's role and responsibilities. We have advocated increased community liaison between the Crown Prosecution Service and Aboriginal communities. Also, we have noted the need for more Aboriginal prosecutors as well as for cross-cultural training and sensitization of Crown attorneys. We will explain that a more open process for the exercise of important discretionary powers in areas such as plea bargaining is necessary to modify the unfortunate legacy of distrust and misunderstanding. Other important prosecutorial issues remain to which we now turn.

120. The classic work in this field remains John L.I. J. Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964). See also LRC, Working Paper 62, *supra*, note 119.

121. *Boucher v. The Queen*, [1955] S.C.R. 16 at 24, Rand J.

122. Unfortunately, one judge has concluded that such compromise occurs in the Canadian North: "Surprisingly, [federal Crown attorneys in the Yukon and Northwest Territories] appear to be reluctant to exercise any significant prosecutorial discretion, as evidenced by the aggressive prosecution of relatively minor charges and the reluctance to withdraw or stay charges during a proceeding where it is apparent that the main Crown witness simply has not produced the evidence anticipated. . . . [I]t is likely that as career Crowns, they are less willing to over-rule or disagree with the police . . . [for reasons of] promotion and advancement. In the result, Crown prosecutors may be more amenable to taking directions from the police, and to exercising prosecutorial discretion in only rare instances, in the clearest of cases." Heino Lilles, "Some Problems in the Administration of Justice in Remote and Isolated Communities" (1990) 15 *Queen's L.J.* 327 at 340.

B. Police Prosecutors

Because remote communities are underserved, public functions often collapse and settle on a single individual (for example, a mayor may also be a justice of the peace). Sometimes this practical compromise is not harmonious and the results, where the justice system is implicated, may be unfortunate. This happens when peace officers serve as prosecutors in supposedly minor cases.¹²³ While the practice has been upheld as constitutional,¹²⁴ in cases prosecuted by the police the professional detachment and impartiality of a true public prosecutor is absent and the appearance of justice suffers. We therefore repeat the recommendation made in our Working Paper 62, *Controlling Criminal Prosecutions*, that all criminal prosecutions should be conducted by a lawyer responsible to and under the supervision of the Attorney General.¹²⁵ With regard to the particular circumstances of Aboriginal people, we further propose that no person other than a lawyer responsible to and under the supervision of the Attorney General should be entitled to conduct prosecutions of hunting, trapping and fishing offences.

RECOMMENDATIONS

9. (1) All public criminal prosecutions should be conducted by a lawyer responsible to and under the supervision of the Attorney General.

(2) No person other than a lawyer responsible to and under the supervision of the Attorney General should be entitled to conduct prosecutions of hunting, trapping and fishing offences.

C. Prosecutorial Discretion

The Crown has enormous discretionary power in deciding whether to pursue or halt a prosecution once charges have been laid. In some jurisdictions, these decisions are made in the absence of clearly stated and publicly accessible criteria. We believe it important to maintaining confidence in the administration of justice that those factors that should be taken into consideration in exercising this discretion are known to the public at large. Much of Aboriginal criminality involves the laying and prosecution of relatively minor (and often alcohol-related) charges. In many individual cases the prosecutions can be justified, but equally clearly, in many others discretion could be better exercised.

As we have noted elsewhere: "The decision to prosecute is a discretionary one lying at the heart of the system."¹²⁶ There is a pressing need, we believe, for explicit and publicly known guidelines for the exercise of the prosecutor's discretion.

123. As we note elsewhere, no case can be regarded as truly minor for Aboriginal persons since incarceration as a result of fine default is a recurrent reality.

124. See *Re R. and Hart* (1986), 26 C.C.C. (3d) 438 (Nfld C.A.) and *R. v. White* (1988), 41 C.C.C. (3d) 236 (Nfld C.A.).

125. *Supra*, note 119, Rec. 15 at 62.

126. *Ibid.* at 80.

RECOMMENDATIONS

9. (3) Prosecutors should be clearly instructed, by directive and through training, that they are to exercise their discretion independent of police influence or pressure and that their advice to the police must remain dispassionate and impartial.

(4) A clearly stated policy should be published and implemented concerning the public interest factors that should and should not be taken into consideration in decisions on whether to commence or stop a prosecution.¹²⁷

With respect to the prosecution of alleged offences occurring in Aboriginal communities or involving Aboriginal offenders, the following factors merit consideration in decisions about whether to initiate or terminate proceedings:

- (a) the likely effect of a prosecution on peace, harmony and security within Aboriginal communities;
- (b) the availability or efficacy of any alternatives to prosecution (including traditional Aboriginal alternatives) in the light of the purposes of the criminal sanction;
- (c) the views and concerns of affected Aboriginal communities, as well as their ability to effect reconciliation or otherwise address criminal justice problems, whether by traditional means or means other than a prosecution;
- (d) whether the consequences of any resulting conviction would be inordinately harsh or oppressive;
- (e) the necessity of maintaining the confidence of Aboriginal communities in legislature, courts and the administration of justice;
- (f) the prevalence of the alleged offence and any related need for deterrence within Aboriginal communities; and
- (g) the relevance of Aboriginal treaty rights such as hunting and fishing.

127. In *ibid.*, Rec. 23 at 79, we have noted that the factors should include: whether the public prosecutor believes there is evidence whereby a reasonable jury, properly instructed, could convict a suspect and, if so, whether the prosecution would have a reasonable chance of resulting in a conviction; whether considerations of public policy make a prosecution desirable despite a low likelihood of conviction; whether considerations of humanity or public policy stand in the way of proceeding despite a reasonable chance of conviction; and whether the resources exist to justify bringing a charge.

D. Disclosure

The Crown prosecutor plays a crucial role in ensuring that the criminal justice system operates in a scrupulously fair and just manner. The prosecutor's responsibility for ensuring the fairness of an accused person's trial is reflected in the Crown's obligation to disclose fully its case to the accused. The Donald Marshall, Jr., case stands as a sad reminder of the tragic consequences of a "critical failure of the Crown to disclose its case."¹²⁸

An accused's right to make full answer and defence is clearly dependent on having complete and timely disclosure of the Crown's case. The continuation of a system that appears to be largely dependent on the *ad hoc* vagaries of local and regional practices obviously impairs the system's ability to provide equal access to justice and equitable treatment.

RECOMMENDATION

9. (5) The *Criminal Code* should be amended to provide for a statutory duty of complete and timely disclosure in all prosecutions.¹²⁹

E. Charge Screening

The practice of plea bargaining and the particular problems for Aboriginal peoples which are associated with that practice are discussed elsewhere in this Report. A potential danger inherent in the plea-bargaining process resides in the police practice of overcharging. Faced with an array of charges, an unsophisticated accused may accept an essentially bad bargain rather than risk the potential jeopardy of a trial. Early post-charge screening and the close scrutiny of multiple charges by prosecutors could greatly modify this practice.

RECOMMENDATION

9. (6) Federal and provincial attorneys general should adopt a policy of early post-charge screening of charges by Crown prosecutors.

III. Defence Counsel

Aboriginal persons face unique difficulties in the criminal justice system: cultural misunderstanding may lead a police officer or a prosecutor to lay or continue charges; conditions of bail that are otherwise routine may be unusually arduous for an Aboriginal accused; an Aboriginal person may have unusual difficulties in understanding the trial process; legal defences unique to an Aboriginal accused may be appropriate; an understanding of Aboriginal culture may be necessary for the trier of fact to assess credibility; a sentence may

128. Marshall Inquiry, vol. 1, *supra*, note 14 at 238.

129. See LRC, *Disclosure by the Prosecution*, Report 22 (Ottawa: Supply and Services Canada, 1984).

have unusually harsh effects on an Aboriginal accused. In each of these cases, sensitivity on the part of police, prosecutors, judges, juries and probation officers is required, and a failure by any one group can have unintended adverse consequences. In all of these situations, defence counsel can do much to compensate for the shortcomings.

An Aboriginal accused person's lawyer, owing to the protective nature of counsel's role, is the one most intimately engaged in ensuring that his or her client is treated not only equally, but in an equitable manner and with respect. Lawyers acting on behalf of Aboriginal persons must therefore be aware of Aboriginal justice issues and able to raise them in a meaningful way.

A. Access to Counsel

In principle, Aboriginal persons may obtain a lawyer in the same way as any other accused: those unable to afford counsel may seek legal aid. In practice, there seem to be obstacles. Aboriginal persons in isolated communities may have no lawyer nearby. Even when a community is not isolated, access to legal aid can be difficult. In particular, lack of awareness may lead to less use of legal aid by Aboriginal persons, particularly young offenders.¹³⁰

While some legal aid offices produce pamphlets in Aboriginal languages to make Aboriginal persons more aware of available services, deficiencies in the availability and accessibility of such information have been noted.¹³¹ To underscore the importance of ensuring that awareness, we recommend the following.

RECOMMENDATION

10. (1) Provincial bar associations and legal aid societies should make public legal education materials — in particular, information about how to obtain legal aid — readily available to Aboriginal persons. Where necessary, video technology should be used or materials should be produced in Aboriginal languages.

130. This possibility may help explain the finding in a 1985 study in Labrador that although young offenders were informed at the time of arrest of their right to counsel "more often than not, a guilty plea is entered before access to counsel." The Report called for public education on the *Young Offenders Act*, *supra*, note 49: RES Policy Research Inc., *Needs of Native Young Offenders in Labrador in View of the Young Offenders Act: Final Report* (Ottawa: Dept. of Justice, 1985) at 43-44.

131. The Marshall Inquiry, vol. 1, *supra*, note 14 at 158, noted that Aboriginal persons "have little access to information about the law," and recommended that public legal education materials and services specifically aimed at Aboriginal and Black communities should be provided: see Rec. 16 at 158. See also Alberta, *The Report of the Task Force on Legal Aid* (Edmonton: The Task Force, 1989) and *Justice on Trial*, *supra*, note 14 at 3-4, to the same effect.

In addition, Aboriginal persons can face inequities in legal aid eligibility guidelines. Hunting and fishing offences are often not covered by legal aid.¹³² Similarly, in the Yukon Territory, an accused person will only be provided with a lawyer when facing imprisonment as a sentence. This rule, although applied equally to all, has an unequal and inequitable effect on Aboriginal persons since a high percentage of Aboriginal persons are imprisoned for default on fines resulting from minor infractions not covered by legal aid.¹³³

RECOMMENDATION

10. (2) Legal aid eligibility guidelines should be reviewed to ensure that they do not have an unequal impact on Aboriginal persons. The governments concerned should ensure that funding is available to provide necessary legal services to all Aboriginal persons who require assistance.

We have also heard complaints from Aboriginal persons about the quality of legal services they receive, whether from private or legal-aid-funded counsel:¹³⁴ that counsel are unfamiliar with Aboriginal issues or culture, take (or fail to take) matters to trial improperly, spend too little time with clients and do not explain things clearly enough. These problems would be remedied to some extent by recommendations made elsewhere about cross-cultural training, but clearly more than that is needed. Whether more steps should be taken through provincial bar associations or legal aid societies, or perhaps through the creation of national standards for providing legal aid, is a matter that we suggest requires further research.

B. Interrogation and the Role of Counsel

Specific problems have been noted for Aboriginal persons at the police interrogation stage. *Justice on Trial* remarked that some Aboriginal persons are especially deferential to authority, which causes them not only to answer any questions posed, but also to offer the answer they believe the questioner wants to hear.¹³⁵ The prejudice this could cause is obvious, particularly when coupled with the reluctance Aboriginal persons feel to criticize someone else in his or her presence.¹³⁶ There is good ground to question whether such statements would be reliable, although under the current law they seem to be considered voluntary and hence admissible.

132. IBA, *supra*, note 24 at 44.

133. *Justice on Trial*, *supra*, note 14 at 3-16, notes a similar problem in Alberta.

134. See also *ibid.*, chap. 3.

135. The Australian Law Reform Commission, *supra*, note 89, has made a similar observation.

136. A tendency also noted in Ross, *supra*, note 21.

In Australia, rules governing the admissibility of statements from Aborigines have been created by the courts, primarily in the case of *R. v. Anunga*.¹³⁷ Consistent with this, the Australian Law Reform Commission has recommended that “[t]here should be a requirement that a ‘prisoner’s friend’ be present in cases where an Aboriginal suspect is in custody or (though not in custody) is being questioned in respect of a serious offence”¹³⁸ and that any statement obtained in breach of the rules should be deemed inadmissible, unless certain conditions are met.¹³⁹

We believe that a similar approach is called for in Canada.

RECOMMENDATION

10. (3) Special interrogation rules governing the taking of statements from Aboriginal persons should be created, including rules concerning the presence of counsel or some other person during questioning.

Rules such as those contained in the *Young Offenders Act*¹⁴⁰ or the Australian rules¹⁴¹ are appropriate models for consideration. Such rules may be appropriate for other disadvantaged groups as well.

Important details need to be worked out before this proposal can be implemented. Acting as a “prisoner’s friend,” to explain rights during interrogation, may be a duty which could be assigned to Aboriginal courtworkers. However, a courtworker’s effectiveness might be jeopardized by too great an involvement in police investigations. Further, because the police may not always be aware that they are interrogating an Aboriginal person, questions of when to apply the rules arise. Questions also arise regarding the nature of the rules themselves — whether legislation or guidelines — and the consequences flowing from any breach of the rules.

IV. The Courts

Most Canadians find the arcane procedures and formal setting of the criminal court intimidating and confusing. It is no wonder, then, that the process is foreign and frightening to many Aboriginal persons. Courts are almost invariably located outside, often far distant from, Aboriginal communities. The judges, prosecutors, defence lawyers and court staff are almost all non-Aboriginal. In many remote areas the court is on circuit and flies

137. (1976) 11 A.L.R. 412 (N.T.S.C.), described in *Justice on Trial*, *supra*, note 14 at 2-57.

138. *Supra*, note 89, para. 115 at 56.

139. Including that “the answers were not given merely out of the suspect’s suggestibility or deference to authority”: *ibid.* at 57. The *Anunga* rules stress that questions should be formulated to avoid suggesting in any way the expected answer.

140. See, e.g., ss 11 and 56, *supra*, note 49, which confer enhanced rights to counsel and to explanations as to the significance of proceedings and the importance of counsel.

141. See *Anunga*, *supra*, note 137, and the discussion in *Justice on Trial*, *supra*, note 14 at 2-56 to 2-59.

into Aboriginal communities. The judge, prosecutor and defence lawyer often arrive on the same plane, contributing to the belief that all of those officials are on the same side and have already decided the outcome of upcoming cases, and that the criminal court process is designed solely for the convenience of judges and lawyers. To give expression to the principles of equal access to justice and respectful and equitable treatment, we must make the system more accessible to Aboriginal persons.

A. The Courtroom Atmosphere

Most accused probably find courtrooms intimidating; in a certain sense, that is part of the purpose of a criminal hearing — to impress the accused with the seriousness of the situation. Since Aboriginal persons view the system itself as alien, the effect increases:

Many Aboriginal people find these rooms frightening and intimidating, with an atmosphere made worse by the Judge looking down on them from a raised platform. They would like to see some articles representative of their culture displayed in the courtrooms that they are required to attend, and have the rooms arranged in a more culturally sensitive manner.¹⁴²

If courtrooms were less intimidating to and more respectful of Aboriginal culture and sensitivities, we believe that they would be better able to command the respect of Aboriginal persons.

RECOMMENDATION

11. (1) Courtrooms serving Aboriginal communities should be physically set up in a way that is sensitive to Aboriginal culture and tradition.

B. Aboriginal Justices of the Peace

The process might also be made less intimidating by the appointment of more Aboriginal justices of the peace to preside in Aboriginal communities.¹⁴³ Justices of the peace play a “crucial role”¹⁴⁴ for Aboriginal communities, dealing with arrest warrants, bail and trials for minor offences. However, justices of the peace are generally appointed provincially, although a little-used federal appointment power, limited to a few minor *Code* offences, is found in section 107 of the *Indian Act*. We see little value in the federal limitation.

142. *Justice on Trial*, *supra*, note 14 at 4-46.

143. Note Rec. 3(1)(c), above at 29, our proposal to appoint Aboriginal persons to *all* levels of the judiciary.

144. Ontario Native Council on Justice, *The Native Justice of the Peace: An Under-employed Natural Resource for the Criminal Justice System* (Toronto: The Council, 1982) at 10.

