

The Aboriginal Justice Inquiry of Manitoba: A Fresh Approach to the “Problem” of Over- representation in the Criminal Justice System

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I. INTRODUCTION

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

— *Commissioners A.C. Hamilton & C.M. Sinclair*¹

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

— *Christopher McCormick, Native Council of Canada*²

We need the support of all Manitobans for the recognition and establishment of ... Indian tribal courts in Manitoba as one of the basic units of Indian government and one of the practical measures for Indian self-determination.

— *Ovide Mercredi, Assembly of First Nations*³

The aim of this paper is to summarise and discuss several major developments in the field of “Aboriginal justice”⁴ which have taken

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

² *Ibid.* at 258.

³ *Ibid.* at 257.

⁴ The term “Aboriginal justice” is often used in relation to the whole range of issues of which Aboriginal people are seeking resolution, including land claims, self-government and socio-economic concerns. It is used in the context of this paper to refer more specifically to the particular question of the impact of the criminal justice system on Aboriginal people, and the remedies which are sought in response to this

place during the last year. More specifically, it considers the significance of the appearance during 1991 of several reports of public inquiries and commissions dealing with this topic.⁵ Analysed in the context of almost two decades of proposed and actual reform to the criminal justice system with the aim of "better accommodating" Aboriginal people, major reports from Alberta, Saskatchewan, and Manitoba, as well as a number of federal proposals, reflect a significant and, perhaps, crucial stage in one important dimension of the Aboriginal struggle: the undoing of years of damage wrought following the imposition of an alien system of social control and justice administration.

This new direction is best illustrated by the *Report of the Aboriginal Justice Inquiry of Manitoba*, which advocates for Aboriginal communities a level of autonomy in the administration of justice which is unprecedented since the erosion of traditional Aboriginal social and political institutions began following Manitoba's entry into Confederation in 1870.⁶

The recommendation for the establishment of Aboriginal justice systems is the key element of the Inquiry's reform strategy. Politically, it constitutes one of the more controversial dimensions of the Aboriginal self-government agenda. As a reform strategy, it represents a critical break with the assimilationist themes which have traditionally informed criminal justice policy in this country. The opposition which the recommendation is presently encountering

particular form of oppression. On the difficulties of precise definition of subject matter in this area, see J. Harding with B. Spence, *An Annotated Bibliography of Aboriginal Controlled Justice Programs in Canada* (Regina: Prairie Justice Research, School of Human Justice, University of Regina, 1991) at 1-4.

⁵ These are listed *infra*, note 41. See also J. Harding & B. Forgay, *Breaking Down the Walls: A Bibliography on the Pursuit of Aboriginal Justice* (Regina: Prairie Justice Research, School of Human Justice, University of Regina, 1991).

⁶ This event was identified by the Aboriginal Justice Inquiry of Manitoba as the starting point of a new era for Manitoba's Aboriginal inhabitants: "The Justice Regime under Canadian Rule," see *supra*, note 1 at 62-83. On the extension of the criminal justice system to Aboriginal people in this province, see J.S. Milloy, *A Partnership of Races: Indian and White, Cross-Cultural Relations and Criminal Justice in Manitoba, 1670-1949* (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People [hereinafter AJI Research Paper], 1990); and D. Gibson & L. Gibson, *Substantial Justice: Law and Lawyers in Manitoba 1670-1970* (Winnipeg: Peguis Publishers, 1972) at 30-31.

both in Winnipeg⁷ and in Ottawa⁸ is indicative of the implications of such a significant departure.⁹

II. THE NATIONAL CONTEXT: A RISING PROFILE FOR ABORIGINAL ISSUES

BY ANY MEASURE, 1991 was an important year for the Aboriginal people of Canada. In the aftermath of the Aboriginal community's key role in the demise of the Meech Lake Accord,¹⁰ along with ongoing assessment of the ramifications of events in Oka during the summer of 1990,¹¹ the concerns of Canada's First Nations, Métis and Inuit peoples have begun to receive a significant, and, on the whole, constructive level of attention from federal and provincial governments. Important developments include the creation of a Royal Commission on Aboriginal People,¹² the presentation by the

⁷ See the discussion of the Manitoba Government's response to the *Report of the Aboriginal Justice Inquiry of Manitoba* *infra*, notes 95–100 and accompanying text.

⁸ Justice Minister Kim Campbell has stated that she "does not believe in a separate system of aboriginal justice," in "Q & A: Kim Campbell" *Canadian Lawyer* (May 1991) 14, 15. She maintained this position at a conference on Aboriginal justice held in Whitehorse in September: L. Johnson, "Self-Government a Must, Native Conference Warned" *Winnipeg Free Press* (7 September 1991) 9. For an indication as to the federal government's position on Aboriginal justice, see *Aboriginal People and Justice Administration: A Discussion Paper* (Ottawa: Department of Justice Canada, 1991).

⁹ The basis of this opposition involves some complex issues which are largely beyond the scope of this paper. However, some of the more commonly voiced reasons for opposing the establishment of Aboriginal justice systems are discussed briefly *infra*, at the text accompanying notes 127–128.

¹⁰ For a celebration of the Aboriginal role, see M.E. Turpel & P.A. Monture, "Ode to Elijah: Reflections of Two First Nations Women on the Rekindling of Spirit at the Wake for the Meech Lake Accord" (1990) 15 *Queen's L.J.* 345.

¹¹ See D. Lavery & B. Morse, "The Incident at Oka: Canadian Aboriginal Issues Move to the Front Burner" (1991) 48 *Aboriginal L. Bull.* 6. For a detailed account of the crisis, see G. York & L. Pindera, *People of the Pines: The Warriors and the Legacy of Oka* (Toronto: Little, Brown & Co. (Canada), 1991); and R. Hornung, *One Nation Under the Gun* (Toronto: Stoddart, 1991). See also Canada, House of Commons, *The Summer of 1990. Fifth Report of the Standing Committee on Aboriginal Affairs*, (Ottawa, May 1991).

¹² On August 27 1991 Prime Minister Mulroney announced the establishment of the Royal Commission on Aboriginal Peoples (to be co-chaired by George Erasmus, former National Chief of the Assembly of First Nations, and René Dussault, Justice of the Quebec Court of Appeal) to examine a broad range of issues concerning Aboriginal peoples in Canada. The terms of reference were recommended by former

federal government of a constitutional reform package which includes a plan for the recognition of Aboriginal self-government,¹³ major progress in relation to certain land claims¹⁴ (though disap-

Chief Justice of the Supreme Court of Canada, Brian Dickson, who served as the Prime Minister's special representative and consulted widely on the mandate and membership of the Commission. The mandate includes Aboriginal self-government, land claims, the status of Métis and off-reserve Indians, the special difficulties encountered by northern communities, and the social, economic, cultural, educational and justice issues of concern to Aboriginal people. The Commission's public consultation process was launched in Winnipeg on 21 April 1992, and will continue in two stages for approximately 12 months: "Royal Commission Launched in Winnipeg" (1992) 1:2 *The Circle* 5.

¹³ On 24 September 1991 Prime Minister Mulroney announced the federal government's proposal for comprehensive amendments to the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act, 1982*]: see Government of Canada, *Shaping Canada's Future Together* (Ottawa: Supply and Services Canada, 1991). The original package included a proposal for the formal recognition of Aboriginal self-government within 10 years:

The Government of Canada proposes an amendment to the Constitution to entrench a general justiciable right to Aboriginal self-government within the Canadian federation and subject to the *Canadian Charter of Rights and Freedoms*, [Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]] with the nature of the right to self-government described so as to facilitate interpretation of that right by the courts.

The Assembly of First Nations registered its dissatisfaction with the proposals by initially threatening to boycott constitutional negotiations (see D. Campbell, "Indians say 10-year wait an outrage" *Winnipeg Free Press* (25 September 1991) 10). Although subsequently agreeing to participate in the process, it was not until March 1992 that the four major Aboriginal organisations — the Assembly of First Nations, the Native Council of Canada, the Métis National Council, and the Inuit Tapirisat of Canada — were formally recognized as entitled to participate fully in discussions with the federal and provincial governments designed to produce an acceptable reform package (see H. Branswell, "Natives win full role in drafting unity package" *Winnipeg Free Press* (13 March 1992) A4). A detailed account of the Multilateral Meetings on the Constitution [hereinafter MMC] which were held March–June 1992 is not possible. For a preliminary note on this process, see *infra*, note 70.