RECOMMENDATION

11. (2) Federal legislation should give federally appointed justices of the peace jurisdiction to deal with all matters conferred on justices of the peace under both the *Criminal Code* and the *Indian Act*. Greater use should be made of this federal appointment power so as to appoint more Aboriginal justices of the peace.

C. Swearing an Oath

At present, witnesses usually testify in criminal trials after swearing on oath on the Bible to tell the truth. Aboriginal persons would prefer to swear an oath in a way that reflects their own culture.¹⁴⁵ Placing their faiths on the same footing as those of Judeo-Christian Canadians gives both tangible and symbolic expression to the principle of treating Aboriginal persons with respect.

RECOMMENDATION

11. (3) The right of Aboriginal persons to swear an oath in a traditional way when giving evidence in court should be recognized.

D. The Location of Court Sitings

The criminal process often requires numerous courtroom appearances to take pleas, hear bail applications and hold trials. The physical isolation of many communities presents Aboriginal persons with problems not experienced by most Canadians, who have relatively easy access to courts. Many isolated communities face enormous transportation problems, including a complete lack of transportation, exorbitant cost and harsh weather and road conditions. This physical inaccessibility of courts and the need to hunt and trap in order to subsist often give rise to "failure to appear" charges and, indeed, even to unwarranted guilty pleas.¹⁴⁶ Also, Aboriginal persons from remote communities are sometimes arrested and then released on bail into non-Aboriginal communities, with no means to return home.¹⁴⁷

Several solutions could help alleviate these problems.

145. *Justice on Trial*, *supra*, note 14 at 4-46. Note also the litigation surrounding Aboriginal oath taking in trials of charges arising out of the Oka incident.

146. See, *e.g.*, the submission of the Métis Association of Alberta to the Cawsey Task Force in *Justice on Trial*, *supra*, note 14 at 4-26.

147. See the Osnaburgh/Windigo Report, *supra*, note 43 at 58.

RECOMMENDATION

11. (4) Court dates for Aboriginal accused persons should be scheduled to avoid, where possible, hunting and trapping seasons. Chief justices of the affected courts should develop scheduling policies in conjunction with and on the advice of community representatives.

To provide such flexibility is merely to extend to Aboriginal persons the same treatment given others, who could more readily arrange a postponement of awkward court dates. Also, the court process could be streamlined to eliminate unnecessary appearances. Many routine court appearances do not really require the physical presence of the accused. To this end, greater use of modern telecommunications systems should be explored; even bail applications might be handled electronically.

RECOMMENDATION

11. (5) Statutory authority should allow for appearances to be made through electronic means.

We suggest, however, that these alternative means should only be used after a policy has been developed by chief justices involving, among other things, the consent of an accused.

Further, transportation problems should be addressed directly.

RECOMMENDATIONS

11. (6) An accused who is released by a court some distance from the place where the arrest was made should, in the discretion of the court, be returned home or to such other place as is reasonably designated by the accused. The *Criminal Code* should contain a statutory direction requiring the judge to inquire into this issue. The cost of transportation should be borne by the state.

(7) The *Code* should provide that a detainee who is released “unconditionally” (that is, without charges being laid) should automatically be returned to the place of arrest or to such other place as is reasonably designated by the detainee.¹⁴⁸

148. A similar recommendation is made by the New South Wales Law Reform Commission, *Police Powers of Arrest and Detention*, Discussion Paper 16 (Sydney: The Commission, 1987) Proposal 50 at 130.

(8) Where court hearings are not held in or near an Aboriginal community, accused persons and witnesses under subpoena should be provided with transportation to and from court hearings or sufficient conduct money to cover the cost of transportation.¹⁴⁹

Also important is the location at which courts will be held. The Cawsey Task Force concluded that the reasonable solution is to take the court to the people. Aboriginal communities should have greater access to court services than is now generally the case, although we do not suggest imposing this solution against the wishes of the people.¹⁵⁰

RECOMMENDATION

11. (9) Wherever possible and desired by the community, the court sitting should occur in or near the Aboriginal community in which the offence was committed.

This does not mean that we favour the idea of itinerant courts. On the whole, we prefer to see these mobile courts eliminated where possible. However, we recognize that, in some cases, court sittings in Aboriginal communities are only possible through the unfortunate device of fly-in courts. Where they are retained, improvements to these itinerant courts are needed.¹⁵¹

149. Some administrative details need to be worked out — one might not want the accused and the Crown witnesses travelling together, for example. Some jurisdictions are grappling with these difficulties, though not effectively. The Osnaburgh/Windigo Report, *supra*, note 43 at 55, states:

Because of the distance to court, the Ontario Provincial Police send a bus to the reserve. However, we were told, that only accused who are on a list provided to the driver are entitled to travel on the bus, even if they have documents showing that they have a case in court that day. No witnesses are allowed on the bus and, accordingly, unless special arrangements are made, they have to fend for themselves. We were told that numerous cases are withdrawn or dismissed because of the non-appearance of witnesses.

150. In *ibid.* it is noted, at 55, that “the Osnaburgh community does not desire the presence, on its territory, of a court which dispenses a law which they perceive to be irrelevant to their needs, operating in a language which many of its members do not understand and using procedures which are, to them, incomprehensible.”

151. Note the remarks of Judge Coutu, Co-ordinating Judge for the Itinerant Court of the District of Abitibi, in the Marshall Inquiry, vol. 7, *supra*, note 22 at 25:

Generally speaking, the Native population is not satisfied with the way we are administering justice in their community, and more and more I am not; and the judges are not satisfied with the work they are doing in the north because they feel there is no consequence to the work they are doing.

... Judges, lawyers, and courtworkers rush in and out of the communities on circuit, always conscious of their drive or flight back to their home bases. As a consequence, people are rushed through the process or their cases are continually delayed for reasons that are only apparent to the court parties who visit them. Weather conditions are often the cause of a postponement of proceedings. In some communities, this means that monthly sittings become bi-monthly sittings as the missed date is not generally re-scheduled. Dockets build up, which simply results in more delays. Meanwhile, the Aboriginal concept of healing and forgiveness has already been applied and makes the delayed court appearance redundant.¹⁵²

Establishing legal service centres in all major Northern communities¹⁵³ addresses part of the problem, but is of no real help to isolated communities. To treat Aboriginal persons in remote communities equally, we would need to simulate the situation that exists in communities that have regular access to counsel and courts. Defence counsel should be available not merely a day or two in advance of a hearing, but at regular intervals; witnesses should be consulted while their evidence is still fresh. This goal might be accomplished by having lawyers (for both the defence and the Crown) or paralegals travel regularly within the area. The public interest requires that all parties be adequately prepared. In addition, to avoid rushed schedules at the actual hearings, it would presumably be necessary to appoint more judges. Greater resources would also be required to deal with the problems of hearing dates cancelled owing to bad weather.

RECOMMENDATION

11. (10) Because fly-in courts do not provide remote communities with legal services equal to those available elsewhere, they should be phased out where possible. Where fly-in courts are used, steps should be taken to guarantee that

- (a) defence counsel is available to all accused persons on a date meaningfully in advance of the court hearing;**
- (b) Crown prosecutors consult with the affected communities enough in advance of court hearings to ensure that the public interest is protected; and**
- (c) sufficient resources, including additional judicial appointments, if necessary, are provided to ensure that court hearings need not be rushed and can be held within a reasonable time after the offence.**

152. *Justice on Trial*, *supra*, note 14 at 4-19 to 4-20. Our consultants suggested that plea bargains are reached on the aircraft, before counsel has consulted with any clients; that the time available for consultation and preparation is unrealistically brief, with inevitable results for the quality of the defence; and that the arrival of the judge and the lawyers together would be grounds for challenging the fairness of the trial anywhere else, but in the North it is routine. In some areas, Crown and defence lawyers have begun to arrive a day earlier than the judge, in order to consult with the parties: Osnaburgh/Windigo Report, *supra*, note 43 at 56-57. This step is an improvement, although it will not ensure that adequate preparation time is provided, nor will it necessarily diminish concerns about plea bargains.

153. As proposed in *Native Peoples and Justice*, *supra*, note 67 at 31.

V. Bail

“Bail” refers to the power to release or detain an arrested person pending trial. What little empirical evidence there is suggests that Aboriginal persons do not fare well under our present bail laws. Some projections indicate that twice as many Aboriginal persons are detained without bail as are other arrested persons.¹⁵⁴ In the ensuing discussion, we propose changes to eliminate some of the inequities in this situation.

A. The Police Power to Release Persons after Arrest

Section 499 of the *Code* permits a peace officer, after executing an arrest warrant, to release the arrested person by way of a promise to appear or a recognizance only if the issuing justice has endorsed the warrant to that effect. But the justice can endorse the warrant only in the case of “minor” crimes, and sometimes the justice has simply not considered endorsing the warrant to allow a peace officer to release the accused. As a result, some Aboriginal persons have been detained pending trial even though the police considered those persons to be no real threat to the community. This detention is particularly disruptive for those in remote communities, since arrested persons must be transported a great distance in order to be detained.

RECOMMENDATION

12. (1) An endorsement permitting a peace officer to release an arrested person on an appearance notice should be available for all crimes. Legislation should expressly require a justice to consider making an endorsement when issuing an arrest warrant.¹⁵⁵

These policies could reduce the number of persons transported from the North to Southern holding facilities, reduce detention costs, reduce delays in court appearances by having the accused available in the community and reduce the trauma and dislocation suffered by young offenders who are transported and held in the South for extended periods on rather minor charges.¹⁵⁶

A similar issue arises under present *Code* section 498. The arresting officer has no power to release persons accused of certain crimes: only the more senior officer in charge may do so, and only on certain conditions or with certain guarantees (such as the provision of sureties and the deposit of money or other valuable security) or both.

154. See Ontario Native Council on Justice, *supra*, note 144 at 9-10, or A. C. Birkenmayer and S. Jolly, *The Native Inmate in Ontario* (Toronto: Ontario Ministry of Correctional Services, 1981).

155. As we have previously recommended in LRC, *Compelling Appearance, Interim Release and Pre-trial Detention*, Working Paper 57 (Ottawa: The Commission, 1988) Rec. 16(2)(c) at 56.

156. See Thérèse Lajeunesse, *Administration of Justice in Northern and Isolated Communities* (Discussion Paper prepared for the Manitoba Department of Justice, October 8, 1986) at 9 [unpublished].

In Working Paper 57, we recommended that any peace officer should have the discretion to release a person arrested for any crime, by means of an expanded appearance notice which could include conditions that, at present, only the officer in charge can impose.¹⁵⁷ We also proposed that a peace officer should be required to release the person unless specific grounds of detention are satisfied.¹⁵⁸ We see potential benefits for Aboriginal suspects in these proposals.

Allowing the peace officer to release for any crime could assist in preventing needless detention where the arrested person must be taken before an officer in charge located some distance away. This proposal's ultimate success depends on the officer in the field using this discretion in a manner consistent with favouring release rather than detention.

RECOMMENDATION

12. (2) Any peace officer should have the discretion to release a person arrested for any crime, by means of an expanded appearance notice which could include conditions that, at present, only the officer in charge can impose. A peace officer should be required to release the person unless specific grounds of detention are satisfied.

B. Conditions of Release

Section 515 of the *Code* allows a justice to release an accused person in a variety of ways: on an undertaking; on a recognizance without sureties and without deposit of money; on a recognizance with sureties but without deposit of money; and on a recognizance without sureties but with deposit of money (cash bail deposits). Each of these situations raises issues for reform.

(1) Undertakings

When an accused is released on an undertaking, conditions are usually imposed. These conditions may be applied to anyone, but some have a particular impact on Aboriginal persons. It has been suggested to us that judges impose many conditions routinely, with no real consideration of whether they are necessary or appropriate.

In urban settings, we are told, judges often order accused persons to stay away from particular areas of the city which, in many cases, are also the areas in which most Aboriginal persons live or congregate; the result is an unintended banishment of the accused from his or her community. Similarly, a condition requiring abstention from alcohol is difficult for an accused who is alcohol-dependent, as many Aboriginal accused are, to comply with. Our consultants also point out that orders not to associate with particular persons can present difficulties: in small Aboriginal communities it may, practically speaking, be impossible to avoid contact with specific individuals, or to avoid associating with anyone having a

157. *Supra*, note 155, Recs 1 to 3 at 43-44.

158. *Ibid.*, Rec. 7(1) at 48.

criminal record. Further, an Aboriginal person making a living by hunting and trapping will be more inconvenienced than most members of society by a restriction on the use of firearms¹⁵⁹ or a requirement to report regularly to a probation officer.

We do not suggest that Aboriginal persons should never be subject to any of these conditions. At the same time, courts must recognize the different impact these types of conditions can have: conditions must not be imposed routinely, but rather only when they are appropriate and relevant to the offender and the offence. Paragraph 515(4)(f) refers to "reasonable conditions." If a condition is clearly one with which the accused cannot comply, then it is not a reasonable condition. However, it may be useful for the *Code* to provide a clearer standard to guide the imposition of reasonable conditions.

RECOMMENDATIONS

12. (3) Bail legislation should specifically provide that, in assessing the reasonableness of any condition of release, the justice must consider:

- (a) an accused's occupation, place of residence and cultural background;**
- (b) the geographical location and size of the community to which the accused belongs; and**
- (c) the special requirements of traditional Aboriginal pursuits.**

(4) A condition requiring an accused to refrain from the use of alcohol should only be attached if the use of alcohol contributed to the offence with which the accused is charged.¹⁶⁰

(2) Recognizances

A recognizance is a promise to pay a sum of money in the event of failure to appear for trial or to comply with certain non-monetary conditions. A person breaching a recognizance (or indeed the conditions in an undertaking) may be guilty of the crime of breach of a condition of release without reasonable excuse. This result poses a dilemma for the system. On the one hand, imposing conditions may be the most effective way to ensure the protection of the public or to prevent the commission of another crime. On the other hand, the result can be a type of double punishment: the accused suffers revocation of bail and is also subject to a new criminal charge, both for the same conduct. This problem of double punishment applies to anyone released on bail but, once again, is particularly acute for Aboriginal persons because of the unequal impact of many conditions.

159. Courts have found that a prohibition on the possession of firearms is cruel and unusual punishment for Aboriginal persons: *R. v. Chief* (1989), 51 C.C.C. (3d) 265 (Y. Terr. C.A.); *R. v. McGillivray* (1991), 12 W.C.B. (2d) 192 (Sask. C.A.). *Contra*, see *infra*, note 208.

160. A condition requiring the accused to enrol in an alcohol treatment program should not be imposed without the consent of the accused. In some areas, we are told, the limited spaces in treatment programs are taken up by accused who are present only by court order, and who therefore receive little real benefit.

In our view, as a general rule of criminal procedure applicable in all cases, there should be no criminal liability for breaching non-monetary conditions of release. Misconduct that is itself a crime is separately chargeable, and we would continue the offence of failing to attend court. Otherwise, the revocation of bail is a sufficient punishment if the accused breaches a condition. The imposition of both penalties opens the way to double punishment.¹⁶¹

RECOMMENDATION

12. (5) There should be no criminal liability for breaching non-monetary conditions of release.

(3) Sureties

Under the present law, an accused person who is released may be required to obtain sureties. A surety is one who essentially guarantees the performance of the accused's obligations and agrees to forfeit an amount of money if the accused fails to perform those obligations.

For Aboriginal persons two issues arise. First, from the point of view of an accused, is the power to impose sureties too broad? Second, from the point of view of a prospective surety, is the present law too harsh in its treatment of the surety? Our consultants have suggested, for example, that it is very difficult for Aboriginal persons to find sureties. In part, this problem results from economic status, but it is compounded by the fact that, because Aboriginal persons on reserves cannot individually own their land, they cannot post houses, for example, as collateral.

The New Zealand Criminal Law Reform Committee proposed several practical reforms in this area.¹⁶² First, it recommended making the requirement of sureties formally subject to the general provision that no condition should be imposed unless it appears to the court to be necessary for the purpose of preventing absconding, offending or the obstruction of the course of justice. Also, all relevant matters, such as character, criminal record and financial resources, should be taken into account in an assessment of the need for and suitability of a surety. Finally, the New Zealand Committee suggested that a surety should not be disqualified simply because he or she does not at present possess sufficient means to meet the obligation of the bond, since this would disqualify persons of limited means. "Financial resources" should merely be a relevant factor to be taken into account in assessing the suitability of a surety. The focus should rest primarily on the surety's character and reliability.

161. See a similar recommendation in the New Zealand Criminal Law Reform Committee, *Report on Bail* (Wellington: The Committee, 1982) para. 140 at 48.

162. The option of abolishing sureties was considered but rejected by the New Zealand Criminal Law Reform Committee, which concluded that abolition would actually increase the number of persons detained. They believed that the courts would more often consider the risks in releasing an accused too high unless other people had a stake in the accused's conduct. We agree. See *ibid.* at 52.

These proposals are equally appropriate to Canada. A flexible approach to assessing the adequacy of a surety may lessen the need to require property as collateral in the first place. If the surety is related or closely tied to the accused and is of good character, these factors could affect the surety's acceptability and the amount for which he or she might be responsible.

RECOMMENDATIONS

12. (6) Bail legislation should be amended to provide that, in considering the suitability of an intended surety, a justice shall consider:

- (a) the financial resources the intended surety has or may reasonably be expected to have;**
- (b) his or her character and the nature of any previous convictions;**
- (c) his or her proximity (whether in kinship, place of residence or otherwise) to the accused; and**
- (d) any other relevant matter.**

(7) A justice should only be allowed to require a surety to deposit cash or other security if the justice is satisfied that exceptional circumstances related to the surety require such an order — for example, where the intended surety resides in another jurisdiction.

The New Zealand Criminal Law Reform Committee also recommended that a surety's liability should be limited, and we agree. In our view, although the surety should formally undertake to supervise the conduct of the accused, misconduct by the accused should not result in forfeiture of the surety's bond. We see merit in imposing by law this kind of moral obligation, even though it is not reinforced by an accompanying legal sanction.

RECOMMENDATION

12. (8) A surety should be under a duty to take all reasonable steps to ensure the attendance of the accused in court. The surety should not be liable to forfeiture for the accused's breach of other bail conditions.

A related problem, not unique to Aboriginal persons, is that an accused may be granted bail, only to remain in custody because of an inability to find an acceptable surety. Requiring bail to be reassessed where conditions have not been met within a short time may prevent persons from being detained merely because they are poor and cannot meet what at first appeared to be reasonable release conditions. We suggest the following, as has the New Zealand Committee.

RECOMMENDATION

12. (9) If a justice orders a person to obtain a surety and that condition is not met within twenty-four hours, the imposition of that condition should be reconsidered.

(4) Cash Bail Deposits

For the same economic reasons that make providing sureties difficult, providing cash bail can be a special obstacle for Aboriginal persons.

The English Home Office Working Party Report rejected the concept of cash bail and called for its abolition for two primary reasons: discrimination against the less well off, and difficulty or hardship in raising money.¹⁶³ The New Zealand Criminal Law Reform Committee recommended that a limited power to require a cash deposit be preserved — that the court should have the power to require a cash deposit or other security only if there are reasonable grounds for believing that, in the absence of the deposit, the defendant would leave the country.¹⁶⁴ The Hong Kong Law Reform Commission recommended that cash bail be retained as an option for the bail authority but that its use be de-emphasized. The proposed Hong Kong code would make it clear that a cash deposit should be demanded only where it is necessary to ensure the appearance of the defendant.¹⁶⁵

The present law regarding cash bail as it applies to Aboriginal persons raises the spectre of unequal treatment.

RECOMMENDATION

12. (10) The requirement of a cash deposit by the accused should either be abolished or be subject to greater restriction, such as requiring a cash deposit only where the justice believes on reasonable grounds that the deposit is necessary to prevent the accused from leaving the country.

VI. Sentencing

The impact of the justice system on Aboriginal persons is most apparent at the sentencing stage. Many studies over many years have noted the high rate of incarceration of Aboriginal offenders. In the Western provinces and in the North, the statistical picture

163. Great Britain, Home Office Working Party, *Bail Procedures in Magistrates' Courts* (London: HMSO, 1974) at 32-33.

164. New Zealand Criminal Law Reform Committee, *supra*, note 161 at 46.

165. Law Reform Commission of Hong Kong, *Report on Bail in Criminal Proceedings*, Topic 16 (Hong Kong: Govt. Printer, 1989) at 83.

is particularly stark.¹⁶⁶ Even more disturbing is that Aboriginal representation in prison has moved upwards over time — a situation which is completely unacceptable in a society that prides itself on being free and democratic.

Many explanations have been offered. The most general and far-reaching of these is that of colonization.¹⁶⁷ It has also been suggested that there is discrimination on the part of justice system personnel. Other explanations point to the frequency of imprisonment for fine default, or the criminalization of alcohol consumption.¹⁶⁸ Obviously, the explanations for Aboriginal over-representation, like its solutions, are complex and defy easy categorization.

A. Alternatives to Incarceration

One prevalent focus within the literature on solutions to the problem of over-representation has been on what are called “alternatives to incarceration.” While even the most recent of analyses continue to support the creative use of well-designed and adequately funded alternatives to incarceration or community sanctions, we recognize that many experiments with these alternatives in recent years have been severely criticized.¹⁶⁹

Theoretically, several alternatives to imprisonment exist at the sentencing stage, such as conditional discharges, suspended sentences, community service orders, compensation, restitution and fine option programs.¹⁷⁰ In addition, options such as diversion, victim-offender reconciliation programs and mediation are also alternatives to imprisonment in

166. Nearly one in three inmates in prairie penitentiaries is of Aboriginal ancestry. Aboriginal people make up almost 10% of the federal inmate population, though they make up less than 2% of the Canadian population as a whole. Aboriginal women constitute over 70% of the inmate population in the Northwest Territories, Manitoba and Saskatchewan. The young offender crime rate for Aboriginal youths is three times higher than their percentage of the national population: Jackson, *supra*, note 18. See also, *Correctional Issues Affecting Native Peoples*, Working Paper No. 7 (Ottawa: Solicitor General Canada, 1988).

167. This analysis of the causes of over-representation tends to merge with theories of crime causation. Hence in Jackson, *supra*, note 18, the assertion is found, at 217-18, that “their over-representation in the criminal justice system is a particular example of the well-known correlation between economic deprivation and criminality.” Jackson’s views on this are complex. He goes on, at 218, to indicate that “attributing the problem to poverty itself is not a sufficient explanation” and focuses on a “process of dispossession and marginalization” otherwise referred to as “colonization.” This colonization theory is also accepted in the Osnaburgh/Windigo Report, *supra*, note 43 (see especially at 4-9) and forms the basis for the analysis in Havemann et al., *supra*, note 11. It also has implicit acceptance in the Marshall Inquiry.

168. These explanations are summarized in John Hagan, “Locking Up the Indians: A Case for Law Reform” (1976) 55 Canadian Forum 16. See also Carol P. LaPrairie, who, in “The Role of Sentencing in the Over-representation of Aboriginal People in Correctional Institutions” (1990) 32 Can. J. Crim. 429, in a careful, contextually based discussion, offers three possible explanations: (1) Aboriginal people and non-Aboriginal people are not treated the same way in policing, charging, prosecution, sentencing and parole decisions; (2) Aboriginal people commit more crime owing to non-racial factors such as poverty or alcohol use; and (3) Aboriginal people commit crimes that are more detectable than those committed by non-Aboriginal people.

169. See, e.g., Norval Morris and Michael Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (New York: Oxford University Press, 1990).

170. One should bear in mind in this section of our Report the important distinction between alternatives to incarceration and intermediate forms of punishment (bush camps, intensive surveillance probation, shock incarceration, house arrest under electronic monitoring) with which they are sometimes confused.

the sense that they do not entail resort to the ordinary process of trial and sentencing. Our Commission has long supported these alternatives, but they are underused.¹⁷¹

RECOMMENDATION

13. (1) Alternatives to imprisonment should be used whenever possible. The *Criminal Code* provisions creating such alternatives should ensure that those alternatives are given first consideration at sentencing. A judge imprisoning an Aboriginal person for an offence amenable to the use of alternative dispositions should be required to set forth the reasons for using imprisonment rather than a non-custodial option.

The case for the use of creative Aboriginal methods of dispute resolution is cogently argued and described by Jackson in our commissioned study entitled *In Search of the Pathways to Justice*.¹⁷² In our view, special alternative programs for Aboriginal persons are important for several reasons. First, they possess the potential to reduce the number of Aboriginal persons in prisons. Further, they could with very little adjustment incorporate customary law, thus increasing their acceptability to the affected population. Finally, they are organized around the concept of community involvement and thus can promote social peace and a sense of community control. Alternative programs are consistent with Aboriginal values in that they seek reconciliation between an offender and the community as a whole, and pursue the goal of restoring harmony.¹⁷³

Two recurring concerns in the material that follows are the commitment and adequacy of resources.

RECOMMENDATION

13. (2) Programs providing alternatives to incarceration should, to the extent possible, be universally available. To pursue this goal, adequate financial and human resources must be made available and comprehensive cost-feasibility studies should be undertaken immediately.

Enabling legislation must be in place, but the mere presence of that legislation is of little significance in the absence of adequate resources and planning. To be successful, programs should be informed by research and individually tailored to particular communities.

171. "One reason why Native inmates are disproportionately represented in the prison population is that too many of them are being unnecessarily sentenced to terms of imprisonment": *Taking Responsibility: Report of the Standing Committee on Justice and the Solicitor General on Its Review of Sentencing, Conditional Release and Related Aspects of Corrections* (Ottawa: Supply and Services Canada, 1988) at 211-12 (Chair: David Daubney) [hereinafter *Taking Responsibility*].

172. *Supra*, note 28.

173. The Osnaburgh/Windigo Report, *supra*, note 43 at 37, notes that the use of alternatives such as alternative dispute resolution systems, "can be seen as part of the general trend towards developing [such] systems in society at large."

RECOMMENDATION

13. (3) Research must be accompanied by monitoring of the programs, together with policy analyses, to allow for structural readjustment as experience is gathered.

Moreover, we believe that much of this research could be assigned to and developed by an Aboriginal body (such as an Aboriginal Justice Institute which, elsewhere in this Report, we propose be created).

One group of reforms, not strictly speaking part of the sentencing process, that is nevertheless regarded as an alternative to imprisonment is victim-offender reconciliation.

(1) Victim-Offender Reconciliation

Victim-offender reconciliation programs may involve diverting offenders away from the criminal process entirely.¹⁷⁴ Such diversion could serve as an ideal mechanism for involving communities in the disposition of some cases (especially minor ones where alcohol may have played a role). Other reconciliation programs occur later in the process, before sentence, with the aim of facilitating mediation and restitution¹⁷⁵ between the offender and the victim. Such programs help restore peace within the community through a reconciliation of the parties. They exist in some Canadian jurisdictions, but are not found in Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick and Alberta.¹⁷⁶

RECOMMENDATION

13. (4) Victim-offender reconciliation programs should be expanded and ought to be evaluated more thoroughly than has been done to date. Federal and provincial governments should provide the necessary financial support to ensure that community programs are made more generally available and to encourage their greater use.

Additional resources must be made available to communities to ensure that these programs are effective.

174. Diversion is not limited to the early pre-trial stages of the process. It may occur at various stages of the process, from relatively early (pre-charge) and involve police discretion, to relatively late (pre-sentence) where prosecutorial and judicial discretion may come into play. There is no provision in the *Code* or elsewhere for pre-charge diversion, or for victim-offender reconciliation programs. By contrast, post-charge diversion is recognized under the *Young Offenders Act*, *supra*, note 49, as an "alternative measure."

175. Restitution is an important part of many Aboriginal dispute resolution processes: See Jackson, *supra*, note 28. It is closely allied to the concept of victim-offender reconciliation and may take many forms — the return of stolen property, an apology, voluntary payment or victim or community service. See LRC, *Restitution and Compensation*, Working Paper 5 (Ottawa: Information Canada, 1974). Recent amendments to the *Criminal Code* have expanded the law concerning restitution, in large part in line with recommendations in LRC, *Guidelines: Disposition and Sentences in the Criminal Process*, Report 2 (Ottawa: Information Canada, 1976).

176. Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1986) at 352.

RECOMMENDATION

13. (5) *The Criminal Code* should contain a counterpart to the “alternative measures” provisions in the *Young Offenders Act*, for disposing of and diverting cases against adult Aboriginal offenders.

Indeed, in our view such alternative measures should be available in all criminal cases.

Measures of this nature are more consistent with the Aboriginal perspective on how criminal justice ought to be administered. They are consistent with Aboriginal values and, indeed, can be a useful means of moving toward greater Aboriginal control over the justice system. One study prepared for us notes that imprisoning Aboriginal offenders can be counter-productive: because of exposure to prison life “[t]hey may return . . . a greater threat to the peace and order of their community than when they left.”¹⁷⁷ Rehabilitation and reconciliation are important considerations for the Aboriginal community.

(2) Fines

Generally speaking, a fine is an appropriate disposition only if the offender is a meaningful participant in a cash economy. That assumption cannot be made of Aboriginal persons who become entangled in the criminal justice system. Fines command little or no respect in their communities, and cease to act as a deterrent when it is generally recognized that they cannot be paid. A substantial proportion of Aboriginal persons in prison are there simply because of an inability to pay fines. The imposition of a fine thus often serves only to postpone incarceration. Three proposals can help alleviate this problem: fine option programs, a “day-fine” system and reform of the law regarding imprisonment for default.

(a) *Fine Option Programs*

Fine option programs have recently been provided for in the *Criminal Code*.¹⁷⁸ These programs allow offenders to work off their fines at a given rate per hour by performing work in the community. They are designed as an alternative to imprisonment for fine default. Unfortunately, such programs are not universally available and, where they exist, are not of uniform quality.¹⁷⁹ Aboriginal women, in some places, are restricted in their access to such programs because of travel difficulties and inadequate child care in their communities.¹⁸⁰ Further:

Sometimes Fine Option programs pose dilemmas for Aboriginal community administrators because they are not linked to genuine projects that lead to a sense of accomplishment and self-worth. The Fine Option programs require effort to set up and ingenuity to make relevant for Aboriginal communities. In Aboriginal communities where there is usually scant administrative resources to spare this diversion of energy is not always a priority.¹⁸¹

177. IBA, *supra*, note 24 at 25.

178. See s. 718.1.

179. See *Justice on Trial*, *supra*, note 14 at 6-40 and 6-41, for a description of some particular defects of these programs in Alberta Aboriginal communities.

180. *Ibid.* at 6-41.

181. IBA, *supra*, note 24 at 49.

RECOMMENDATION

13. (6) Fine option programs should be created in communities that wish to institute them. The programs should be provided with resources adequate to allow the community to mount projects that will promote a sense of accomplishment and self-worth. Special measures should be taken to make these programs accessible to Aboriginal women.

(b) *Day Fines*

In our 1974 Working Paper on *Fines*,¹⁸² we examined the Swedish "day-fine" system, whereby a fine is calculated as a fraction of the yearly gross income of the offender. The Canadian Sentencing Commission recently suggested that further investigation into transplanting a day-fine system to Canada is needed because of our different system of income reporting and taxation.¹⁸³ The Sentencing Commission concluded, and we agree, that the provinces should be encouraged to institute pilot projects on the use of day-fine systems. In our view, Aboriginal communities ought to be among the first beneficiaries of such projects.

RECOMMENDATION

13. (7) The provinces should be encouraged to institute pilot projects on the use of day-fine systems, and Aboriginal communities ought to be among the first beneficiaries of such projects.

(c) *Imprisonment for Default*

The imposition of a "semi-automatic" prison term for fine default has been the subject of relentless criticism in the sentencing literature. There is statistical evidence to support the conclusion that the imprisonment of fine defaulters without reference to their ability to pay discriminates against impoverished offenders. One highly visible example of this phenomenon is the over-representation of native persons in provincial institutions.¹⁸⁴

Various models for avoiding imprisonment for fine default have been proposed, all of which have certain common features.¹⁸⁵

182. LRC, *Fines*, Working Paper 6 (Ottawa: Information Canada, 1974).

183. See Canadian Sentencing Commission, *supra*, note 176, discussion at 378.

184. *Ibid.* at 380.

185. We advanced one in our Working Paper 5, *supra*, note 175. Another enforcement scheme was set out in Bill C-19, *An Act to amend the Criminal Code . . .*, 2d Sess., 32d Parl., 1983-84 (first reading 7 February 1984), and the Canadian Sentencing Commission put forward a proposal in *supra*, note 176.