¹⁴ For example, on December 16, 1991 the Government of Canada and leaders of the Tungavik Federation of Nunavut agreed on a process for the establishment of a new territory called Nunavut as part of a major land claim covering over 2 million square kilometres in the central Northwest Territories and the eastern Arctic: "Resolution of Outstanding Issues Opens Way to Final Agreement on TFN Claim and Creation of Nunavut Territory," Indian and Northern Affairs Canada Communique (December 1991). For background information on this claim and details on the terms of the agreement, see J. Merritt *et al.*, *Nunavut: Political Choices and Manifest Destiny* (Ottawa: Canadian Arctic Resources Committee, 1989); and Tungavik Federation of Nunavut, *Agreement-in-Principle Between the Inuit of the Nunavut Settlement Area*

pointing setbacks in relation to others¹⁵) and an unprecedented profile for Aboriginal concerns over the striking inadequacies of the criminal justice system. This latter issue has emerged as a key element of the Aboriginal political agenda. Indeed, recent criticisms of the justice system for its failure to deal effectively with Aboriginal people are not offered in isolation, but are explicitly linked with a pattern of non-Aboriginal domination in which the *Indian Act*¹⁶ and the criminal justice system were, and continue to be, two of the most powerful and intrusive legal mechanisms. As a topic of investigation and action then, "Aboriginal justice" is more strongly aligned with broader Aboriginal autonomy aspirations and political activity, than with criminology's critiques of the operation of criminal laws and the way justice is administered in this and other similarly structured countries.¹⁷

III. CONFRONTING OVER-REPRESENTATION

THE ARREST AND INCARCERATION of Aboriginal people at rates which far exceed their proportion of the general population has become widely adopted as the key indicator of the justice system's funda-

and Her Majesty in Right of Canada (Ottawa: Indian and Northern Affairs Canada, 1990).

¹⁵ In *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.), McEachern C.J. of the British Columbia Supreme Court rejected a claim on behalf of the Gitksan and Wet'suwet'en people for ownership of and jurisdiction over approximately 22,000 square miles in north-west British Columbia, and for aboriginal rights in this territory. The judgment has been widely criticised for its conclusion, its tone and for its demonstration of "the judge's failure to understand the teachings that the chiefs and elders had so generously given him": R. Ridington, "Fieldwork in Courtroom 53: A Witness to *Delgamuukw v. A.G.*" — paper presented at Delgamuukw and the Aboriginal Land Question, Victoria Conference Centre, September 10 & 11, 1991 (Conference sponsored by the School of Public Administration, University of Victoria, and the Office of the Hereditary Chiefs of the Gitksan and Wet'suwet'en People) at 4.

¹⁶ R.S.C. 1985, c. I-5; see *supra*, note 1 at 62-72; and R.H. Bartlett, *The Indian Act of Canada*, 2d ed. (Saskatoon: Native Law Centre, University of Saskatchewan, 1988).

¹⁷ See, for example, the critical approach of radical and left realist criminology to the "law and order" agenda, illustrated in R. Matthews, "Taking Realist Criminology Seriously" (1987) 11 *Contemporary Crises* 371; I. Taylor, "The Law and Order Issue in the British General Election and the Canadian Federal Election of 1979: Crime, Populism and the State" (1980) 5 *Can. J. of Sociology* 285; and C. Cunneen, "Aborigines and Law and Order Regimes" (1990) 3 *J. for Soc. Just. Stud.* 37.

mental flaws.¹⁸ Recognition of the need to seriously address the reality of Aboriginal over-representation at all stages of the criminal justice system has been steadily growing in recent years. Consequently, the volumes of statistics continue to accumulate, as one investigation after another “uncovers” the truth of how the justice system operates. Two such accounts are summarised here.

A. The Evidence

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

- Aboriginal people constitute 11.8 percent of the Manitoba population, yet account for more than 50 percent of people in correctional institutions;¹⁹
- Aboriginal males between 18 and 34 spend 1.5 times longer in pre-trial detention than other suspects;²⁰
- only 1 in 5 Aboriginal accused are successful in obtaining bail, compared to more than half of non-Aboriginal defendants;²¹ and
- approximately 25 percent of Aboriginal persons received sentences that involve some degree of incarceration, compared to 10 percent of non-Aboriginal persons.²²

In Alberta, statistics collected by the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta paint a similar picture:

- Aboriginal people constitute 4 to 5 percent of the provincial population, yet in 1989, 29.5 percent of persons admitted to Alberta pro-

¹⁸ Some commentators have, however, questioned the simplistic identification of over-representation as “the problem” faced by Aboriginal people. For example, La Prairie suggests that it is “probably erroneous to continue to depend on “over-representation” as a viable explanation for the situation of aboriginal people as offenders in the criminal justice system”: C. La Prairie, “If Tribal Courts Are the Solution, What is the Problem?” (Consultation document prepared for the Department of the Attorney General, Province of Nova Scotia, 1990) at iv-v.

¹⁹ *Supra*, note 1 at 8, 101.

²⁰ *Ibid.* at 102.

²¹ *Ibid.* at 221.

²² *Ibid.* at 103.

vincial and federal correctional facilities were Aboriginal.²³ For Aboriginal women the figure was 44.6 percent;²⁴

- it has been estimated that by the year 2011, the level of Aboriginal admissions will rise to 38.5 percent of the total intake;²⁵
- of all persons charged by the Edmonton and Calgary police services it is estimated that 13.7 percent are Aboriginal;²⁶
- 38.5 percent of young Aboriginal offenders were admitted to young offender centre facilities compared to 21.4 percent for non-Aboriginal offenders;²⁷ and
- Aboriginal people are less likely to receive a probation release than they are to be admitted to a correctional centre, and they have a very high involvement in the fine option program.²⁸

To the extent that a system which is designed for the maintenance of social order can, when it impacts disproportionately on a particular sector of society, be seen as inherently unjust, the identification of over-representation as a "problem" is uncontroversial. It is difficult to contest the validity of the statistical evidence which reveals this disproportionate impact. But this would appear to be too simplistic a conception of the problem. For example, for many Aboriginal people, over-representation is seen, both symbolically and realistically, as the product of a long history of dispossession by

²³ Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta, *Justice on Trial. Volume I: Main Report* (Edmonton: Province of Alberta, 1991) at 8-18.

²⁴ *Ibid.* at 6-7.

²⁵ *Ibid.* The projected Aboriginal population of Alberta in 2011 is 203,333 or 6.5 percent of the provincial total: *ibid.* at 8-15.

²⁶ *Ibid.* at 6-5.

²⁷ *Ibid.* at 6-6. Despite the adoption of a policy of decreasing the use of custody dispositions in Alberta Youth Courts, "Native young offender sentenced admissions recorded a consistent increase from 1986 to 1989": *ibid.* at 6-7.

²⁸ *Ibid.* at 6-5, 6-6. Statistics released recently by Correctional Services Canada, reveal the level of prison overrepresentation on the prairies is a magnification of the national picture. 11.2 percent of male and 15.4 percent of female inmates in federal penitentiaries are Aboriginal, although Aboriginal people constitute less than 4 percent of Canada's total population: *Basic Facts About Corrections in Canada 1991* (Ottawa: Correctional Services of Canada, 1991). These figures are based on data contained in the Offender Population Profile System, as of March 31, 1991.

and subjugation to non-Aboriginal values and institutions.²⁹ It reflects an ongoing process of racist, and often violent domination and cultural destruction. In this context, and in the context of attempts by criminologists to explain "Aboriginal criminality," the conceptualisation of a problem is rather more complex. Increasingly, the problem is being articulated in terms of a denial of legitimate autonomy, an approach which has implications in terms of the evaluation of any proposed solutions.

B. The Identification and Explanation of a "Problem"

At least into the early 1980s, the dominant theme of research literature which attempted to explain the over-involvement of Aboriginal people with the criminal justice system was an interpretation of the "problem" which focused on individual Aboriginal offenders and their "conspicuous criminality."³⁰ This approach was based on a conceptual framework which assumed that:

The Canadian criminal code is a "just" system of laws to apply to indigenous people; and ... [t]he criminal justice system is an inherently fair and effective system to enforce such law.³¹

²⁹ There are many accounts of the various manifestations of this process. See, for example, G. York, *The Dispossessed: Life and Death in Native Canada* (London: Vintage, 1990); J.S. Frideres, *Native Peoples in Canada: Contemporary Conflicts*, 3d ed. (Scarborough, Ont.: Prentice-Hall Canada, 1988); and J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1989). There is also a rapidly expanding body of literature by Aboriginal authors which documents the ways in which Aboriginal communities across Canada have responded to the non-Aboriginal onslaught. Two excellent examples are B. Richardson, ed., *Drumbeat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press, 1989); and D. Jensen & C. Brooks, eds, *In Celebration of Our Survival: The First Nations of British Columbia* (Vancouver: University of British Columbia Press, 1991).