RECOMMENDATION

13. (8) Incarceration for non-payment of fines should only occur upon a refusal or wilful default to pay a fine, not upon an inability to pay. An offender should not be imprisoned unless the following alternatives have been tried:

- (a) show-cause hearings over why the offender has not paid the fine;
- (b) attachment of wages, salaries and other moneys;
- (c) seizure of the offender's property;
- (d) community service equal to the fine; and
- (e) alternative community sanctions.¹⁸⁶

(3) Community Service Orders

Like fine option programs, community service order (CSO) programs have the potential to do good but, if improperly structured, they can become a burden to the community and fail to live up to their promise.¹⁸⁷

Typically, a CSO requires an offender to perform, without pay, a number of hours of work for the community.¹⁸⁸ The CSO can help achieve a reconciliation between the community and the offender by repairing the harm done, and by applying a positive form of censure to an offence.¹⁸⁹ The general (as contrasted with the Aboriginal) experience with such orders has been positive.¹⁹⁰

A study of the fine option/CSO program in Manitoba concluded that it "seems to serve the Treaty Indian/Métis/Non-Status Indian community quite well. High use is made of the program by Aboriginal people, their completion rate is better than average, and the jail admissions for default are not out of line with default admissions from the non-Aboriginal community."¹⁹¹ However, a study in Ontario describing the results of two programs specifically designed for Aboriginal persons in London and Kenora reported very mixed results with CSOs.¹⁹² Clearly, firm conclusions cannot be drawn from the

186. Consideration should also be given to the eventual abolition of imprisonment for fine default. There are imaginative non-criminal means for the recuperation of debts. This approach is consistent with one that our Commission is developing in a forthcoming Working Paper on *Costs in Criminal Cases*.

187. See *Justice on Trial*, *supra*, note 14 at 6-40 to 6-42.

188. Such orders are made under *Criminal Code* s. 737(2)(h), which allows a court to attach "reasonable conditions" to a probation order. Apparently the only Canadian jurisdiction not providing for CSOs is New Brunswick. See *Taking Responsibility*, *supra*, note 171 at 79.

189. See LRC, Report 2, *supra*, note 175 at 23-24.

190. *Taking Responsibility*, *supra*, note 171 at 80.

191. Barkwell et al., *supra*, note 18 at 138.

192. "Indicators of success or failure do not emerge": Margaret Jackson and John W. Ekstedt, *Alternatives to Incarceration/Sentencing Option Programmes: What Are the Alternatives?*, Research Report of the Canadian Sentencing Commission (Ottawa: Dept. of Justice, 1988) at 26.

experience to date. To be successful, considerably greater resources must be devoted to the monitoring and design of these community-based programs. By the same token, the scarcity of administrative resources can result in a theoretically beneficial program becoming a nuisance to the very community that administers the program. As with other alternative programs, a CSO program must enjoy the support of the affected community.

RECOMMENDATION

13. (9) Community service order programs should be created in communities that wish to institute them. The programs should be provided with resources adequate to determine what kind of community service work could be performed and what resources the community needs to make such programs succeed. Much greater care must be taken in the design of these programs, and the enabling statute or regulation should clearly set out the purposes of the programs. There must be appropriate education of the judiciary, Crown prosecutors and defence counsel about the purposes and availability of the programs.¹⁹³ While its use should be encouraged, the *Criminal Code* should provide that a community service order will only be imposed after the court has ascertained from the community the opportunities for community service and the willingness of the community to accept the offender.

B. Probation

Probation is used mainly to supervise convicted offenders who are allowed to remain at liberty or who are returned to the community after serving a period of imprisonment. It also provides a mechanism for extending treatment or other assistance to sentenced individuals.

The terms and conditions typically included in probation orders are not always appropriate to Aboriginal persons. The obligation to report regularly to a probation officer can create difficulties when the offender lives in an isolated community. Many treatment programs are not designed with Aboriginal persons in mind. Some non-association orders can be difficult to comply with in small communities and may almost amount to banishment.

Greater local control over probation would help.¹⁹⁴ The stumbling block would be enlisting sufficient community support. Nevertheless, if selected members of communities were trained as probation officers, there would be far fewer reporting difficulties. Even in communities with no trained probation officers, many tasks could be performed by

193. Jackson and Ekstedt, *ibid.*, indicate, at 25, that some judges misunderstood the nature of the CSO, thus undermining its value and utility.

194. What must be provided are specialized correctional institutions and programs modified to meet the needs of Aboriginal offenders. Issues such as the location of probation facilities and the training of staff to be employed in correctional institutions and in probation, parole, rehabilitation and after-care services also must be addressed. There are some lessons to be cognizant of in this area. Note especially the experience with the unimplemented 1975 James Bay Agreement and see the critique of it contained in Jackson, *supra*, note 18 at 257-60.

respected community members under the guidance of a probation officer located elsewhere.¹⁹⁵ Further, reporting requirements should be interpreted to maximize the offender's ability to maintain a productive life-style. For hunters, this could mean assigning a local person to hunt with one or several offenders or simply postponing the reporting requirement.

RECOMMENDATION

13. (10) Probation services, modified to meet the needs of Aboriginal offenders, should be provided in a wide range of Aboriginal communities. More use should be made of community resources, coupled with a commitment to train individuals from the communities to serve as probation officers.

Sentencing judges, when considering a probation order, have repeatedly lamented the fact that appropriate facilities and treatment programs do not exist, and that it is impossible to place people into the programs that do exist. Additional resources are necessary to provide appropriate facilities, trained staff and a variety of useful treatment programs. Only if such resources are available will the sentencing court be in a position to impose a meaningful disposition.

It is often asserted that Aboriginal offenders are generally not regarded by judges as good candidates for probation.¹⁹⁶ While the reasons for this are complex, the cultural factor is important. Judges must come to recognize that "our techniques of rehabilitation, of 'healing,' may not only be very different, but also traditionally improper."¹⁹⁷

RECOMMENDATION

13. (11) The criteria governing eligibility for probation should be formulated to have proper regard for cultural differences and to meet the needs of Aboriginal offenders and communities. In addition, probation reports should give greater emphasis to factors such as the offender's skills, potential employability and preparedness to enrol in treatment or training programs. The community's willingness to become involved in the probation and supervision of the offender should also take on added importance.

195. See *Justice on Trial*, *supra*, note 14 at 6-42 to 6-43. In Ontario, the Ministry of Correctional Services employs assistants to probation officers who reside in Aboriginal communities and act as friend and counsellor to probationers and parolees: Stan Jolly, C. Peters and S. Spiegel, *Progress Report on Government Action Taken Since the 1975 Federal-Provincial Conference on Native Peoples and the Criminal Justice System*, Report prepared for the Ontario Native Council on Justice (Toronto: The Council, 1979).

196. See the sources cited in Susan V. Zimmerman, *The Revolving Door of Despair: Native Involvement in the Criminal Justice System* (Paper prepared for the Law Reform Commission of Canada, 1991) at 46-49 [unpublished]. This perception is questioned by LaPrairie, *supra*, note 168 at 433.

197. Ross, *supra*, note 21 at 10.

C. Structural Adjustments and Process Reforms

(1) The Need for a Revised Sentencing Structure

Canada's current sentencing laws are archaic and inadequate. The *Criminal Code* lacks a coherent sentencing philosophy and provides little or no direction to sentencing judges. These defects result in serious sentencing disparities. In our view, the current regime fails to respect the *Charter's* guarantees of equality and fundamental justice in a number of important respects. To rectify these shortcomings, we have elsewhere recommended a major reclassification of current sentencing practices, bench-mark sentences, the abolition of parole and the creation of a permanent Sentencing Commission.¹⁹⁸ In addition, proposals for structural change made elsewhere in this Report, such as for the creation of an Aboriginal Justice Institute, increased involvement of Elders and courtworkers and formal community liaison, offer potential benefits for Aboriginal persons in the sentencing process.

(2) Racism, Discrimination and Sentencing Practices

Racism was a matter of pressing concern to our consultants. Anecdotal evidence of racism exists but is often discounted because proof in accordance with the standards of the social sciences is elusive.¹⁹⁹ Overt racism is difficult to prove, in part because the culpable actors are sufficiently sophisticated to mask this motivation. Also, regarding both overt racism and systemic discrimination, "the lack of a solid empirical base has inhibited any real understanding of whether bias exists in the conviction and sentencing of Aboriginal accused."²⁰⁰

RECOMMENDATION

13. (12) Further research should be conducted into whether Aboriginal persons receive harsher sentences than non-Aboriginal persons, and, if so, the causes of that disparity.

Although sentences that are harsher based on race or culture are repugnant, we do not suggest that racial or cultural factors should always be irrelevant at sentencing. The Canadian Sentencing Commission, in *Sentencing Reform*, proposed national sentencing guidelines, which would only be departed from where aggravating or mitigating factors

198. See, e.g., our Report 2, *supra*, note 175. The 1987 Report of the Canadian Sentencing Commission, *supra*, note 176 and the 1988 Report, *Taking Responsibility*, *supra*, note 171, also advocated the creation of a permanent Sentencing Commission.

199. See LaPrairie, *supra*, note 168 at 436.

200. *Ibid.* at 432, citing Clark.

set forth in a statutory scheme come into play.²⁰¹ Mitigating factors, such as whether restitution or compensation was made by the offender, are contemplated under the Sentencing Commission's proposal. Given this approach or, indeed, current sentencing practices, the race or culture of the offender could also be relevant in mitigation of sentence, provided other features are present.

RECOMMENDATION

13. (13) A list of factors should be enunciated which, in conjunction with other circumstances, would mitigate sentence where the offender is an Aboriginal person. For example, where an offender is an Aboriginal person, the sentence to be imposed should be reduced if the offender has already been, or will be, subject to traditional sanctions imposed by the community.

Such mitigating factors could be coupled with others that are generally accepted, such as evidence of the offender's acknowledgement of responsibility towards the victim and his or her community. This approach is consistent with the principle that incarceration should only be used as a last resort, and accords with the need to promote more appropriate individualization in sentencing.

(3) Plea Bargaining

Plea bargaining includes agreements to plead guilty in exchange for a prosecutor's withdrawing some charges or making certain representations on sentence. Our consultants suggest, and surveys confirm, that Aboriginal persons perceive plea bargains as often being reached without their conscious participation.²⁰² Obviously, this situation is unacceptable.

Knowledge of the effect of race and culture on plea bargaining is limited, and studies do not agree about the extent to which Aboriginal persons are subject to that effect.²⁰³ One study shows a disturbing lack of understanding on the part of Aboriginal persons; often no one, including defence counsel, explained the plea-bargaining process to them.²⁰⁴ Openness in the process and a clearer articulation of the proper roles to be played by defence counsel, Crown attorneys and judges could do much to rectify this situation.

201. *Supra*, note 176 at 320ff.

202. See Morse and Lock, *supra*, note 89.

203. Compare John Hagan, "Parameters of Criminal Prosecution: An Application of Path Analysis to a Problem of Criminal Justice" (1974) 65 J. Crim. L. & Criminology 536 at 542; and Derek F. Wynne and Timothy F. Hartnagel, "Race and Plea Negotiation: An Analysis of Some Canadian Data" (1975) 1:2 Can. J. Soc. 147 at 149.

204. Morse and Lock, *supra*, note 89 at 40.

Our Working Paper 60, *Plea Discussions and Agreements*,²⁰⁵ argues that an open and accountable process of plea discussions and agreements is appropriate to the criminal justice system. We proposed the development of a process resting on a framework of statutory rules and published guidelines. Under this scheme, the negotiation is disclosed to the court and pains are taken to ensure that the accused (and also the victim and the public) understands the exact nature of what has occurred. These proposals would go some distance toward ensuring that the Aboriginal offender is properly informed about the nature of the process.

RECOMMENDATION

13. (14) As we have previously recommended, a well-structured, visible and responsible process of plea discussion and agreement should be established.

(4) The Preparation of Pre-sentence Reports

The bare power of the sentencing judge to obtain a pre-sentence report is contained in subsection 735(1) of the *Criminal Code*. These reports can be valuable but should be improved.

RECOMMENDATION

13. (15) The *Criminal Code* provisions pertaining to pre-sentence reports should be considerably more detailed than at present. At a minimum, the contents of those reports and the circumstances in which they are to be ordered should be the subject of clear statutory provisions.

Characteristically a pre-sentence report supplies information concerning the offender's age, employment, family situation, personal history, education and financial situation. These are useful categories of information which ought to be set out in the legislation stipulating the contents of such reports. However, chronic unemployment in Aboriginal communities, family environments that have been disrupted, substandard educational facilities and general conditions of poverty in the area militate against relying on a report that only supplies the information required at present.

RECOMMENDATION

13. (16) The *Criminal Code* should provide that pre-sentence reports shall set out and consider the special circumstances of Aboriginal offenders.

The views of the community regarding the offender's potential for reintegration into that community should be considered. Any rehabilitative measures undertaken or planned by the offender in conjunction with the community should be mentioned. Also, the suitability of the offender for any particular disposition or programs ought to be considered.

205. LRC, *Plea Discussions and Agreements*, Working Paper 60 (Ottawa: The Commission, 1989).

These suggestions may accord with current practice in some parts of the country. However, to encourage greater uniformity and to remove any ambiguity, we are calling for statutory amendments to promote a positive and lasting reform of the process. In addition, in view of the sensitive content of the pre-sentence reports, we attach the utmost importance to the following requirement.

RECOMMENDATION

13. (17) Only persons familiar with the general condition of Aboriginal peoples and with their customs, culture and values should prepare pre-sentence reports.

Further, the case law reveals difficulties when a court incarcerates offenders in the absence of a pre-sentence report.²⁰⁶

RECOMMENDATION

13. (18) Where incarceration of an offender is being considered for the first time (and incarceration is not required by law), the court should be expressly obliged to order a pre-sentence report. Moreover, the statute should direct that, whenever incarceration is contemplated, the judge should consider ordering a report.

A pre-sentence report should not merely depend on the request of the offender or defence counsel.

We also believe that the assistance of counsel prior to the preparation of a pre-sentence report can be vital.

RECOMMENDATION

13. (19) Where a pre-sentence report is to be prepared, the court should ensure that any unrepresented offender is advised of the possible benefits of having counsel.

This task need not be performed by the judge personally. Rather, the court should draw on the resources of the community, perhaps through the use of Aboriginal court-workers.

(5) Weapons Bans

Many members of Aboriginal communities rely on hunting, fishing and trapping as means of livelihood. Typically, treaties preserved Aboriginal hunting and fishing rights in perpetuity, and “[t]he exercise of hunting and fishing rights is as central an element of Aboriginal culture as any characteristic of Aboriginal people.”²⁰⁷ Some conflicts arise from the inherent requirements of this life-style. Specifically, the possession of weapons is of particular importance to Aboriginal persons.

206. See, e.g., *R. v. Young* (1982), 39 Nfld & P.E.I.R. 76 (P.E.I.S.C.).

207. IBA, *supra*, note 24 at 42-43.

Section 100 of the *Criminal Code* prohibits an offender convicted of certain crimes from possessing firearms for a fixed period. The purported equal application of this section can cause inequity. A weapons ban has a much greater impact on Aboriginal persons who support themselves, as their treaties allow, through hunting and trapping and have no alternative occupations to pursue. Two courts of appeal have nonetheless found that a weapons ban does not create a *Charter* violation.²⁰⁸ By contrast, *R. v. Chief* holds that “[i]n the case of a trapper in the Yukon, . . . [a ban] is a virtual prohibition against employment in the only vocation that may be open to him,”²⁰⁹ and violates section 12 of the *Charter*. Consequently, the court granted the offender a “constitutional exemption” from the absolute prohibition, allowing him to have a weapon while hunting.²¹⁰

We favour the approach in *Chief*.

RECOMMENDATION

13. (20) Subsection 100(1) of the *Criminal Code* should be amended to allow for a limited exemption to the mandatory prohibition on the possession of weapons, where a judge is satisfied that the prohibition would be oppressive and unfair and that allowing the offender to have access to weapons for the purpose of making a living would not cause any threat to public safety.

VII. Corrections

In recent years, the National Parole Board and the Correctional Service of Canada have made valuable efforts to address the concerns and needs of Aboriginal offenders, but this process is in its infancy and much remains to be done. Generally speaking, Aboriginal offenders are incarcerated in prisons that are geographically and culturally far removed from their communities. The programs and services at those institutions have not been sensitive to the culture of Aboriginal inmates and, in particular, to their spiritual needs. Few Aboriginal persons work within the correctional system. Native brotherhoods and sisterhoods have done important work, but they suffer from inadequate recognition and insufficient resources. Further, Aboriginal offenders must satisfy parole and early release criteria that, in some respects, appear to be culturally inappropriate.²¹¹ Also, many reports have commented on the inadequacy of after-care facilities for Aboriginal offenders, in their own communities and elsewhere.²¹²

208. See *R. v. Tobac* (1985), 60 A.R. 253 (N.W.T. C.A.); *R. v. Weyallon* (1985), 60 A.R. 79 (N.W.T. C.A.); and *R. v. Kelly* (1990), 80 C.R. (3d) 185 (Ont. C.A.). The latter case considers, but is not itself, a “trapper case.”

209. *Supra*, note 159 at 270-71.

210. See *McGillivray*, *supra*, note 159, to the same effect.

211. National Parole Board, *Final Report: Task Force on Aboriginal Peoples in Federal Corrections* (Ottawa: Supply and Services Canada, 1988) recommended, at 36, that: “The current assessment tools, criteria, and procedures being used should be evaluated as to their validity for Aboriginal offenders.”

212. See, e.g., Marshall Inquiry, vol. 1, *supra*, note 14 at 181; *Justice on Trial*, *supra*, note 14 at 6-18 to 6-21; National Parole Board, *supra*, note 211 at 67.

A. Spirituality and Elders

The importance of spirituality and Elders in the rehabilitation of Aboriginal offenders has generally been recognized in principle. In practice, however, Elders seem to be given less freedom and trust than other spiritual leaders: they are required to have their ceremonies and activities supervised. Even Elders known to prison officials and regarded as posing no real threat have their medicine bundles searched when they enter the institution.²¹³ Further, the use of sweetgrass is associated with drug use by correctional officials, and sweat lodges are looked on with suspicion.²¹⁴

RECOMMENDATION

14. (1) Aboriginal spirituality should, by legislation, be given the same recognition as other religions, and Aboriginal Elders should be given the same status and freedom as prison chaplains.²¹⁵

On occasion, this may mean releasing a prisoner on a day pass into the custody of members of the community to attend ceremonies outside the prison.

B. Program Development and Delivery

Generally, the programs and services offered at federal and provincial correctional facilities have, until very recently, provided little that is culturally relevant and responsive to Aboriginal offenders. The cost to society of maintaining an offender in prison — already high — is that much greater if there is no discernible benefit to the inmate from the programs and services provided there.

RECOMMENDATION

14. (2) A review of all programming should be undertaken, in co-operation with Aboriginal persons and organizations, to develop programs and services that are culturally relevant to Aboriginal inmates. Aboriginal service organizations and prisoners' support groups should be systematically involved in program and service delivery and should be appropriately funded in this regard.

213. *Justice on Trial*, *supra*, note 14 at 6-27.

214. Jackson, *supra*, note 18 at 289. See also *Correctional Issues Affecting Native Peoples*, *supra*, note 166 at 33: "[S]ince complaints continue to arise about the recognition of Native spirituality as a religion, and about the particulars of Native spiritual observance, some critics would support special guarantees."

215. See the similar suggestion in *Correctional Issues Affecting Native Peoples*, *supra*, note 166 at 34.

C. Parole

Aboriginal offenders are less likely to be released on parole: in 1987, 9.5 per cent of Aboriginal offenders were released on parole, compared to 24 per cent of non-Aboriginal offenders.²¹⁶ Aboriginal offenders granted parole are more likely to find themselves back in prison,²¹⁷ and there is some concern that they waive their right to a parole hearing more frequently than do non-Aboriginal offenders.²¹⁸

Many explanations have been offered for these phenomena. Aboriginal offenders may not understand the system well enough to assert their rights fully.²¹⁹ Very few case management officers are of Aboriginal origin or have been adequately trained to recognize Aboriginal needs, and so might misjudge an aboriginal inmate's readiness for conditional release.²²⁰ Certain parole criteria are inherently weighted against Aboriginal offenders;²²¹ consequently, Aboriginal inmates may be detained owing to an inappropriate analysis of their behaviour or of the risk they represent to society.²²² It has also been suggested that release conditions are enforced more stringently against Aboriginal persons, and that they have inadequate support upon release.²²³

In other parts of this Report, we have made recommendations for greater cross-cultural training, increased hiring of Aboriginal persons, greater liaison with Aboriginal communities and consultation on release criteria and plans: all of those proposals are relevant here. In addition, steps should be taken to guard against waiver of parole applications or hearings caused by case management officers' subtle encouragement.²²⁴

216. National Parole Board, *supra*, note 211, Table 7 at 29.

217. A 1986 study found that Native penitentiary inmates had the worst total release supervision success rate — 55.9%. White inmates had a 66.2% success rate, while inmates of other races had a 74.2% success rate. William G. Harman and Robert G. Hann, *Release Risk Assessment: An Historical Descriptive Analysis*, User Report No. 1986-32 (Ottawa: Solicitor General Canada, 1986) at 2-9 and 4-4.

218. National Parole Board, *supra*, note 211 at 29.

219. *Taking Responsibility*, *supra*, note 171 at 214.

220. See National Parole Board, *Pre- and Post-Release Decision Policies* (Ottawa: The Board, 1989) Appendix A, where its general recidivism prediction scoring system is not applied to Aboriginal offenders because of insufficient data relating to Aboriginal persons in development of the test. No alternative measures appropriate to Aboriginal persons have been developed. See, however, Robert G. Hann and William G. Harman, *Release Risk Prediction: Testing the Nuffield Scoring System for Native and Female Inmates*, User Report No. 1989-4 (Ottawa: Solicitor General Canada, 1989) at 6, holding that except for one category, "the Nuffield scoring system seems to differentiate between the low and high risk inmates at least as well for Native and for non-Native inmates," and, at 9, that "[b]iasing parole release decisions for Natives solely on Nuffield scores would have resulted in a significant increase in the parole release rate for Natives — from 12% to 41%.

221. *E.g.*, using employment prospects as a criterion works against Aboriginal persons: see Marshall Inquiry, vol. 3, *supra*, note 18 at 44. Our consultants point out that a prohibition against association with anyone having a criminal record causes difficulties owing to the high percentage of Aboriginal persons with a criminal record: see also *Taking Responsibility*, *supra*, note 171 at 215.

222. See Canada, House of Commons, *Minutes and Proceedings of the Standing Committee on Justice and the Solicitor General*, Issue No. 57 at 57:10-57:11 (18 December 1990) in the submission of the Indigenous Bar Association to the Committee.

223. National Parole Board, *supra*, note 211 at 31.

224. *Ibid.* at 47.

RECOMMENDATION

14. (3) The National Parole Board and the Correctional Service of Canada should develop a national policy and guidelines concerning waiver of parole applications, parole hearings and reviews, and appropriate training should be provided to correctional staff. Information as to the national policy and guidelines should be made available to inmates.²²⁵

D. After-care

Aboriginal involvement in the criminal justice system has to do not only with offending but also with reoffending. Reintegration into society is the surest way to guard against recidivism, but reintegration depends on the availability of appropriate after-care facilities and programs. Specifically, there must be half-way houses, substance abuse treatment programs and employment and life skills programs which are sensitive to the particular needs of Aboriginal persons. Mainstream programs and facilities are not designed by or for Aboriginal people: the most effective means of providing for these needs of Aboriginal offenders is to involve Aboriginal communities and service organizations in after-care.

Where an offender returns to an Aboriginal community, that community can play a role in formulating and delivering after-care services.²²⁶ Aboriginal inmates going to an urban setting require a similar social structure, which might be provided by Native friendship centres, Métis community organizations and Aboriginal women's groups. If they choose, these organizations might offer the structure and leadership that band councils provide on reserves and in remote communities.²²⁷ At present, these organizations generally operate on shoe-string budgets, and have too many demands on their resources to be able to take on the supervision of paroled offenders. With appropriate financial support and training from correctional services, however, suitable programs could be developed.

225. See *ibid.*, Rec. 17, for similar proposals.

226. See also the discussion, above, in chap. 5 at 34, under "IV. Increasing Community Involvement with the Justice System." We are told that some groups of communities have pooled their resources: five or six communities may jointly support half-way houses, shelters, and so on, with each facility located in a different community. Of course, not all communities will wish to be involved in after-care, and these programs can only be instituted where there is local support.

227. *E.g.*, the Grierson Centre in Edmonton, administered by Native Counselling Services of Alberta since the fall of 1989, has been praised as a "fine example" of the federal and provincial governments working together with a Native service organization: remarks of Carola Cunningham in *Sharing Our Future: A Conference of Aboriginal Leaders and Correctional Service Managers*, held at Kananaskis, Alberta, February 11-13, 1991 (Ottawa: Correctional Service of Canada, 1991). See also the discussion of the Native Counselling Services of Alberta in *Correctional Issues Affecting Native Peoples*, *supra*, note 166 at 27-28.

RECOMMENDATION

14. (4) Aboriginal community organizations should be funded to design and administer after-care programs for Aboriginal people. In particular, the use of alternative residential facilities for Aboriginal offenders in areas where half-way houses are neither available nor economically feasible should be promoted.²²⁸

E. Regional and Local Facilities

Family, community, culture and spirituality are significant to the rehabilitation of all offenders. However, while for most non-Aboriginal offenders prison does not mean incarceration in a foreign cultural milieu, for many Aboriginal offenders it does. Thus, it is important to the rehabilitation of Aboriginal offenders that they be located as near as possible to their communities, to have access to families, Elders and community support.

Case management officers do consider an offender's community of origin and, in many cases, transfer agreements allow offenders to be located as near as possible to home. However, Aboriginal offenders from the North sometimes cannot be transferred because of shortage of space; female Aboriginal federal offenders are often placed far from home, because there is only one federal prison for women.²²⁹

RECOMMENDATION

14. (5) Smaller local correctional facilities should be created and Aboriginal communities should exercise control over those facilities.²³⁰

In some areas, we are told, programs to send Aboriginal offenders out on trap-lines rather than incarcerating them have been instituted. As we have noted above, in our discussions under "VI. Sentencing," we support the use of such alternatives.

Aboriginal women account for 20 to 30 per cent of inmates at Kingston's Prison for Women (P4W), currently the only federal facility for female offenders. In recent years, four of them have committed suicide in the prison, and a fifth did so shortly after her

228. Note, *e.g.*, the recommendation concerning the use of private homes, with indirect supervision of parolees, in National Parole Board, *supra*, note 211, Rec. 37 at 68.

229. Recent Government policy indicates that five regional prisons for women will be opened in the future. This will ameliorate to some extent the particular hardship facing female Aboriginal federal offenders.

230. See *Justice on Trial*, *supra*, note 14 at 6-28, and Osnaburgh/Windigo Report, *supra*, note 43 at 65. Note also the observation in *Correctional Issues Affecting Native Peoples*, *supra*, note 166 at 27, that legislation will "need to be open-ended enough to take into account a wide variety of correctional arrangements In an effort to develop a culturally-based system or systems, Native groups may propose correctional facilities or services which are very different from existing structures."

release. The particularly harsh effect on Aboriginal women of conditions at P4W has led at least one judge to rule that sending an Aboriginal woman to serve her sentence at P4W constitutes cruel and unusual punishment, in violation of her *Charter* rights.²³¹

The Task Force on Federally Sentenced Women recently recommended the creation of an Aboriginal healing lodge as one of five regional facilities to replace P4W. The success of the healing lodge will depend upon the extent to which Aboriginal women have an effective voice in the design and control of that facility.

RECOMMENDATION

14. (6) In establishing the Aboriginal healing lodge, the Correctional Service of Canada should ensure that it does so in accordance with the recommendation of the Task Force on Federally Sentenced Women. Aboriginal peoples should be consulted and given effective control over the process.²³²

231. *R. v. Daniels*, [1990] 4 C.N.L.R. 51 (Sask. Q.B.), overturned on appeal on jurisdictional grounds, June 6, 1991.

232. Issues unique to Aboriginal women, particularly correctional issues, are noted in our agenda for future action as especially important matters requiring further research.

CHAPTER SEVEN

Ensuring Progress

Highlights

We call for the creation of an Aboriginal Justice Institute. This Institute should have a broad mandate to deal with any matters relating to Aboriginal persons in the criminal justice system, including collecting data, developing programs within the justice system or as alternatives to it, providing assistance to Aboriginal communities in establishing programs, and developing policy options regarding Aboriginal justice issues. An Aboriginal Justice Institute should be staffed, operated and controlled by Aboriginal persons to the fullest extent possible.

Informed readers will recognize that many of our recommendations are not new, but are similar to recommendations made in previous reports over many years. One report prepared for us has noted that:

In 1975, the National Conference on Native Peoples held in Edmonton made a number of recommendations that were easily achievable. They recommended that courts sit in Native communities, that provision be made for judges to increase their awareness of the Native communities, and that resident judges or justices of the peace be appointed from within Native communities. Sixteen years later, in 1991, the Alberta Task Force on the impact of the criminal justice system on the Indian and Métis people of Alberta found it necessary to make essentially the same recommendations.²³³

It is clear that a major difficulty in solving Aboriginal criminal justice problems lies not in finding the solutions, but in instituting them. For that reason, we feel it necessary to make particular recommendations in this regard.

233. IBA, *supra*, note 24 at 12.

I. Ascertaining the Costs of Change

Clearly, one issue is cost. One is likely to conclude that large sums of money would be required to institute our recommendations. That additional resources are required cannot be denied, but not all of our proposals are costly. Some would result in decreased cost: many of our suggestions would improve or simplify procedures generally, and simplified procedures are less expensive procedures. Many of our proposals are cost-neutral, resulting in neither increased savings nor increased expenditures. Further, other proposals could be accommodated with no noticeable increase in current budgets. (In some cases, the prudent reallocation of existing budget resources would accomplish the objective.) Nonetheless, many of our proposals would involve additional cost. Supporting Aboriginal justice systems in particular would require additional resources.

Funding for various Aboriginal justice programs is currently drawn from several sources. Federal departments — Indian Affairs and Northern Development, Justice, Solicitor General, Secretary of State — all provide resources, as do many provincial government departments and other bodies such as bar associations and universities. We suggest that the level of resources currently devoted to Aboriginal justice issues, including provincial resources, should be precisely identified and evaluated. Expenditure priorities should be established in consultation with Aboriginal peoples to decide the best ways to deploy resources and eliminate unnecessary duplication.²³⁴ This process should include not only “Aboriginal-specific” programs, but also the portion of spending that in large part concerns Aboriginal people, such as funding for correctional facilities or policing. Comprehensive cost-feasibility studies should be immediately undertaken in respect of all proposals carrying resource implications that are advanced in this Report.

The historical disadvantage suffered by Aboriginal persons in the justice system has been too long ignored. If needed reforms have not been made in a timely fashion, we cannot now plead poverty as an excuse for continued inaction.²³⁵

RECOMMENDATION

15. (1) The level of resources currently devoted to Aboriginal justice issues, including provincial resources, should be precisely identified and evaluated. Expenditure priorities should be established in consultation with Aboriginal peoples to decide the best ways to deploy resources and eliminate unnecessary duplication. Comprehensive cost-feasibility studies should be immediately undertaken in respect of all proposals carrying resource implications that are advanced in this Report.

234. This process was begun with the work undertaken by the Nielsen Task Force in 1985: See Task Force on Program Review, *Improved Program Delivery: Indians and Natives*, a Study Team Report (Ottawa: The Task Force, 1985) (Chair: Eric Nielsen). One focus of this study was on areas of duplication and fragmentation between federal departments and agencies. Provincial programming was also examined.

235. The Prime Minister has spoken approvingly of Government decisions to increase spending on Aboriginal issues, saying that “we have made these decisions because they are right”: The Rt. Hon. Brian Mulroney, Address (First Nations Congress, Victoria, B.C., 23 April 1991) at 6 [unpublished].

Further, although funds must be allocated immediately, a short-term perspective is not appropriate. Aboriginal justice systems may be expensive in the short term, but in the long term, there would be a return on the investment.²³⁶ The expense can be rationalized by looking at the saving that would come partly from the fact that the rest of the justice system, the correctional system in particular, would be required to deal with fewer Aboriginal persons. But beyond that, restoring social control to communities could help to reverse the process of colonization that has created the problems Aboriginal persons face in the justice system. Their increased social control should result in lower crime rates and a lessened need for the use of any justice system.