³⁰ See P. Havemann, "The Over-Involvement of Indigenous People With the Criminal Justice System: Questions About Problem "Solving" — A Canadian Case Study" in K.M. Hazlehurst, ed., *Justice Programs for Aboriginal and Other Indigenous Communities*. Seminar Proceedings No. 7 (Canberra: Australian Institute of Criminology, 1985) at 126–128. This article discusses some of the major findings of a report completed for the Ministry of the Solicitor-General: P. Havemann et al., *Law and Order for Canada's Indigenous People: A Review of Recent Research Literature Relating to the Operation of the Criminal Justice System and Canada's Indigenous People*. (Regina: Prairie Justice Research, School of Human Justice, University of Regina, 1985).

³¹ Havemann, *ibid.* at 126.

In 1975 a national conference³² of government representatives, academics, justice professionals and members of aboriginal organisations met to discuss “[c]oncern over the jailing of [a] disproportionate number of Canada’s native people.”³³ Based on the objective of ensuring “the equitable treatment of native peoples within the Canadian criminal justice system,”³⁴ the conference adopted the following “guidelines for action:” including closer involvement of native persons in the planning and delivery of justice services, greater control by native communities over service delivery, cultural sensitivity training for non-native staff in the criminal justice system, recruitment of native persons for service functions at all stages of the criminal justice system, increased use of native para-professionals, and a greater policy emphasis on prevention, community-based diversions and alternatives to imprisonment, and the protection of young persons.³⁵

Since this conference,³⁶ the topic of “Aboriginal People and the Criminal Justice System” has generated an ever-increasing body of literature and prompted a (somewhat less rapid) political awakening that Aboriginal concerns and aspirations in relation to this issue are legitimate and must be addressed. For example, in a recent study on the state of policing reform in Canada, Harding comments that “[s]ince the 1960s, we have witnessed a change from widespread denial of systemic discrimination in policing of Aboriginal people to the pondering of fundamental alternatives to the tra-

³² *Native Peoples and Justice. Reports on the National Conference and the Federal-Provincial Conference on Native Peoples and the Criminal Justice System* (Ottawa: Solicitor General Canada, 1975).

³³ *Ibid.* at 3.

³⁴ *Ibid.* at 4.

³⁵ *Ibid.* at 38.

³⁶ I am not suggesting that this particular government-sponsored conference in itself spawned the large and growing body of literature on this issue, let alone the emergence of a strong Aboriginal justice lobby which has subsequently played a central role in bringing about many of the dozens of government reports and commissions of inquiry (including the Aboriginal Justice Inquiry of Manitoba) which have appeared since 1975. It was, however, one of the first occasions on which “Aboriginal Peoples and Criminal Justice” was dealt with as a discreet topic requiring investigation and indicative of the need for fundamental changes in the way justice is administered in this country.

ditional organization and role of peace officers as law enforcers."³⁷ The research trend continued in 1990 and 1991, with the appearance of several important studies on a number of justice issues including the impact of sentencing on Aboriginal over-representation.³⁸ This period also witnessed the increasing involvement of Aboriginal communities in justice research with the release in July 1990 of a report by the Osnaburgh/Windigo Tribal Council Justice Review Committee,³⁹ and the completion in 1991 of a major research project commissioned by the Grand Council of the Crees (of Quebec) and the Cree Regional Authority.⁴⁰

A distinguishing feature of more recent approaches to the question has been a willingness to challenge the basic assumption that the Canadian justice system is "inherently fair," by shifting the empirical and analytical focus from the individual offender to the system itself. This shift has had important implications for the types of solutions offered. In particular it has facilitated the emergence of justice initiatives which are strongly consistent with the wider Aboriginal political agenda.

One of the most significant contributions to this new perspective, particularly from a law reform perspective, was the release in 1991 of several important reports on this topic,⁴¹ including the formal

³⁷ J. Harding, "Policing and Aboriginal People" (1991) 33 Can. J. Crim. 363. See also, Commission of Inquiry on Policing in Relation to the Blood Tribe, *Report of a Public Inquiry* (Edmonton: The Commission, 1991).

³⁸ See e.g., C. LaPrairie, "The Role of Sentencing in the Over-representation of Aboriginal People in Correctional Institutions" (1990) 32 Can. J. Crim. 429; M. Sinclair, "Dealing With the Aboriginal Offender: Indians and Criminal Law" (1990) 14:2 Prov. Judges J. 14; B.P. Archibald, "Sentencing and Visible Minorities: Equality and Affirmative Action in the Criminal Justice System" (1989) 12 Dalhousie L.J. 377; and R. Ross, "Leaving Our White Eyes Behind: The Sentencing of Native Accused" [1989] 3 C.N.L.R. 1.

³⁹ *Tay Bway Win: Truth, Justice and First Nations* (Report prepared for the Ontario Attorney General and Solicitor General, 1990).

⁴⁰ See J.-P. Brodeur, C. La Prairie & R. McDonnell, *Justice for the Cree: Final Report* (Nemaska: Grand Council of the Crees (of Quebec)/Cree Regional Authority, 1991). This is one of four volumes which resulted from the study. The other three are titled *Communities, Crime and Order*, *Policing and Alternative Dispute Resolution*, and *Customary Practices*.

⁴¹ See e.g., in Alberta: *supra*, note 23; and on the federal level: Department of Justice, *supra*, note 8; and Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: The Commission, 1991). A similar process has taken place in Australia, see Royal Commission into

release of the *Report of the Aboriginal Justice Inquiry of Manitoba*.⁴² In important respects this report represents a major advance in the way in which the issues of Aboriginal involvement in the justice system have been dealt, and in the formulation of "solutions" to this particular problem. It has accurately been described as "probably the most in-depth public inquiry into aboriginal justice issues undertaken to date."⁴³

IV. THE ORIGINS AND OPERATION OF THE INQUIRY

THE PUBLIC INQUIRY INTO the Administration of Justice and Aboriginal People was created by the Manitoba government on April 13, 1988. The commissioners were asked to "investigate, report and make recommendations to the Minister of Justice on the relationship between the administration of justice and Aboriginal peoples of Manitoba."⁴⁴ The Inquiry was directed to consider all aspects of the cases of J.J. Harper and Helen Betty Osborne.⁴⁵ The scope of inquiry was broad:

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

Aboriginal Deaths in Custody, *National Report* (Canberra: Australian Government Publishing Service, 1991). The findings of this Royal Commission are compared with those of the Aboriginal Justice Inquiry of Manitoba in L. McNamara, "Aboriginal People and Criminal Justice Reform: The Value of Autonomy-Based Solutions" [1992] 1 C.N.L.R. 1. In January 1992 Saskatchewan joined the list of provinces which have produced Aboriginal justice reports recently: Saskatchewan Indian Justice Review Committee, *Report of the Saskatchewan Indian Justice Review Committee* (1992); and Saskatchewan Métis Justice Review Committee, *Report of the Saskatchewan Métis Justice Review Committee* (1992).

⁴² The two-volume report was formally released by Justice Minister Jim McCrae on 29 August 1991.

⁴³ Saskatchewan Indian Justice Review Committee, *supra*, note 41 at 4.

⁴⁴ *Supra*, note 1 at 3.

⁴⁵ The circumstances of these specific incidents which prompted the establishment of the Inquiry are summarised in *ibid.* at 2.

whether there are alternative methods of dealing with aboriginal persons involved with the law.⁴⁶

The Inquiry employed a variety of methods in its efforts to satisfy the terms of reference, which it interpreted broadly. It held formal judicial hearings in relation to the two cases that had sparked the investigation. On the broader question of Aboriginal contact with the justice system, the Inquiry held open community hearings in 36 Aboriginal communities, seven other Manitoba communities (including several hearings in Winnipeg) and five hearings in provincial correctional institutions. It heard from approximately 1,000 presenters at these hearings.⁴⁷

The Inquiry also embarked on several major research projects. Forty-one research papers were completed either by the Inquiry's research staff or by independent consultants.⁴⁸ Finally, the commissioners visited several tribal courts in the United States and organised two conferences: a symposium on tribal courts, and a meeting of Aboriginal elders. During more than three years of operation, the Inquiry accumulated an impressive collection of materials, which has since been donated to the E.K. Williams Law Library at the University of Manitoba.