In addition to providing funding, further steps are necessary to ensure the enactment of reforms.

II. Creating an Aboriginal Justice Institute

We suggest that an Aboriginal Justice Institute should be created specifically to deal with Aboriginal criminal justice issues and to oversee the implementation of these recommendations. That Institute could perform a number of valuable functions.²³⁷

First, the Institute could direct future empirical research. Despite the extensive study of Aboriginal justice issues that has taken place, there are major gaps in our knowledge. It is not clear, for example, whether racial bias plays a role in the sentencing of Aboriginal offenders.²³⁸ Indeed, some people challenge whether Aboriginal persons really are over-represented in prisons — the claim that, to many eyes, justifies the need for studies such as this.

Over-representation is an important issue in Aboriginal justice questions,²³⁹ and more data about certain questions would be useful. Does a lower income and a younger average age account for Aboriginal representation in prison?²⁴⁰ Would Aboriginal persons still

236. A Gitksan and Wet'suwet'en request for funding to research, design and implement a dispute settlement project points out that "the problems that western justice systems have with Aboriginal people have been vividly recounted in a number of enquiries across Canada, any one of which would cost more than [this] project": Jackson, *supra*, note 28 at 94-95.

237. In particular, creating such an Institute would help ensure that Aboriginal peoples would be more closely and significantly involved in the reform process, a step which we agree is important: see IBA, *supra*, note 24 at 52, 58-59.

238. LaPrairie, *supra*, note 168.

239. Many problems facing Aboriginal persons — translation, understanding the criminal process, obtaining counsel, bail and probation conditions — would need to be addressed even were Aboriginal persons incarcerated only at the same rate as the rest of the population.

240. There is some evidence that Aboriginal prisoners are older on average: see Alberta, Board of Review on the Administration of Justice in the Provincial Courts of Alberta, *Native People in the Administration of Justice in the Provincial Courts of Alberta*, Report No. 4 (Edmonton: The Board, 1978) (Chair: W. J. C. Kirby). This result suggests that the average younger age of the Native population is not a factor accounting for the high proportion of Aboriginal offenders.

be over-represented in provincial prisons if all fine-defaulters were removed from the equation? The answers cannot show that no problem exists — that a sixteen-year-old Aboriginal boy has a 70-per-cent chance of going to prison²⁴¹ is a problem whatever the cause — but can help isolate the causes of the problem. Figures on whether there are differences in the rate at which Aboriginal persons are charged with crimes, plead guilty, are convicted or are imprisoned could help show whether solutions are needed throughout the process or in specific areas.²⁴²

Beyond simply gathering data, however, an Aboriginal Justice Institute should play a role in formulating policy. The Institute could look at broad questions of principle regarding sentencing, and develop sentencing guidelines or propose modifications or alternatives to the sentencing process. Similarly, it could question the view that sentencing guidelines must be laid down province-wide, and develop guidelines concerning when cultural and local differences should affect general principles of sentencing. In part, the Institute could operate as an Aboriginal Sentencing Commission.

The Institute ought also to be closely involved in implementing the recommendations in this Report and those of other Aboriginal criminal justice initiatives. The Institute could conduct or commission research into customary law. It could help train Aboriginal justices of the peace. It could help establish cross-cultural training programs or training programs for legal interpreters. It could advise on holding court sittings in Aboriginal communities. It could develop criteria for granting bail or parole that take the special situation of Aboriginal persons into account.

The Institute could also evaluate existing measures such as diversion, fine option or community service programs. The Institute could formulate programs of its own, provide expert assistance to communities wishing to create such programs and assist in making funding applications. Another possibility is to give the Institute the ability to fund those programs itself. This step could make implementation of programs easier and more efficient — services and resources might be more economically arranged on a large scale — but might also create other problems. We therefore make no recommendation on this point at the moment.

241. John Hylton, "Locking Up Indians in Saskatchewan," discussed in Jackson, *supra*, note 18 at 216.

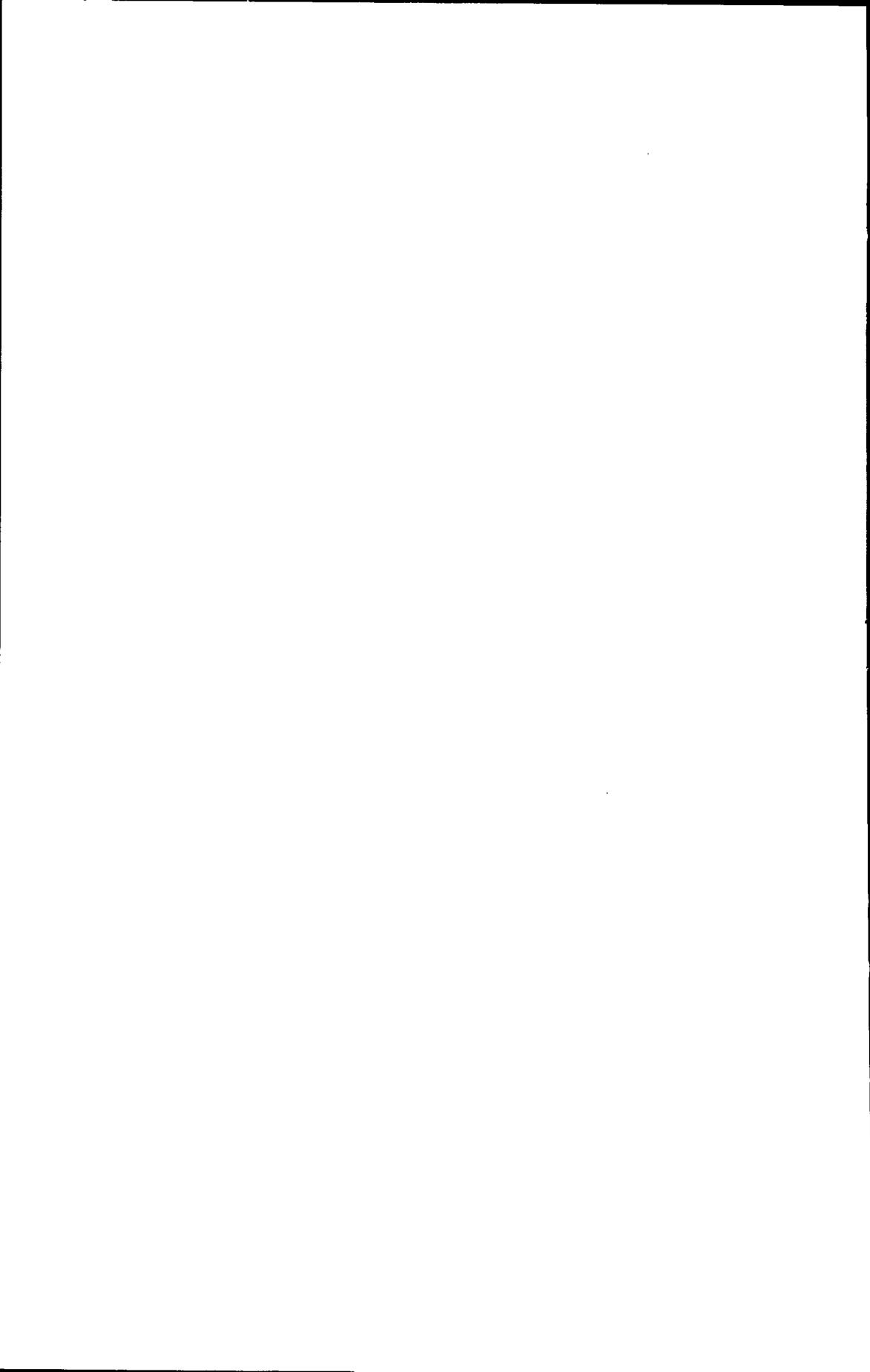
242. Some information is available concerning these types of questions: see, e.g., LaPrairie, *supra*, note 168, and the sources discussed there; Nova Scotia, Royal Commission on the Donald Marshall, Jr., Prosecution, *Discrimination against Blacks in Nova Scotia* by Wilson Head and Don Clairmont, vol. 4 (Halifax: The Commission, 1989) (Chair: T. A. Hickman); or Hagan, *supra*, note 203, but more is required. Data-collection practices vary considerably across the country: some jurisdictions keep very limited data on race, or are unable to correlate it to data such as type of offence. Also, the Canadian Centre for Justice Statistics has decided not to collect data based on ethnicity: some people argue that such data may be misinterpreted to mean that particular races are especially prone to criminal behaviour. The absence of such data makes it difficult to determine whether members of various races are treated unfairly: How can one argue that *too* many Blacks are charged, for example, without knowing *how* many Blacks are charged?

RECOMMENDATIONS

15. (2) An Aboriginal Justice Institute should be created and should have a broad mandate to deal with any matters relating to Aboriginal persons in the criminal justice system, including:

- (a) conducting empirical research;
- (b) collecting data;
- (c) developing and evaluating programs within the justice system or as alternatives to it;
- (d) providing assistance to Aboriginal communities in establishing programs; and
- (e) developing policy options regarding Aboriginal justice issues.

(3) The Aboriginal Justice Institute should be instrumental in the design, implementation and monitoring of initiatives concerning criminal justice deriving from proposals advanced in this Report as well as those generated by the commissions of inquiry. The Aboriginal Justice Institute should be staffed, operated and controlled by Aboriginal persons to the fullest extent possible.



CHAPTER EIGHT

Conclusion

I. Agenda for Future Action

Given the constraints on the preparation of this Report, there are of course many areas that we were either unable to address or not able to address in sufficient detail. It is appropriate, therefore, to indicate some of the areas in which further work is required.

We have chosen to defer two issues, namely, trial by jury and police harassment, for subsequent consideration in our second Report under this Reference, which will deal with religious minorities and multicultural justice issues. This decision was based on our belief that the interests of Aboriginal peoples and those of ethnic and religious minorities with regard to trial by jury and police harassment are not significantly different.

One purpose of a jury is to allow an accused to be tried by his or her peers.²⁴³ Fundamental to that purpose is the possibility that jury members and the accused will have something in common. If jury members share none of the cultural background and experiences of the accused, then the potential benefits may well be lost. However, the issue becomes more complicated when one also considers that the jury is intended to represent the community. Whose interests is it most important to protect, and how are competing interests to be balanced?

The police have sometimes been accused of using their vast discretionary powers simply for harassment: recently, for example, the systematic stopping of many Kahnawake motorists by the Quebec Police Force, ostensibly for highway traffic purposes, has heightened tensions in the wake of the Oka crisis.²⁴⁴ In due course we will be canvassing various methods for responding to these complaints — for example, through police complaint procedures, court action or human rights legislation — but we are not yet in a position to make a firm recommendation.

As this Report reveals, much additional work, specific to Aboriginal peoples, is required and should be undertaken as part of the implementation of this Report's recommendations. Still needed are research into customary law, a review of legal aid eligibility

243. A 1989 study reported that there had not yet been a single jury trial in Nova Scotia in which an Aboriginal person has served as a juror: Marshall Inquiry, vol. 3, *supra*, note 18 at 48.

244. See "Armed Mohawks, Police Clash Violently" *The [Toronto] Globe and Mail* (9 January 1991) A1-A2; "Issue of Policing at Centre of Storm," "Police Patrols Increased on Reserve" and "Oka Lesson Ignored, Natives Say" *The [Toronto] Globe and Mail* (10 January 1991) A5.

guidelines and the creation of special interrogation rules. We have also suggested that an Aboriginal Justice Institute should commission empirical studies into certain areas, such as sentencing disparity.

Among our proposals is a call for special rules regarding Aboriginal offenders in a number of situations. The details of those individual rules, and in addition more general issues, need to be decided. Will the rules be legislated or introduced through guidelines? Will they apply to all Aboriginal persons? Whose responsibility will it be to raise a rule? What consequences will flow from failing to follow the rules? These are matters calling for separate, sustained and detailed study.

Beyond this, other areas need further research. One especially important issue is the situation regarding Aboriginal women. Aboriginal persons are incarcerated in a much higher percentage than their proportion in the population, and this disproportion is especially pronounced for Aboriginal women.²⁴⁵ Aboriginal women are also more likely to be incarcerated far from home. Other correctional issues affecting these women also arise: Are the standards applied in deciding the security classification of female offenders, or in assessing transfer applications, for example, inherently biased against Aboriginal women? There are also several notorious examples of the justice system failing Aboriginal women who have been victims.²⁴⁶ Specific study of Aboriginal women in the criminal justice system is therefore called for. For similar reasons, particular consideration of Aboriginal young offenders is also required.

The quality and the quantity of legal services Aboriginal persons receive have often been raised as a concern. Should there be a national role in setting minimum standards, either through legal aid funding (which covers only some lawyers) or some other means? A study on this subject should be mounted.

We have proposed local control of police forces: in that regard, questions requiring study arise. To whom in the community would such police forces be accountable? Would they have any accountability beyond the local level? Would such safeguards be necessary to prevent the political use of local police forces?

It has also been suggested to us that some type of mechanism to allow communities a say in which judges are assigned to work there would be appropriate. We agree that the idea deserves consideration, but an exploration into its ramifications would be required before we could be in a position to make a recommendation. In the same vein, recommendations regarding the appointment process for judges also might be appropriate, but we have not as yet made any suggestions in this area. Further investigation is required.

245. According to the Canadian Centre for Justice Statistics, "Adult Female Offenders in the Provincial/Territorial Corrections Systems, 1989-90" (1991) 11:6 Juristat 1 at 5, 29.1% of women in provincial/territorial facilities were Aboriginal, while 16.9% of male prisoners were Aboriginal, and "[s]ince 1986-87 these proportions have remained stable."

246. The murder of Helen Betty Osborne is the best-known example.

Cross-cultural training programs increase the level of knowledge that actors in the criminal justice system have concerning Aboriginal persons, but they are not designed to change underlying attitudes. Changing those attitudes, especially through short-term programs, is a much more difficult task. Further research into effective methods of anti-racism training is therefore necessary.

The number of female Aboriginal offenders who commit suicide in prison is disturbing, as is the much higher suicide rate among Aboriginal people generally.²⁴⁷ Examination of Aboriginal suicide and its relationship to incarceration or to the criminal justice system is called for.

These are a few of the areas that clearly justify additional research and study. Some of this could be done by an Aboriginal Justice Institute and, as noted, it is our hope to carry some of it out ourselves. However, this agenda for future research and study should not in any way prevent the immediate implementation of other valuable reforms, where possible. Some of our recommendations require no further detail, while others need filling in and refinement through negotiation or implementation. Most importantly, although more study can always be justified, action is needed and is possible, now.

II. Some Final Observations

The system that many Aboriginal people would replace or drastically alter is much admired the world over, because it is generally characterized by humanity and a respect for human dignity. However, as we have reported, this has not been the experience of Aboriginal peoples with the system.

History records that Canada's Aboriginal peoples have suffered terrible and devastating wrongs. As a result, traditional Aboriginal life has been drastically altered and, in some communities, distorted beyond recognition. The conclusion has been drawn that "the original lifestyle of Aboriginal society, characteristic of pre-European contact, will never again be fully reached."²⁴⁸ Whether this is true or not is ultimately irrelevant insofar as Aboriginal aspirations and political strivings are concerned. Aboriginal peoples have consistently voiced their desire to establish systems of justice that incorporate their own values, customs, traditions and beliefs but that permit the adaptation of these features to the realities of the modern age. They have well-articulated and amply documented reasons for preferring their vision to the present criminal justice system — a system to which, they contend, they have never consented and that can never command their respect.

247. In 1986, 34 Status Indians, 54 Inuit but only 15 in 100,000 of all Canadians committed suicide: see Standing Committee on Aboriginal Affairs, *Unfinished Business: An Agenda for All Canadians in the 1990's*, Second Report (Ottawa: The Committee, 1990) Appendix C.

248. Osnaburgh/Windigo Report, *supra*, note 43 at 37.

The Canadian people have reached a better understanding of the Aboriginal reality and have come to acknowledge the legitimacy of Aboriginal historical grievances.²⁴⁹ That recognition is now supplemented by a willingness among Canadians to attempt to redress past injustices.²⁵⁰

Substantial changes to the present system are urgently required. Our own work over a period of twenty years in the fields of criminal law and procedure bears sufficient testimony to this fact. The many system alterations which we propose in this Report are, in our view, necessary to provide as much effective, remedial relief as possible. We believe that these proposals can facilitate the creation of the kind of plural legal reality that Aboriginal peoples desire and our Constitution is able to accommodate.

We accept the necessity to effect fundamental changes to the criminal justice system in order to ensure that Aboriginal persons are treated equitably and with respect. Equal access to justice in this context means equal access to a system that is sensitive to the needs and aspirations of Aboriginal people. That system, as we have repeatedly emphasized throughout this Report, is not uniform. Nor does it invariably require a marked departure from the present one. It must, however, be a system that the Aboriginal peoples themselves have shaped and moulded to their particular needs.

249. See *Citizens' Forum on Canada's Future: Report to the People and Government of Canada* (Ottawa: Supply and Services Canada, 1991) at 74-85.

250. *Ibid.* at 120-21.

Summary of Recommendations

The Meaning of Equal Access to Justice, Equitable Treatment and Respect

1. The criminal justice system must provide the same minimum level of service to all people and must treat Aboriginal persons equitably and with respect. To achieve these objectives, the cultural distinctiveness of Aboriginal peoples should be recognized, respected and, where appropriate, incorporated into the criminal justice system.

The Desirability of Aboriginal Justice Systems

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

Criminal Justice System Recruitment and Training

3. (1) Programs should be established to bring more Aboriginal persons into all aspects of the criminal justice system, including as police, lawyers, judges, probation officers and correctional officials. More specifically, the following steps should be taken:

- (a) police forces and correctional services should hire Aboriginal persons through affirmative action if necessary, and an affirmative action policy should be carried over into access to training and promotion decisions;**
- (b) recruitment programs to draw more Aboriginal persons into law schools should be financially supported to a greater extent than is presently the case; and**
- (c) Aboriginal persons should be appointed as judges at all levels of the judiciary, based on consultation with Aboriginal communities to identify appropriate candidates.**

(2) Aboriginal courtworker programs should be expanded, and their functions should include involvement with Aboriginal accused persons at all stages of the investigation and prosecution process, particularly where a lawyer is not immediately and continuously available.

(3) Cross-cultural training for all participants in the criminal justice system, including police, lawyers, judges, probations officers and correctional officials, should be expanded and improved. This training should be mandatory and ongoing for those whose regular duties bring them into significant contact with Aboriginal persons. Local Aboriginal groups should be closely involved in the design and implementation of the training.

(4) Information concerning Aboriginal culture should be incorporated into law school programs.

(5) Legal aid services should make arrangements to allow some lawyers to specialize in representing Aboriginal persons.

Overcoming Language Difficulties and Cultural Barriers

4. (1) The right of Aboriginal peoples to express themselves in their own Aboriginal languages in all court proceedings should be statutorily recognized. Qualified interpreters should be provided at public expense to all Aboriginal persons who need assistance in court proceedings.

(2) Legislation should provide that interpreters be provided during the pre-trial stage of a police-conducted investigation, including questioning, to any suspect who needs assistance.

(3) The *Criminal Code* and the *Canada Evidence Act* should provide that the costs of interpreter services rendered to accused persons at any stage of the criminal process must be borne by the state.

(4) Notices should be prominently posted, in languages frequently used in the community, in each court house or preferably outside of each courtroom, explaining the section 14 *Charter* right to an interpreter. These notices should set out:

- (a) the requirements for obtaining an interpreter;
- (b) that an accused or witness who speaks some English or French may still be entitled to an interpreter; and
- (c) that, if an interpreter is ordered, the accused or witness will not be required to pay for it.

(5) Duty counsel should be instructed to pay particular attention to the language abilities of Aboriginal accused.

(6) Unless advised by counsel that it is unnecessary, judges should satisfy themselves on first appearance that Aboriginal accused or witnesses speak and understand the language in which the proceedings are to be conducted.

(7) The need for, the feasibility and the cost of providing simultaneous translation services to members of the Aboriginal public attending court hearings on or near reserves should be examined.

(8) A system should be established to train independent, competent professional interpreters for criminal cases. As a general rule, only such interpreters should qualify to assist in criminal cases.

Increasing Community Involvement with the Justice System

5. (1) Consideration should be given to making "Peacemakers" a formal aspect of the justice system to mediate disputes.

(2) Permanent liaison mechanisms should be established between local Crown prosecutors and Aboriginal communities and leaders.

(3) Representatives of the accused's community should be allowed to give evidence, at bail hearings, of available alternatives to custody pending trial.

(4) Lay assessors (Elders or other respected members of the community) should be permitted by express statutory provision to sit with a judge to advise on appropriate sentences.

(5) A process of ongoing consultation between Aboriginal service providers and officials of the Correctional Service of Canada and the National Parole Board should be established.

(6) Aboriginal communities should be involved in the preparation of release plans for Aboriginal offenders and the supervision of those persons in their communities following release.

Applying Customary Law and Practices

6. The federal government should provide funding for research into Aboriginal customary law.

Asserting Treaty Rights in Criminal Courts

7. Governments should develop clear and public policies concerning the preferred methods for determining Aboriginal and treaty rights. These policies should encourage identifying areas of conflict through discussion with Aboriginal communities, for the purpose of negotiating agreements about those issues with the affected parties. Where litigation is necessary, declaratory relief or court references should be preferred to the laying of charges, but if prosecutions are commenced, multiple proceedings should be vigorously discouraged and only a single test case pursued.

The Police

8. (1) The police must be more involved in and accountable to the communities they serve.

(2) Community-based policing should be facilitated to the fullest extent in Aboriginal communities that wish to continue to have external police services.

(3) The federal and provincial governments should facilitate autonomous Aboriginal police forces wherever local communities desire them. No single structure or role for that police force should be demanded. If the force is to be autonomous, then its structure and its role must be determined by the community.

(4) Funding for autonomous police services should not be limited to programs that are directly analogous to existing agencies.

(5) Although police officers should retain the discretion to decide when to lay charges, they should routinely seek advice from Crown prosecutors, including advice as to whether it is appropriate to lay charges at all.

(6) The police should take special care, when presenting an Aboriginal person with an appearance notice, to confirm that that person understands the significance of failing to appear in court and is clearly made aware of the appearance date; in particular, the officer should inquire whether there is any reason the person will be unavailable and make reasonable accommodations concerning the date. Instruction manuals and training courses should be altered so as to give effect to this recommendation. It should be emphasized, however, that no accused should be unnecessarily detained simply to comply with this recommendation.

(7) Police forces should be encouraged to use forms translated into the language of the relevant community where possible and where the nature and extent of police contact with the community justifies the practice.

Prosecutors

9. (1) All public criminal prosecutions should be conducted by a lawyer responsible to and under the supervision of the Attorney General.

(2) No person other than a lawyer responsible to and under the supervision of the Attorney General should be entitled to conduct prosecutions of hunting, trapping and fishing offences.

(3) Prosecutors should be clearly instructed, by directive and through training, that they are to exercise their discretion independent of police influence or pressure and that their advice to the police must remain dispassionate and impartial.

(4) A clearly stated policy should be published and implemented concerning the public interest factors that should and should not be taken into consideration in decisions on whether to commence or stop a prosecution.

(5) The *Criminal Code* should be amended to provide for a statutory duty of complete and timely disclosure in all prosecutions.

(6) Federal and provincial attorneys general should adopt a policy of early post-charge screening of charges by Crown prosecutors.

Defence Counsel

10. (1) Provincial bar associations and legal aid societies should make public legal education materials — in particular, information about how to obtain legal aid — readily available to Aboriginal persons. Where necessary, video technology should be used or materials should be produced in Aboriginal languages.

(2) Legal aid eligibility guidelines should be reviewed to ensure that they do not have an unequal impact on Aboriginal persons. The governments concerned should ensure that funding is available to provide necessary legal services to all Aboriginal persons who require assistance.

(3) Special interrogation rules governing the taking of statements from Aboriginal persons should be created, including rules concerning the presence of counsel or some other person during questioning.

The Courts

11. (1) Courtrooms serving Aboriginal communities should be physically set up in a way that is sensitive to Aboriginal culture and tradition.

(2) Federal legislation should give federally appointed justices of the peace jurisdiction to deal with all matters conferred on justices of the peace under both the *Criminal Code* and the *Indian Act*. Greater use should be made of this federal appointment power so as to appoint more Aboriginal justices of the peace.

(3) The right of Aboriginal persons to swear an oath in a traditional way when giving evidence in court should be recognized.

(4) Court dates for Aboriginal accused persons should be scheduled to avoid, where possible, hunting and trapping seasons. Chief justices of the affected courts should develop scheduling policies in conjunction with and on the advice of community representatives.

(5) Statutory authority should allow for appearances to be made through electronic means.

(6) An accused who is released by a court some distance from the place where the arrest was made should, in the discretion of the court, be returned home or to such other place as is reasonably designated by the accused. The *Criminal Code* should contain a statutory direction requiring the judge to inquire into this issue. The cost of transportation should be borne by the state.

(7) The *Code* should provide that a detainee who is released "unconditionally" (that is, without charges being laid) should automatically be returned to the place of arrest or to such other place as is reasonably designated by the detainee.

(8) Where court hearings are not held in or near an Aboriginal community, accused persons and witnesses under subpoena should be provided with transportation to and from court hearings or sufficient conduct money to cover the cost of transportation.

(9) Wherever possible and desired by the community, the court sitting should occur in or near the Aboriginal community in which the offence was committed.

(10) Because fly-in courts do not provide remote communities with legal services equal to those available elsewhere, they should be phased out where possible. Where fly-in courts are used, steps should be taken to guarantee that

(a) defence counsel is available to all accused persons on a date meaningfully in advance of the court hearing;

(b) Crown prosecutors consult with the affected communities enough in advance of court hearings to ensure that the public interest is protected; and

(c) sufficient resources, including additional judicial appointments, if necessary, are provided to ensure that court hearings need not be rushed and can be held within a reasonable time after the offence.

Bail

12. (1) An endorsement permitting a peace officer to release an arrested person on an appearance notice should be available for all crimes. Legislation should expressly require a justice to consider making an endorsement when issuing an arrest warrant.

(2) Any peace officer should have the discretion to release a person arrested for any crime, by means of an expanded appearance notice which could include conditions that, at present, only the officer in charge can impose. A peace officer should be required to release the person unless specific grounds of detention are satisfied.

(3) Bail legislation should specifically provide that, in assessing the reasonableness of any condition of release, the justice must consider:

- (a) an accused's occupation, place of residence and cultural background;
- (b) the geographical location and size of the community to which the accused belongs; and
- (c) the special requirements of traditional Aboriginal pursuits.

(4) A condition requiring an accused to refrain from the use of alcohol should only be attached if the use of alcohol contributed to the offence with which the accused is charged.

(5) There should be no criminal liability for breaching non-monetary conditions of release.

(6) Bail legislation should be amended to provide that, in considering the suitability of an intended surety, a justice shall consider:

- (a) the financial resources the intended surety has or may reasonably be expected to have;
- (b) his or her character and the nature of any previous convictions;
- (c) his or her proximity (whether in kinship, place of residence or otherwise) to the accused; and
- (d) any other relevant matter.

(7) A justice should only be allowed to require a surety to deposit cash or other security if the justice is satisfied that exceptional circumstances related to the surety require such an order — for example, where the intended surety resides in another jurisdiction.

(8) A surety should be under a duty to take all reasonable steps to ensure the attendance of the accused in court. The surety should not be liable to forfeiture for the accused's breach of other bail conditions.

(9) If a justice orders a person to obtain a surety and that condition is not met within twenty-four hours, the imposition of that condition should be reconsidered.

(10) The requirement of a cash deposit by the accused should either be abolished or be subject to greater restriction, such as requiring a cash deposit only where the justice believes on reasonable grounds that the deposit is necessary to prevent the accused from leaving the country.

Sentencing

13. (1) Alternatives to imprisonment should be used whenever possible. The *Criminal Code* provisions creating such alternatives should ensure that those alternatives are given first consideration at sentencing. A judge imprisoning an Aboriginal person for an offence amenable to the use of alternative dispositions should be required to set forth the reasons for using imprisonment rather than a non-custodial option.

(2) Programs providing alternatives to incarceration should, to the extent possible, be universally available. To pursue this goal, adequate financial and human resources must be made available and comprehensive cost-feasibility studies should be undertaken immediately.

(3) Research must be accompanied by monitoring of the programs, together with policy analyses, to allow for structural readjustment as experience is gathered.

(4) Victim-offender reconciliation programs should be expanded and ought to be evaluated more thoroughly than has been done to date. Federal and provincial governments should provide the necessary financial support to ensure that community programs are made more generally available and to encourage their greater use.

(5) The *Criminal Code* should contain a counterpart to the "alternative measures" provisions in the *Young Offenders Act*, for disposing of and diverting cases against adult Aboriginal offenders.

(6) Fine option programs should be created in communities that wish to institute them. The programs should be provided with resources adequate to allow the community to mount projects that will promote a sense of accomplishment and self-worth. Special measures should be taken to make these programs accessible to Aboriginal women.

(7) The provinces should be encouraged to institute pilot projects on the use of day-fine systems, and Aboriginal communities ought to be among the first beneficiaries of such projects.

(8) Incarceration for non-payment of fines should only occur upon a refusal or wilful default to pay a fine, not upon an inability to pay. An offender should not be imprisoned unless the following alternatives have been tried:

- (a) show-cause hearings over why the offender has not paid the fine;
- (b) attachment of wages, salaries and other moneys;
- (c) seizure of the offender's property;
- (d) community service equal to the fine; and
- (e) alternative community sanctions.

(9) Community service order programs should be created in communities that wish to institute them. The programs should be provided with resources adequate to determine what kind of community service work could be performed and what resources the community needs to make such programs succeed. Much greater care must be taken in the design of these programs, and the enabling statute or regulation should clearly set out the purposes of the programs. There must be appropriate education of the judiciary, Crown prosecutors and defence counsel about the purposes and availability of the programs. While its use should be encouraged, the *Criminal Code* should provide that a community service order will only be imposed after the court has ascertained from the community the opportunities for community service and the willingness of the community to accept the offender.

(10) Probation services, modified to meet the needs of Aboriginal offenders, should be provided in a wide range of Aboriginal communities. More use should be made of community resources, coupled with a commitment to train individuals from the communities to serve as probation officers.

(11) The criteria governing eligibility for probation should be formulated to have proper regard for cultural differences and to meet the needs of Aboriginal offenders and communities. In addition, probation reports should give greater emphasis to factors such as the offender's skills, potential employability and preparedness to enrol in treatment or training programs. The community's willingness to become involved in the probation and supervision of the offender should also take on added importance.

(12) Further research should be conducted into whether Aboriginal persons receive harsher sentences than non-Aboriginal persons, and, if so, the causes of that disparity.

(13) A list of factors should be enunciated which, in conjunction with other circumstances, would mitigate sentence where the offender is an Aboriginal person. For example, where an offender is an Aboriginal person, the sentence to be imposed should be reduced if the offender has already been, or will be, subject to traditional sanctions imposed by the community.

(14) As we have previously recommended, a well-structured, visible and responsible process of plea discussion and agreement should be established.

(15) The *Criminal Code* provisions pertaining to pre-sentence reports should be considerably more detailed than at present. At a minimum, the contents of those reports and the circumstances in which they are to be ordered should be the subject of clear statutory provisions.

(16) The *Criminal Code* should provide that pre-sentence reports shall set out and consider the special circumstances of Aboriginal offenders.

(17) Only persons familiar with the general condition of Aboriginal peoples and with their customs, culture and values should prepare pre-sentence reports.

(18) Where incarceration of an offender is being considered for the first time (and incarceration is not required by law), the court should be expressly obliged to order a pre-sentence report. Moreover, the statute should direct that, whenever incarceration is contemplated, the judge should consider ordering a report.

(19) Where a pre-sentence report is to be prepared, the court should ensure that any unrepresented offender is advised of the possible benefits of having counsel.

(20) Subsection 100(1) of the *Criminal Code* should be amended to allow for a limited exemption to the mandatory prohibition on the possession of weapons, where a judge is satisfied that the prohibition would be oppressive and unfair and that allowing the offender to have access to weapons for the purpose of making a living would not cause any threat to public safety.