In August 1991, commissioners A.C. Hamilton and C.M. Sinclair officially presented the Inquiry's final report to the Minister of Justice. It consisted of two volumes. Volume 2 deals with the specific cases of Helen Betty Osborne and John Joseph Harper.⁴⁹ Volume 1 — *The Justice System and Aboriginal People*⁵⁰ — is the culmination of the Inquiry's exhaustive analysis of the broader issue of Aboriginal contact with the criminal justice system. It represents a major contribution to the Aboriginal justice literature and will be reviewed here.

⁴⁶ *Ibid.*

⁴⁷ Listed *ibid.* at 769–782 and 783–785. It also received more than 60 submissions from people who did not appear at the hearings: listed at 782–783.

⁴⁸ Listed *ibid.* at 721–722.

⁴⁹ Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba. Volume 2: The Deaths of Helen Betty Osborne and John Joseph Harper* (Winnipeg: The Inquiry, 1991). As my emphasis in this paper is how the Aboriginal Justice Inquiry has affected the direction of Aboriginal justice reform, the specific findings and recommendations contained in this report are not detailed here; but see McNamara, *supra*, at note 41.

⁵⁰ *Supra*, note 1.

V. THE JUSTICE SYSTEM AND ABORIGINAL PEOPLE

WHAT IS IMMEDIATELY STRIKING about this 700 page report is the breadth of issues which it considers, and the perspective on the justice system which it assumes. The volume opens with a discussion of "Aboriginal concepts of justice,"⁵¹ thus setting the tone for the detailed investigations which follows. One of the strongest themes of the report is the incompatibility between the principles and procedures of the Canadian criminal justice system, and Aboriginal culture and law. The increasing intensity of this conflict is illustrated in an historical overview of the impact on Aboriginal people of the extension of the Canadian legal and political system, after which the report concludes:

Manitoba's Aboriginal people have known three justice regimes. During two of those regimes, they exercised control over their lives. In the third, this control was taken from them. ... We deplore the injustice which was done to Aboriginal people during this regime. By treating Aboriginal people in a condescending manner, by smothering their political and cultural expressions, as well as by failing to deal in a forthright and respectful manner with legitimate Aboriginal claims, Canadian government policy has done all Canadians a disservice.⁵²

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

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

Historically, the justice system has discriminated against Aboriginal people by providing legal sanction for their oppression. This oppression of previous generations forced Aboriginal people into their current state of social and economic distress. Now, a seemingly neutral justice system discriminates against current generations of Aboriginal people by applying laws which have an adverse impact on people of lower socio-economic status. This is no less racial discrimination; it is merely "laundered" racial discrimination.⁵³

⁵¹ *Ibid.* at 17-46.

⁵² *Ibid.* at 83.

⁵³ *Ibid.* at 109.

The remaining chapters of the report deal with how best to alter this pattern. However, it is indicative of the fresh approach taken by the commissioners that the report does not turn immediately to the question of reforming the existing justice system, but instead undertakes a detailed examination of Aboriginal and treaty rights,⁵⁴ thereby highlighting the political and legal context for the analysis and recommendations which follow.

An examination of the problems faced by Aboriginal people as they pass through Manitoba's courts creates a vivid image of a court system which "appears to view Aboriginal people and their communities with a mixture of disdain and disregard" and which "is inefficient, insensitive and, when compared to the service provided to non-Aboriginal people, decidedly unequal."⁵⁵ The reality of the system's many flaws is most powerfully illustrated by regular use of extracts from submissions presented to the Inquiry. For example, in the section dealing with the effect of delay and court inaccessibility on Aboriginal people, a God's River band councillor described the consequences for members of his community:

A round trip [by plane to the circuit court at God's Lake Narrows] costs \$240. If a person knows they are innocent and can prove it by having a witness present it means they have to pay for the witness to go to the Narrows to testify. If the witness is employed it sometimes means they have to pay for lost wages too. So it is often easier to just plead guilty and pay a fine if the charge isn't too serious ... More often than not our people travel to the Narrows, wait all day and then are told their case is remanded. This means they have to go home, wait until the appointed time and try to save enough money to go back again. And when we go back we stand a good chance of being remanded again. This can happen many times to the same person.⁵⁶

The Inquiry's damning assessment of the Manitoba court system, and its earlier discussion of Aboriginal rights and concepts of justice, sets the scene for its support of Aboriginal justice systems. From a law reform perspective, the justification for this approach is that "[s]imply providing additional court services in Aboriginal communities or otherwise improving what is inherently a flawed approach to justice is not, in our view, the answer."⁵⁷ As the com-

⁵⁴ *Ibid.* at 115-210.

⁵⁵ *Ibid.* at 249.

⁵⁶ *Ibid.* at 239.

⁵⁷ *Ibid.* at 252.

missioners observed, a pattern of limited internal reforms has traditionally been preferred by governments, but as a solution this approach "has been unproductive for government and unacceptable to Aboriginal people."⁵⁸ The Aboriginal Justice Inquiry of Manitoba represents an important break from this pattern, by "factoring in" Aboriginal autonomy aspirations as a legitimate and fundamental component of the justice reform equation.

A. Autonomy and Justice Reform

The highlight of the Inquiry's "Strategy for Action" is its proposal that Aboriginal communities⁵⁹ be empowered to establish their own justice systems:

Aboriginal justice systems should be established in Aboriginal communities, beginning with the establishment of Aboriginal courts. We recommend that Aboriginal communities consider doing so on a regional basis, patterned on such systems as the Northwest Intertribal Court System [in Washington, USA] ... We suggest that Aboriginal courts assume jurisdiction on a gradual basis, starting with summary conviction criminal cases, small claims and child welfare matters. Ultimately, *there is no reason why Aboriginal courts and their justice systems cannot assume full jurisdiction over all matters at their own pace.*⁶⁰ [Emphasis added.]

The commissioners reached this position after noting that "[t]he call for separate, Aboriginally controlled justice systems was made repeatedly in our public hearings throughout Manitoba ..."⁶¹ After canvassing the arguments in favour of establishing Aboriginal justice systems, the report examines in some detail the history and current operation of Indian tribal courts in the United States.⁶² It also considers the relevant Australian and New Zealand experi-

⁵⁸ *Ibid.*

⁵⁹ That is, First Nations on their own geographically defined reserves and those Métis communities which can be identified as such by agreement between the Manitoba Métis Federation and the Government of Manitoba.

⁶⁰ *Supra*, note 1 at 642.

⁶¹ *Ibid.* at 256.

⁶² See also R.H. Hemmingson, "Jurisdiction of Future Tribal Courts in Canada: Learning from the American Experience" [1988] 2 C.N.L.R. 1; and B. Morse, *Indian Tribal Courts in the United States: A Model for Canada?* (Saskatoon: Native Law Centre, University of Saskatchewan, 1980).

ence,⁶³ and the limited and disappointing history of the *Indian Act* section 107 courts in Canada.⁶⁴

In terms of the structure of proposed Aboriginal justice systems, the commissioners have recommended a high degree of flexibility which would allow individual Aboriginal communities to develop "culturally appropriate rules and processes"⁶⁵ in a less formalistic court-room environment. The essence of the proposal is that every component of the justice system operational within an Aboriginal community — from police, to prosecutor to court to probation, to jails — must be controlled by Aboriginal people. Because of the relatively small size of many communities in Canada, a regional network is recommended, which would allow several communities to share facilities and resources including judges.⁶⁶

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

Federal-Indian negotiations leading to a recognition of the right of Aboriginal people to establish and maintain Aboriginal courts as an aspect of the "existing treaty and aboriginal rights of the aboriginal peoples," as recognised and affirmed by section 35 of the *Constitution Act, 1982*.⁶⁷

This approach places the justice system proposal firmly within the context of Aboriginal self-government. The basic point of identification, then, is with the immediate political aspirations of Aboriginal peoples of Canada, rather than with the policies of assimilation and

⁶³ For a summary of Australia's experience with special justice mechanisms for Aboriginal people, see H. McRae, G. Nettheim & L. Beacroft, *Aboriginal Legal Issues: Commentary and Materials* (Sydney: Law Book Company, 1991) at 229-237.

⁶⁴ See B. Morse, "A Unique Court: s. 107 Indian Act Justices of the Peace" (1982) 5 *Can. Legal Aid Bull.* 131; R.H. Debassige, *Section 107 of the Indian Act and Related Issues* (Ottawa: Dept. of Indian and Northern Affairs, 1979); and G. Youngman, *Section 107 and Other Alternative Justice Systems for Indian Reserves in British Columbia* (Vancouver: Dept. of Indian and Northern Affairs, Vancouver Region, 1978).

⁶⁵ *Supra*, note 1 at 315.

⁶⁶ The model which the Commissioners recommend should be adopted in Manitoba is based on the Northwest Intertribal Court System which provides court services to 16 tribes in one region of the state of Washington.

⁶⁷ *Supra*, note 1 at 311.

paternalism that have historically informed criminal justice "reforms."

According to the Inquiry, "Aboriginal self-government means the right of Aboriginal communities to run their own affairs within their own territory."⁶⁸ Significantly, "Aboriginal affairs" is not limited in this respect to politically uncontroversial or traditionally accepted heads of power, but is expressly stated to include the right of Aboriginal governments to establish their own constitutions, civil and criminal laws, and institutions of government.⁶⁹

The commissioners recommended that both federal and provincial governments specifically recognise the right of Aboriginal self-government by constitutional amendment. Such a recognition is currently on the constitutional reform agenda.⁷⁰ Yet, there may be some doubt as to the level of Aboriginal autonomy in justice administration which is supported by the right to self-government.⁷¹ This question, and other controversial issues relating to Aboriginal justice systems will be addressed briefly in part VIII below.

B. Alleviating Conditions in the Existing System

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

⁶⁸ *Ibid.* at 641.

⁶⁹ *Ibid.* at 323.

⁷⁰ See discussion *supra*, at note 13. In February 1992 the Special Joint Committee on a Renewed Canada recommended "the entrenchment in section 35 of the *Constitution Act, 1982* of the inherent right of aboriginal peoples to self-government within Canada": Parliament of Canada, Special Joint Committee of the Senate and the House of Commons, *A Renewed Canada: The Report of the Special Joint Committee of the Senate and the House of Commons* (28 February 1992) (Co-Chairs: G.A. Beaudoin & D. Dobbie) at 29. The Special Joint Committee endorsed the formula for constitutional recognition favoured by the Royal Commission on Aboriginal Peoples. See Royal Commission on Aboriginal Peoples, *The Right of Aboriginal Self-Government and the Constitution: A Commentary* (13 February 1992); also Manitoba Constitutional Task Force, *Report of the Manitoba Constitutional Task Force* (28 October 1991) (Chair: W. Fox-Decent). In July 1992 the MCC process resulted in a tentative agreement on a complete package of constitutional reforms, including provisions for the recognition of the inherent right of Aboriginal self-government. See S. Delacourt, "Premiers break unity log-jam" *The [Toronto] Globe and Mail* (8 July 1992) A1.

⁷¹ See, e.g., B.A. Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self Government in Canada* (Montreal: McGill-Queen's University Press, 1990) at 124-130.

Recommendations for reforms in these areas are made by the Inquiry on the basis that, while the establishment of Aboriginal justice systems is crucial and the key to the genuine change, this strategy is not the "total answer."⁷² First, not all Aboriginal people will have access to an Aboriginal justice system in their community.⁷³ Second, "there will be a period of transition before Aboriginal justice systems achieve the full jurisdiction that we anticipate they will assume."⁷⁴ The common element of the recommendations summarised here⁷⁵ is the need to alleviate the injustices faced by Aboriginal people in their contact with the justice system.

In terms of reforms to the court system, the Inquiry's recommendations included that: adequate facilities always be available so that all trials can be held in the community where the offence was alleged to have been committed; members of Aboriginal communities be employed to work as court staff; case backlogs in remote and rural Aboriginal communities be reduced by a concerted "blitz;" and Aboriginal peacemakers be appointed as officers of the court, with responsibility for seeking to divert Aboriginal accused from the formal adjudication process by attempting to facilitate a reconciliation between the victim and offender through the use of traditional Aboriginal dispute resolution techniques.

The Inquiry recommended significant changes to the jury selection process, including the elimination of standasides and peremptory challenges and the introduction of procedures designed to ensure as far as possible that the jurors are drawn from the community in which the trial is to be held, or in urban areas, from specific neighbourhoods of the town or city in which victims and accused reside.⁷⁶

⁷² *Supra*, note 1 at 258. As Gordon Peters, Vice Chief of the Assembly of First Nations stated during a presentation to the Inquiry: "... we won't say that tribal courts are going to be the answer. We think it is part of the answer. We think it is one of the ways that we can deal with our own people," *ibid*.

⁷³ This applies particularly to Aboriginal people living in urban centres such as Winnipeg. On the problems faced by such communities see J. Yarnell, *Urban Aboriginal Issues: A Literature Review* (Winnipeg: AJI Research Paper, 1990).

⁷⁴ *Supra*, note 1 at 339.

⁷⁵ This selected outline is based on the individual chapters, the "strategy for action" described in Chapter 17, and the summary of recommendations in Appendix 1 of the report.

⁷⁶ See also L. Messer, *Manitoba Jury Study* (Winnipeg: AJI Research Paper, 1990).

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

Incarceration should be used only as a last resort and only where a person poses a threat to another individual or to the community, or where other sanctions would not sufficiently reflect the gravity of the offence or where the offender refuses to comply with the terms of another sentence that has been imposed upon him or her.⁷⁷

The commissioners stressed the need to develop alternatives to incarceration which incorporate stronger community sanctions and reconciliation programs. They called on the Manitoba Court of Appeals to encourage more creativity in sentencing by trial court judges, with a view towards decreasing the use of incarceration as the "standard punishment." It also recommended that cultural factors be given greater consideration during the determination of sentences, particularly for Aboriginal offenders, and that judges adopt the policy of inviting Aboriginal communities to express their views on any case involving a member of their community.

The Inquiry recommended that Canada's *Criminal Code* be amended both to give formal recognition to the relevance of cultural values when sentencing, and to allow judges to designate the specific place of custody for offenders. In the event that incarceration is deemed to be necessary for an Aboriginal person, the sentence should be carried out in a culturally relevant and community-based facility.⁷⁸

Chapter 11 documents the overwhelming evidence that the prison system fails Aboriginal inmates.⁷⁹ Although the Inquiry recommends a number of improvements designed to enhance the system's effectiveness, the overwhelming conclusion reached after a detailed survey of conditions in Manitoba's jails and Youth Centres, is that ... "fundamental reforms, based on a new set of principles, are required."⁸⁰ Along with the need for more community-based facilities as discussed above, the Inquiry also called for a substantial reduction in the number of Aboriginal people in jail and a reduction in the overall capacity of the jail system. It called for a

⁷⁷ *Supra*, note 1 at 647.

⁷⁸ See generally, R. Fossett Jones, *Alternatives to Incarceration: Literature Review and Selected Annotated Bibliography* (Winnipeg: AJI Research Paper, 1990).

⁷⁹ See D. Young *et al.*, *Manitoba Inmate Survey* (Winnipeg: AJI Research Paper, 1991).

⁸⁰ *Supra*, note 1 at 433.

change in the system's obsession with security — commonly manifested as “a maze of bars and restrained humanity ...,”⁸¹ increased capacity within institutions for Aboriginal inmates to maintain close contact with their communities, greater access to either active employment within the prison system, or training, education and counselling programs, and the adoption of a formal policy by government and prison authorities guaranteeing the right of Aboriginal people to culturally appropriate spiritual services, including access to spiritual services both within and outside the prison system.

The commissioners recommended that the present parole system adopt “as a governing principle that all inmates should be entitled to be released after having completed the same proportion of their sentence, except for those who are considered violent or dangerous.”⁸² It also calls for a more culturally sensitive application process including the completion of parole assessments by Aboriginal people in the prisoner's community.

The report deals individually with the problems faced by Aboriginal women and young offenders, on the basis that both groups face unique and serious problems.

It addressed the experience of women as both victims of crime and as offenders.⁸³ In the former category, the commissioners recommended extensive improvements in the way Aboriginal community leaders and police forces respond to domestic disputes and incidents of women and children abuse, including the establishment of shelters and safe homes. In relation to the sentencing of Aboriginal women, the report reaffirms the need for alternatives to incarceration such as greater use of open custody facilities for Aboriginal women living in isolated or rural communities, and the establishment of culturally appropriate group homes in urban areas where Aboriginal women could serve their sentence.

The Inquiry observed that “[w]e are failing to meet the needs of Aboriginal young people in the youth justice system just as surely as we are failing to meet the needs of adult Aboriginal people in the adult justice system.”⁸⁴ In fact, the level of over-representation is

⁸¹ *Ibid.* at 437.

⁸² *Ibid.* at 462.