Corrections

14. (1) Aboriginal spirituality should, by legislation, be given the same recognition as other religions, and Aboriginal Elders should be given the same status and freedom as prison chaplains.

(2) A review of all programming should be undertaken, in co-operation with Aboriginal persons and organizations, to develop programs and services that are culturally relevant to Aboriginal inmates. Aboriginal service organizations and prisoners' support groups should be systematically involved in program and service delivery and should be appropriately funded in this regard.

(3) The National Parole Board and the Correctional Service of Canada should develop a national policy and guidelines concerning waiver of parole applications, parole hearings and reviews, and appropriate training should be provided to correctional staff. Information as to the national policy and guidelines should be made available to inmates.

(4) Aboriginal community organizations should be funded to design and administer after-care programs for Aboriginal people. In particular, the use of alternative residential facilities for Aboriginal offenders in areas where half-way houses are neither available nor economically feasible should be promoted.

(5) Smaller local correctional facilities should be created and Aboriginal communities should exercise control over those facilities.

(6) In establishing the Aboriginal healing lodge, the Correctional Service of Canada should ensure that it does so in accordance with the recommendation of the Task Force on Federally Sentenced Women. Aboriginal peoples should be consulted and given effective control over the process.

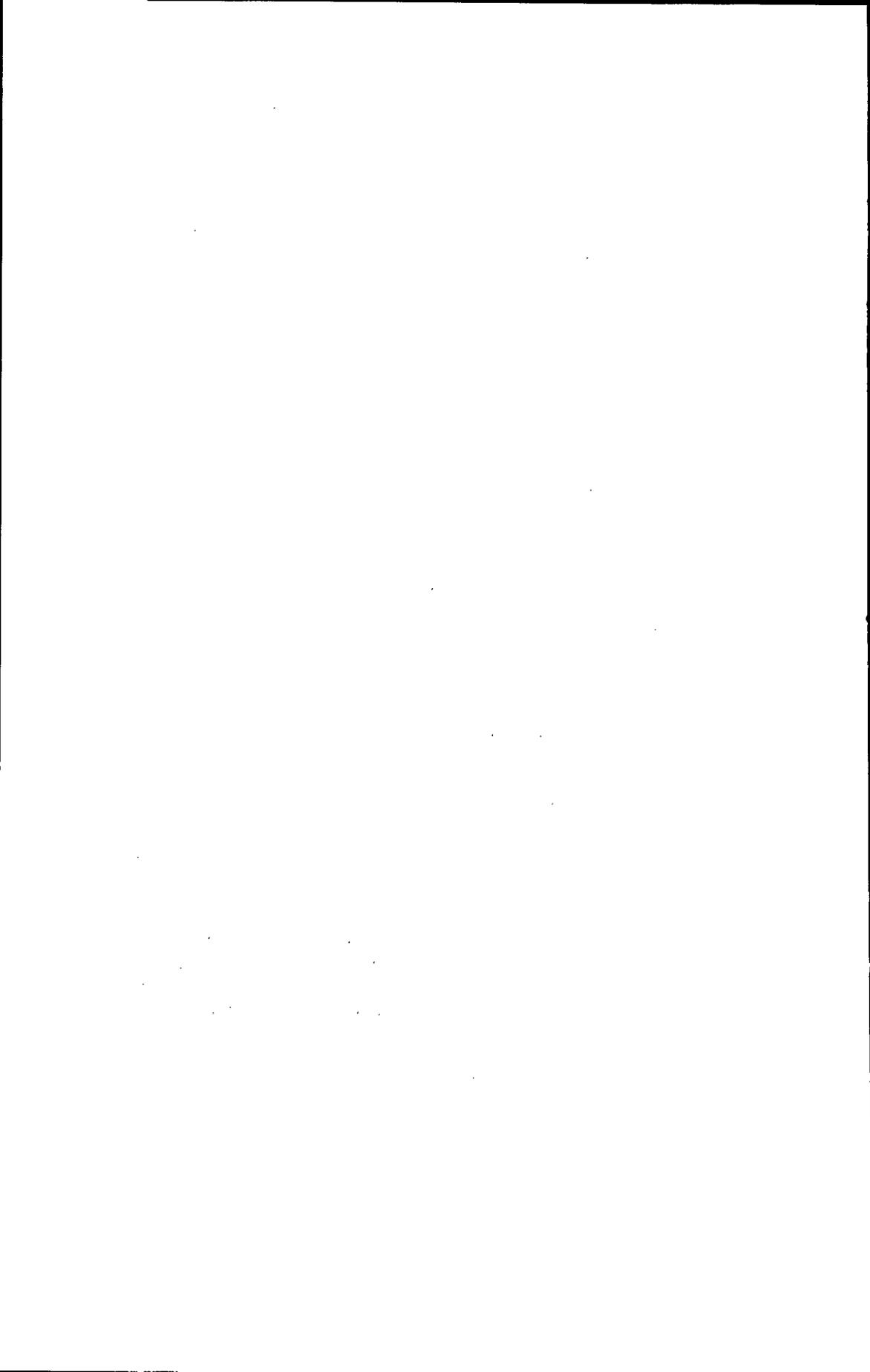
Ensuring Progress

15. (1) The level of resources currently devoted to Aboriginal justice issues, including provincial resources, should be precisely identified and evaluated. Expenditure priorities should be established in consultation with Aboriginal peoples to decide the best ways to deploy resources and eliminate unnecessary duplication. Comprehensive cost-feasibility studies should be immediately undertaken in respect of all proposals carrying resource implications that are advanced in this Report.

(2) An Aboriginal Justice Institute should be created and should have a broad mandate to deal with any matters relating to Aboriginal persons in the criminal justice system, including:

- (a) conducting empirical research;
- (b) collecting data;
- (c) developing and evaluating programs within the justice system or as alternatives to it;
- (d) providing assistance to Aboriginal communities in establishing programs; and
- (e) developing policy options regarding Aboriginal justice issues.

(3) The Aboriginal Justice Institute should be instrumental in the design, implementation and monitoring of initiatives concerning criminal justice deriving from proposals advanced in this Report as well as those generated by the commissions of inquiry. The Aboriginal Justice Institute should be staffed, operated and controlled by Aboriginal persons to the fullest extent possible.



APPENDIX A

Unpublished Studies Commissioned for This Report

Doob, Anthony N., and Philip C. Stenning. *Report to the Law Reform Commission of Canada on the Aboriginal Reference from the Minister of Justice, Canada*. 1991.

Indigenous Bar Association. *The Criminal Code and Aboriginal People*. 1991.

Jackson, Michael. *In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities*. 1991.

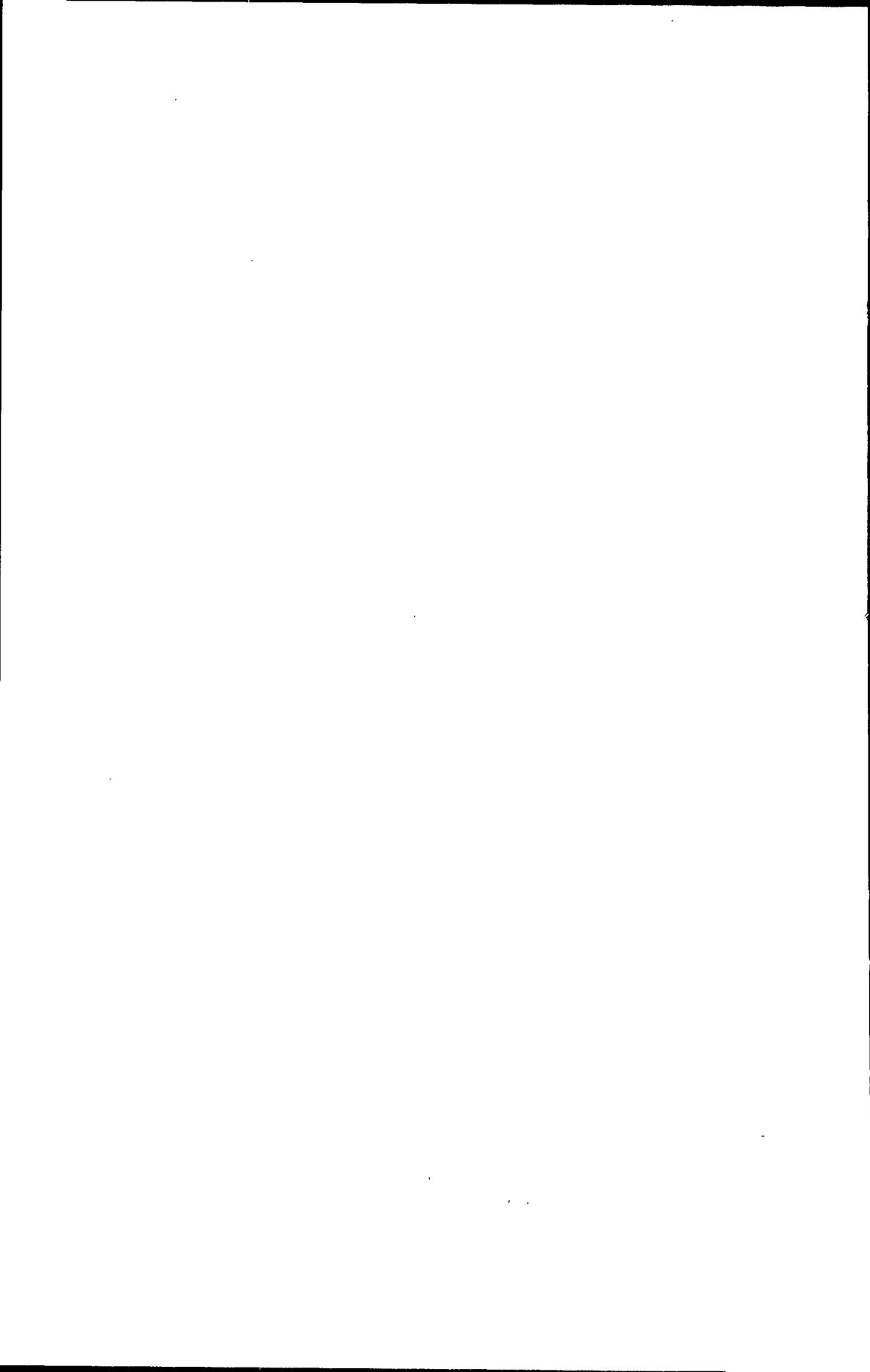
Kaiser, H. Archibald. *The Criminal Code of Canada: A Review Based on the Minister's Reference*. 1991.

Monture, Patricia A., and Mary Ellen Turpel, eds. *Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice*. 1991.

Zimmerman, Susan V. *The Revolving Door of Despair: Native Involvement in the Criminal Justice System*. * 1991.

The last five of the above studies will be published under separate cover.

* This study was developed in conjunction with the Aboriginal Justice Inquiry of Manitoba, and derives in part from a background study prepared by Kenneth Chasse.



APPENDIX B

Consultants

On March 18 and 19, 1991, the Commission met with a group of consultants in Edmonton, Alberta. Present at that consultation were:

Mr. Daniel Bellgarde,
First Vice-Chief,
Federation of Saskatchewan Indian Nations

Ms. Marion Buller,
Barrister and Solicitor,
Member, Indigenous Bar Association

Mr. Dennis Callihoo,
Barrister and Solicitor

Mr. Larry Chartrand,
Chair,
Indigenous Bar Association Justice
Committee

Professor Paul Chartrand,
Department of Native Studies,
University of Manitoba

Professor Michael Jackson,
Faculty of Law,
University of British Columbia

Ms. Deborah Jacobs,
Associate Director of Education,
Squamish Nation

Professor Archibald Kaiser,
Dalhousie Law School

Ms. Joan Lavalee,
Elder

Mr. Tony Mandamin,
Barrister and Solicitor

Mr. Ovide Mercredi,
Barrister and Solicitor,
Vice-Chief,
Assembly of First Nations

Professor Patricia Monture,
Dalhousie Law School

Ms. Eileen Powless,
Barrister and Solicitor,
Indian Association of Alberta

Ms. Carol Roberts,
Legal Counsel,
Department of Justice (Northwest
Territories)

Professor Philip C. Stenning,
Centre of Criminology,
University of Toronto,
Former Consultant to Marshall Inquiry

Ms. Fran Sugar,
Task Force on Federally Sentenced
Women

Mr. Allan Torbitt,
Political Co-ordinator,
Assembly of Manitoba Chiefs

Ms. Rosemary Trehearne,
Manager, Justice Programs,
Council for Yukon Indians

On March 25 and 26, 1991, a consultation was held in Toronto, Ontario. Present at that consultation were:

Mr. Jerome Berthellete,
Executive Director,
National Association of Friendship Centres
of Canada

Mr. Ian Cowie,
Barrister and Solicitor,
Consultant

Sergeant Bob Crawford,
Metro Toronto Police Force

Mr. Chester Cunningham,
Executive Director,
Native Counselling Services of Alberta

Mr. Ab Currie,
Department of Justice

Professor Anthony N. Doob,
Centre of Criminology,
University of Toronto,
Former Member,
Canadian Sentencing Commission,
Consultant to the Nishnawbe-Aski Legal
Services Corporation

Grand Chief Phil Fontaine,
Association of Manitoba Chiefs

Mr. John Giokas,
Department of Justice

Mr. Roger Jones,
Barrister and Solicitor,
Former President,
Indigenous Bar Association

Ms. Rosemarie Kuptana,
Former Vice-President,
Inuit Circumpolar Conference

Mr. Harry Laforme,
Commissioner,
Indian Commission of Ontario

Mr. Ovide Mercredi,
Barrister and Solicitor,
Vice-Chief,
Assembly of First Nations

Chief Henry Mianscum,
Mistissini Band (Cree)

Professor Patricia A. Monture
Dalhousie Law School

Grand Chief Mike Mitchell,
Mohawk Council,
Territory of Akwesasne

Mrs. Carole V. Montagnes,
Executive Director,
Ontario Native Council on Justice

Professor Graydon Nicholas,
Chair, Native Studies,
St. Thomas University,
Former President,
Union of New Brunswick Indians

Mr. Moses Okimaw,
Barrister and Solicitor,
Association of Manitoba Chiefs

Chief Violet Pachanos,
Chisasibi Band (Cree)

Mr. Gordon Peters,
Ontario Regional Chief,
Chiefs of Ontario

Ms. Viola Robinson,
President,
Native Council of Canada

Chief Tom Sampson,
Chair,
First Nations of the South Island Tribal
Council
British Columbia

Mr. Art Solomon,
Elder

Mr. Lewis Staats,
Member,
Six Nations Police Commission

Professor Philip C. Stenning,
Centre of Criminology,
University of Toronto,
Former Consultant to Marshall Inquiry

Chief Bill Wilson,
Barrister and Solicitor,
First Nations Congress

Mr. Paul Williams,
Counsel to Iroquois Confederacy,
Barrister and Solicitor practising
exclusively Aboriginal Law

On April 30, 1991, the Commission, responding to a request for a meeting from the Métis National Council, consulted with members of the Council in Winnipeg, Manitoba. Present at that consultation were:

Ms. Cynthia Bertolin,
Barrister and Solicitor

Mr. David Gray,
Legal Counsel,
Manitoba Métis Federation

Mr. David Chartrand,
Manitoba Métis Federation

Mr. Ron Rivard,
Executive Director,
Métis National Council

Professor Paul L. A. H. Chartrand,
Department of Native Studies,
University of Manitoba

Mr. Edward Swain,
Manitoba Métis Federation

Mr. Norman Evans,
Barrister and Solicitor

On July 25, 26, and 30, 1991, the Commission met in Ottawa with a group of reviewers to receive advice and comments on a draft of the Report. Present at those meetings were:

Professor Jean-Paul Brodeur,
International Centre for Comparative
Criminology,
University of Montreal

Mr. Roger Jones,
Barrister and Solicitor,
Former President,
Indigenous Bar Association

Ms. Marion Buller,
Barrister and Solicitor,
Member, Indigenous Bar Association

Ms. Rosemary Trehearne,
Manager, Justice Programs,
Council for Yukon Indians

Professor Paul L. A. H. Chartrand,
Department of Native Studies,
University of Manitoba

Mr. Paul Williams,
Counsel to Iroquois Confederacy,
Barrister and Solicitor practising
exclusively Aboriginal Law

Professor Michael Jackson,
Faculty of Law,
University of British Columbia