⁸³ See E.J. Courchene, *Aboriginal Women's Perspective of the Justice System in Manitoba* (Winnipeg: AJI Research Paper, 1990).

⁸⁴ *Supra*, note 1 at 549.

even greater for Aboriginal youth.⁸⁵ The report calls for greater use of pre-trial diversion, an expansion of the number of youth justice committees throughout the province, the establishment of short-term youth detention facilities in Aboriginal communities and longer term "wilderness camps," and improved coordination between the child welfare and youth justice services.⁸⁶

Finally, the report turns to the important topic of policing. The Inquiry concluded that "the future of Aboriginal policing in Manitoba lies in the creation of Aboriginal controlled police forces for Aboriginal communities and in increasing the numbers of Aboriginal police officers on existing forces."⁸⁷ In relation to the first objective, the commissioners made the recommendation that "[a]s soon as possible, Aboriginal police forces take over from the RCMP the responsibility for providing all police services in Aboriginal communities."⁸⁸ The Dakota Ojibway Tribal Council (DOTC) Police Force was cited as the model for this transfer of policing responsibilities. DOTC has been operating on eight Dakota and Ojibway reserves in Manitoba since 1973 when it was established on a shared cost basis between the Department of Indian Affairs and Northern Development and the Government of Manitoba. The Inquiry envisaged the emergence of a network of Aboriginal forces throughout Manitoba, coordinated by an Aboriginal Police Commission.

To achieve the second objective, the commissioners called for the adoption of a community policing approach (particularly in Aboriginal communities), employment equity programs to increase the proportion of Aboriginal police officers to a level equivalent to the Aboriginal proportion of the total Manitoba population, an improvement in the cross-cultural education components of all police train-

⁸⁵ A survey conducted in October 1990 revealed that Aboriginal youth accounted for 64 percent of the inmates at the Manitoba Youth Centre and 78 percent of the inmates of the Agassiz Youth Centre: *ibid.* See Animus Research Consultants, *The Manitoba Justice System and Aboriginal Young Offenders* (Winnipeg: AJI Research Paper, 1991).

⁸⁶ The Report includes a review of the operation of the child welfare system (Chapter 14), but my emphasis here is on those recommendations which relate to the criminal justice system and so this important issue is not discussed here. See Animus Research Consultants, *Manitoba Child and Family Services Report on Services to Aboriginal Children and Families* (Winnipeg: AJI Research Paper, 1991).

⁸⁷ *Supra*, note 1 at 645.

⁸⁸ *Ibid.* at 609.

ing courses, and a mechanism for screening out any police recruits displaying racist attitudes.

In relation to police investigation and interrogation procedures, the Inquiry's recommendations included that "[t]he courts adopt the Anunga Rules of Australia, as rules of the court governing the reception into evidence of statements to police made by Aboriginal persons,"⁸⁹ and that all statements taken by police officers be recorded using either audio or video equipment with the latter technology to be used in cases involving death and other serious cases.

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

VI. RESPONSES TO THE INQUIRY'S FINDINGS AND RECOMMENDATIONS

A. The Aboriginal Community

Representatives of Aboriginal organisations in Manitoba and across the country registered their approval of the Aboriginal Justice Inquiry's conclusions about the impact of the justice system on Aboriginal people, and generally endorsed its plan for change.⁹⁰ For example, the report was described by Phil Fontaine, Grand Chief of the Assembly of Manitoba Chiefs as "a solid piece of work with recommendations that represent fundamental social change in this province and elsewhere."⁹¹ Ovide Mercredi, National Chief of the Assembly of First Nations responded by calling on federal and provincial governments to "recognize that aboriginal people are entitled to a parallel system of justice."⁹² The President of the

⁸⁹ *Ibid.* at 608.

⁹⁰ This is not intended to be an exhaustive coverage of Aboriginal responses to the report. Rather, the particular responses to which reference is made are used simply to illustrate the general tone of comments by representatives from Aboriginal communities following the report's release, as demonstrated in local media treatments.

⁹¹ A. Santin, "Findings, recommendations 'exactly what natives expected' " *Winnipeg Free Press* (30 August 1991) 5.

⁹² G. Young, "Self-rule stand 'reinforced' " *Winnipeg Free Press* (30 August 1991) 14. Mercredi stated that: "First Nations have the mandate to establish aboriginal justice systems. There are first nations which want to put their justice system into action and we encourage them to do so." "Won't wait 'forever' " *The Winnipeg Sun* (30

Indigenous Women's Collective, Winnie Giesbrecht, expressed "relief" that the particular concerns of Aboriginal women had been addressed by the Commissioners.⁹³

The overwhelmingly positive response to the report appears to have been based on a belief that the justice concerns of Aboriginal people had finally been addressed in a serious and constructive manner by an independent inquiry. The mood was optimistic, as reflected in the comments of a spokesperson for the Assembly of First Nations, when he concluded that if the Manitoba Government acted upon the recommendations, "it could set a precedent for the entire country."⁹⁴

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

B. The Manitoba Government

On 28 January 1992 the provincial government released its formal response to the Report, some five months after its release. Justice Minister Jim McCrae announced a number of reforms which would, he promised, result in a "better justice system in Manitoba for aboriginal people than anywhere in the country."⁹⁵ Proposed changes include placing more aboriginal people in charge of decision-making within the system, institution of pre-trial diversions including more conflict resolution, mediation and "peacemaking" approaches to disputes, a reassessment of sentencing practices so as to reduce incarceration levels, greater access to Aboriginal cultural activities in provincial jails, and an investigation of the possibility

August 1991) 5.

⁹³ "Women react" *The Winnipeg Sun* (30 August 1991) 5.

⁹⁴ Bill Wilson, British Columbia Vice-Chief of the Assembly of First Nations in *supra*, note 91.

⁹⁵ D. Campbell & T. Weber, "Province Rejects Separate Native Justice System" *Winnipeg Free Press* (29 January 1992) at A1, A2.

of expanding tribal policing services.⁹⁶ However, the Manitoba Government refused to endorse the autonomous justice direction charted by the Aboriginal Justice Inquiry on the basis that “[s]uch key ... recommendations as an aboriginal justice system, separate criminal codes, civil codes and charters of rights for First Nations are not achievable within the current constitutional framework.”⁹⁷ It also declined to establish a commission to oversee implementation of the recommendations, opting instead for the appointment of working groups to consult in four areas: justice, native affairs, family services, and treaty land rights.

Aboriginal groups have roundly criticised the government’s response, which was described by Ovide Mercredi as “an insult to Indian people in Manitoba.”⁹⁸ Representatives of the province’s Métis community have expressed their disbelief at the government’s failure to even acknowledge their particular concerns.⁹⁹ Leaders of Manitoba’s largest Aboriginal organisations indicated that they would not participate in the implementation process unless the government agreed to reconsider several key issues, including the relationship between self-government and Aboriginal jurisdiction over justice. As Phil Fontaine observed, “One of the inconsistencies that has to be dealt with is the government’s support of inherent right to self-government and the rejection of a separate justice system.”¹⁰⁰

C. Editorial Responses

Media responses to both the *Report of the Aboriginal Justice Inquiry of Manitoba* and the Law Reform Commission of Canada’s *Aboriginal Peoples and Criminal Justice* focused on the recommen-

⁹⁶ *Ibid.*; and D. Roberts, “Separate Native Justice Rejected for Manitoba”, *The [Toronto] Globe and Mail* (29 January 1992) A1, A6.

⁹⁷ Roberts, *ibid.* at A6.

⁹⁸ T. Weber & D. Campbell, “McCrae, Chiefs in AJI Showdown” *Winnipeg Free Press* (30 January 1992) A1.

⁹⁹ This is particularly disappointing given that the Inquiry made a deliberate effort to address the specific concerns of the Métis community and to consult widely with them. See e.g., P. Chartrand, *Métis People and the Justice System: Final Report* (Winnipeg: AJI Research Paper, 1989); and Manitoba Métis Federation, S.W. Corrigan & L.J. Barkwell, eds, *The Struggle For Recognition: Canadian Justice and the Métis Nation* (Winnipeg: Pemmican Publications, 1991).

¹⁰⁰ T. Weber, “Natives agree to talk on AJI” *Winnipeg Free Press* (4 February 1992) B14.

dation that Aboriginal justice systems be established. Editorial opinions on this issue have been mixed. Following the release of the former report, a *Winnipeg Free Press* editorial described the proposal for Aboriginal courts as "ambitious," suggesting that

[T]here is little a Manitoba government can do about this part of the report until a native community comes forward with a plausible specific proposal for a local, native-run justice system and seeks recognition of its jurisdiction.¹⁰¹

The [Toronto] Globe and Mail supported the Manitoba Government's refusal to establish Aboriginal justice systems citing several unanswered questions including the applicability of the *Charter* and the jurisdiction of any such systems.¹⁰² However, another commentator described the government's response to the recommendations contained in the *Report of the Aboriginal Justice Inquiry of Manitoba* as exhibiting "the unfortunate air of foot-dragging which has dogged Manitoba history,"¹⁰³ suggesting that it "could have committed itself more generously to a separate native justice system, and begun establishing tribal courts and a separate native-run administration within the provincial court system."¹⁰⁴

VII. THE CONTRAST WITH OTHER RECENT REPORTS

ONE KEY FEATURE SETS the *Report of the Aboriginal Justice Inquiry of Manitoba* apart from the reports of many other provincial and

¹⁰¹ "A Proposal For Reform" *Winnipeg Free Press* (30 August 1991) 6. Representatives of one such initiative — the St. Theresa Point Indian Government Youth Court System — recently "came forward," not to seek "recognition of its jurisdiction" (in fact, as Robert Wood, the co-ordinator of the system, recently stated, "We were not concerned about jurisdiction and whose toes we might step on, we simply moved ahead": B. Lowery, "Native Struggle for Court Funding" *Winnipeg Free Press* (30 January 1992) B17.), but in search of funding. It secured limited support from the Manitoba Government: T. Weber, "Native Youth Court Saved" *Winnipeg Free Press* (31 January 1992) B24. For a description and assessment of the system, see G. Lewis, *St. Therese Point Indian Government Youth Court System: Preliminary Assessment* (Winnipeg: Research and Development, Manitoba Justice, 1989).

¹⁰² "Native Justice Inquiries" (3 February 1992) A18.

¹⁰³ R. Sheppard, "Native Justice: Let's Take the Plunge" *The [Toronto] Globe and Mail* (30 January 1992) A17. This criticism was levelled at the Filmon government by the Liberal Party and the New Democratic Party shortly after the release of the report: D. Campbell, "Opposition charges Tories dragging feet on Aboriginal justice" *Winnipeg Free Press* (1 September 1991) 2.

¹⁰⁴ Sheppard, *Ibid.*

federal government sponsored inquiries in recent years on the question of "Aboriginal people and the administration of justice." Two other major reports released in 1991 are reviewed below. The recommendations of the Alberta Task Force can be placed generally within the, by now familiar, category of proposals which take the approach of sensitizing, and increasing Aboriginal participation in, the existing system, with limited support for community-based autonomy. In contrast, the Law Reform Commission of Canada included the option of Aboriginal justice systems within its reform package. However, it is only the recommendations of the Aboriginal Justice Inquiry of Manitoba which are based on an explicit recognition that there is a fundamental relationship between the undeniable need for reforms to the way justice is administered in this province (and the country) and the desirability of achieving meaningful Aboriginal self-government as a significant component of the Canadian federal structure.

A. Alberta

By virtue of its relatively specific mandate, the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta limited its recommendations ("with regard for present constitutional and legal frameworks in Canada and Alberta")¹⁰⁵ to those which could achieve the following objective: "... to ensure that the Aboriginal people receive fair, just and equitable treatment at all stages of the criminal justice process in Alberta."¹⁰⁶ To this end, its detailed recommendations included:

- that the R.C.M.P. should provide Aboriginal awareness field training for its officers, accelerate efforts to recruit Aboriginals and continue establishing "non-political aboriginal advisory committees;"¹⁰⁷
- that Aboriginal people be appointed to fill all positions necessary to operate an Aboriginal Provincial Court (Criminal Division) to go on circuit and that a similar court be established in a large urban area,¹⁰⁸

¹⁰⁵ Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta, *Justice on Trial. Volume II: Summary Report* (Edmonton: Province of Alberta, 1991) at 1.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.* at 2.

¹⁰⁸ *Ibid.* at 17.

- that the Province of Alberta establish Elder sentencing panels to assist judges in the sentencing of convicted Aboriginal persons;¹⁰⁹ and
- that the goal be adopted of placing all minimum security serving prisoners in facilities in their home community for their entire sentence.¹¹⁰

These examples reflect a reform program in which there is much to be commended. However, unlike its counterpart in Manitoba, the Alberta Task Force failed to challenge the assumption that Aboriginal people *can* find fairness, justice and equitable treatment *within* the parameters of the existing justice system. In fact, the Task Force took the position that “[w]hether an Aboriginal Justice system should exist and its scope and extent, is a matter for negotiation between the Indian and Métis people and the Governments of Canada and Alberta.”¹¹¹

B. Law Reform Commission of Canada

The Aboriginal Justice Inquiry of Manitoba’s decision to map a new direction in Canadian justice policy as it affects Aboriginal people received support from an unexpected source.¹¹² In December 1991 the Law Reform Commission of Canada released its report on a reference issued by the Federal Minister of Justice on June 8 1990.¹¹³ *Aboriginal Peoples and Criminal Justice* represents something of a departure from the Commission’s commitment to “the principles of uniformity and consistency”¹¹⁴ in relation to the

¹⁰⁹ *Ibid.* at 19.

¹¹⁰ *Ibid.* at 27.

¹¹¹ *Ibid.* at 43.

¹¹² It should be noted that the development of alternative native justice systems was recommended in a Report of the Committee of the Canadian Bar Association on Imprisonment and Release in June 1988. See M. Jackson, “Locking Up Natives in Canada” (1989) 23 U.B.C. L. Rev. 215.

¹¹³ Law Reform Commission of Canada, *supra*, note 41. The Commission was asked “to study, as a matter of special priority, the *Criminal Code of Canada* and related statutes and to examine the extent to which those laws ensure that Aboriginal persons ... have equal access to justice and are treated equitably and with respect”: *supra* at 1.

¹¹⁴ *Ibid.* at 1. While conscious of the fact that the report’s recommendations would be perceived as constituting a divergence from the Commission’s traditional reform strategy, the Commissioners expressed their belief that “this Report does no violence to our work in the field of criminal law. Rather, it expresses our basic commitment to

reform of the criminal process.¹¹⁵ While less overtly politically supportive of Aboriginal self-government aspirations than the Aboriginal Justice Inquiry of Manitoba, the Law Reform Commission of Canada adopted a similar two-pronged reform strategy:

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.¹¹⁶

The Commission's short term plan is a detailed package of reforms based on the position that "the cultural distinctiveness of Aboriginal peoples should be recognized, respected and, where appropriate, incorporated into the criminal justice system."¹¹⁷ It recommended that the existing system be made more sensitive to Aboriginal needs by increasing system-wide Aboriginal representation, implementing effective cross-cultural training, increasing the availability of interpreter services and statutorily recognising "the right of Aboriginal peoples to express themselves in their own Aboriginal languages in all court proceedings,"¹¹⁸ increasing community involvement with the justice system in a variety of ways including the possibility of creating a formal role for "Peacemakers" in the mediation of disputes, establishing liaison mechanisms between prosecutors and Aboriginal communities, and providing by statute for the use of community Elders as lay assessors during the sentencing of Aboriginal offenders.

In terms of reforming the existing process, the Commission made a range of recommendations dealing with policing, courtroom procedure, bail arrangements, sentencing and the use of alternatives to incarceration and prison facilities.¹¹⁹ The Commission also called for the establishment of an Aboriginal Justice Institute to conduct

the creation of a criminal justice system that pursues the value of humanity, freedom and justice," *supra* at 2.

¹¹⁵ For a critique of the Commission's traditional approach, see R. Hastings & R.P. Saunders, "Social Control, State Autonomy and Legal Reform: The Law Reform Commission of Canada" in R.S. Ratner & J.L. McMullan, eds, *State Control: Criminal Justice Politics in Canada* (Vancouver: University of British Columbia Press, 1987).

¹¹⁶ LRC, *supra*, note 41 at 3.

¹¹⁷ *Ibid.* at 12.

¹¹⁸ *Ibid.* at 32.

¹¹⁹ The Commission's recommendations are summarised, *ibid.* at 95-105.

research, and generally oversee the implementation of its recommendations.¹²⁰

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

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.¹²¹

While stressing that it should be left to individual communities to determine the precise make-up of their justice system, the Commission suggested that the following features may be incorporated:¹²²

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

Unlike the Aboriginal Justice Inquiry of Manitoba, the Law Reform Commission of Canada did not locate its recommendation for the creation of Aboriginal justice systems within the context of Aboriginal self-government.¹²³ The Commission justified its departure from the general principle that "criminal law and procedure

¹²⁰ *Ibid.* at 87-89. After concluding that "[c]ustomary law can be just as effective a mechanism of social control as statutory law," the Commission recommended that "[t]he federal government should provide funding for research into Aboriginal customary law."

¹²¹ *Ibid.* at 16.

¹²² *Ibid.* at 22-23.

¹²³ In fact, the Commission expressly distanced itself from the whole self-government debate, *ibid.* at 14: "We recognise that the call for completely separate justice systems is part of a political agenda primarily concerned with self-government. We need not enter that debate. Aboriginal-controlled justice systems have merits quite apart from political considerations."

should impose the same requirements on all members of society,"¹²⁴ on the basis of "the distinct historical position of Aboriginal persons," which has given them a "different constitutional status."¹²⁵ Paradoxically, the current constitutional structure was cited by the Manitoba Government as precluding implementation of the Aboriginal Justice Inquiry's recommendation for the establishment of Aboriginal justice systems.¹²⁶

VIII. ABORIGINAL JUSTICE SYSTEMS: THE "RIGHT" REFORM STRATEGY?

THE FAILURE TO IMMEDIATELY establish Aboriginal justice systems in this province is not, in itself, the most disappointing aspect of the Manitoba Government's response to the *Report of the Aboriginal Justice Inquiry of Manitoba*. The Inquiry's prescription is couched in fairly general terms, and leaves a considerable amount of detail to be settled by negotiation between the government and interested Aboriginal communities. Other fundamental issues such as the jurisdiction of Aboriginal courts, and the applicability of the *Charter*, are yet to be addressed in a manner that is entirely satisfactory, let alone conclusive.¹²⁷ Also, by drawing an explicit connection between Aboriginal demands for self-government and the justice strategy of encouraging Aboriginal control over criminal matters, the Aboriginal Justice Inquiry of Manitoba may have given greater legitimacy to the position which calls for the *definition* of the right to self-government before it is formally recognised. Of each of the powers which potentially constitute Aboriginal self-government, control over "law and order" is likely to be one of the more keenly disputed by all levels of non-Aboriginal government.

¹²⁴ *Ibid.* at 14.

¹²⁵ *Ibid.* at 14-15.

¹²⁶ *Supra*, note 97.

¹²⁷ The Inquiry did discuss both issues in its chapter on "Aboriginal Justice Systems," but both continue to be subjects of considerable debate: see *supra*, note 1 at 318-329, 333-336; also, B. Schwartz, "A Separate Aboriginal Justice System?" (1990) 19 *Man. L.J.* 77 at 83-85; Hemmingson, *supra*, note 62 at 30-40 and 42-45; S. Jolly, "Implications of the Report of the Special Committee on Indian Self-Government (Penner Report) for the Creation of Autonomous Native Justice Structures" in C.T. Griffiths, ed., *Circuit and Rural Court Justice in the North. A Resource Publication* (Burnaby: The Northern Conference and Simon Fraser University, 1984) at 2-89; and Morse, *supra*, note 62 at 27-28.

Further, there may be valid legal and constitutional arguments which support such opposition. For example, Bruce Clarke has argued persuasively that the right of Aboriginal self-government is already recognised under section 35 of the *Constitution Act, 1982*. However, he suggests that, as a result of two imperial statutes enacted in the early nineteenth century, this right does not extend to jurisdiction over criminal matters.¹²⁸

In light of these considerations, the Manitoba Government's failure to give a blanket endorsement to the Aboriginal Justice Inquiry's key recommendation is not surprising, and indeed, may have some justification. What is most unsatisfactory about the government's response is the attitude which it demonstrates in terms of the government's commitment to constructive criminal justice reform. By failing to even register its *support* for autonomy-based initiatives such as the creation of an Aboriginal Justice Commission, or confirm the legitimacy of Aboriginal justice systems as a solution to Aboriginal over-representation in the existing criminal justice system, the Manitoba Government has rejected a valuable opportunity to attempt a new direction in justice policy and structure, and failed to capitalise on the serious consideration and many hours of consultation which went into the *Report of the Aboriginal Justice Inquiry of Manitoba*.¹²⁹

It would have been unrealistic to expect a wholesale adoption of each recommendation shortly following the release of the report. The experience of countless inquiries and reports has taught this lesson.¹³⁰ In January 1992, more than two years after the release of the *Report of the Royal Commission on the Donald Marshall, Jr. Prosecution*,¹³¹ the Nova Scotia Government announced that a

¹²⁸ Clark, *supra*, note 71 at 125.

¹²⁹ See F. Russell, "Province Keeps Tight Grip on Power Despite Rhetoric" *Winnipeg Free Press* (1 February 1992) A7.

¹³⁰ The recommendations contained in more than 20 reports relating to Aboriginal justice released between 1967 and 1990 were reviewed by the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta, *Justice on Trial. Volume III: Working Papers and Bibliography* (Edmonton: Province of Alberta, 1991) c. 4.

¹³¹ Royal Commission on the Donald Marshall, Jr. Prosecution, *Report* (Halifax: The Commission, 1989). For a discussion of the Marshall Royal Commission, see H.A. Kaiser, "The Aftermath of the Marshall Commission: A Preliminary Opinion" (1990) 13 Dalhousie L.J. 364; B.H. Wildsmith, "Getting at Racism: The Marshall Inquiry" (1991) 55 Sask. L. Rev. 97; and J. Mannette, ed., *Elusive Justice: Beyond the Marshall Inquiry* (Halifax: Fernwood, 1992).

Micmac-based court would be established as a pilot project on the Indian Brook Reserve.¹³² This initiative was taken in response to one of the recommendations of the Royal Commission which proposed that "a community-controlled Native Criminal Court be established in Nova Scotia, initially as a five-year pilot project."¹³³

As this example illustrates, innovative projects in the area of justice administration do not gain government support quickly, or without careful deliberation. But the Manitoba Government's response to the *Report of the Aboriginal Justice Inquiry of Manitoba* has been widely considered by critics to be rather more cautious and circumspect than the current Aboriginal justice context warrants.

IX. CONCLUSION

FOLLOWING THE RELEASE OF the report in August 1991, when hopes for the creation of Aboriginal justice systems were high, New Democratic Party spokesperson, Oscar Lathlin realistically observed that "we aren't going to wake up tomorrow morning ... and find a whole new system in place."¹³⁴ Six months later, Lathlin criticised the Manitoba Government for refusing to give up the power

¹³² "N.S. unveils first court for reserve" *Winnipeg Free Press* (23 January 1992) A13.

¹³³ Royal Commission on the Donald Marshall, Jr. Prosecution, *Digest of Findings and Recommendations* (Halifax: The Commission, 1989) at 28. The Commissioners recommended that the court incorporate the following elements:

- (a) a Native Justice of the Peace appointed under Section 107 of the *Indian Act* with jurisdiction to hear cases involving summary conviction offences committed on a reserve;
- (b) diversion and mediation services to encourage resolution of disputes without resort to the criminal courts;
- (c) community work projects on the reserve to provide alternatives to fines and imprisonment;
- (d) aftercare services on the reserve;
- (e) community input in sentencing, where appropriate; and
- (f) court worker services.

Several projects including a community court were also recommended by C. La Prairie in a report prepared for the Nova Scotia Attorney General, *supra*, note 18 at 60-71.

¹³⁴ "New system will take time" *The Winnipeg Sun* (30 August 1991) 7.

necessary to set the wheels in motion *toward* a time when Aboriginal justice systems *could* operate throughout the province.¹³⁵

Clearly, the *Report of the Aboriginal Justice Inquiry of Manitoba* does envisage a redistribution of power in relation to the administration of justice. Indeed, this is primarily what sets the report apart from its "internal reform" orientated predecessors. It looks *beyond* the existing criminal justice system for answers as to why Aboriginal people are so heavily over-represented in Canadian prisons, and it engages the same perspective in terms of formulating solutions to this particular "problem." By stretching the parameters of Aboriginal justice to incorporate the pressing political demands of Aboriginal people, the Aboriginal Justice Inquiry of Manitoba has entered largely uncharted law reform territory. Ultimately, this approach may bring the results which it is intended to achieve. However, advocates of this new direction will first have to confront the defensiveness of governments when faced with the possibility of accepting a reduced level of control over an institution of social control as fundamental as the criminal justice system.

¹³⁵ Campbell & Weber, *supra*, note 97 at A2.