

# Aboriginal Justice Inquiries: An Overview of Findings

## INTRODUCTION

During the past two decades, a number of major public inquiries and reviews have been commissioned by Canadian governments and other bodies to examine Aboriginal justice issues. While it is beyond the scope of this brief to review all of these reports in detail, some of the most significant studies completed will be discussed.

The findings and conclusions of these public inquiries and major reviews are important for a number of reasons:

- These inquiries and reviews usually involved a comprehensive synthesis and analysis of large bodies of relevant research;
- Additional research to fill gaps in information and understanding was often undertaken as part of the inquiry process;
- The inquiries and reviews went beyond the strict confines of scientific research to gather a much broader base of evidence. This allowed for more authoritative findings and conclusions to be reached than would have been possible with statistical studies alone. In particular, such inquiries and reviews heard personal testimony, held public hearings, and sought out the advice of experts in the field; and
- Such studies and reviews were headed by Canadians and Canadian institutions with outstanding records for objectivity, leadership and judgment.

For these reasons, the findings and conclusions reached by these public commissions and inquiries are worthy of careful attention.

## *Aboriginal Justice Inquiries (continued)*

### **A SUMMARY OF FINDINGS**

The following is an overview of some of the findings and conclusions of some of the key public inquiries and reviews conducted over the past decade.

#### **1. The Royal Commission on Aboriginal Peoples (RCAP)**

Appointed by Prime Minister Brian Mulroney in 1991, *The Royal Commission on Aboriginal Peoples (RCAP)* was comprised of seven Aboriginal and non-Aboriginal leaders, including two co-chairs: George Erasmus, former National Chief of the Assembly of First Nations, and the Honourable Rene Dussault, a former senior civil servant and now a superior court judge in Quebec. The Commission was asked to investigate all aspects of the relationship between Aboriginal peoples and Canadian society.

Justice issues were a key concern for the RCAP. Extensive research was commissioned, a synthesis of previous studies and inquiries was prepared, and a "round table" forum was convened (Royal Commission 1993). The Commission also issued a special report - *Bridging The Cultural Divide: A Report on Aboriginal People and Criminal Justice In Canada* (Royal Commission 1995).

The round table brought together by the *RCAP* in 1992 included a number of prominent judges, police officers, government ministers and senior bureaucrats, as well as representatives from many Aboriginal organizations. The first conclusion reached by the round table was that the justice system had failed Aboriginal people (1993). The special report issued by the *RCAP* (1995) reconfirmed this conclusion, but it went further. In particular, the Commission observed and stated in its report:

- The Canadian criminal justice system had failed the Aboriginal peoples of Canada - Indian, Inuit and Métis people, on-reserve and off-reserve, urban and rural - in all territorial and government jurisdictions;
- The principle reason for this crushing failure was the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice;
- Aboriginal people are over-represented in the criminal justice system, most dramatically and significantly in provincial and territorial prisons and federal penitentiaries;

- Over-representation of Aboriginal people in the criminal justice system is a product of both high levels of crime among Aboriginal people and systemic discrimination; and
- High levels of Aboriginal crime, like other symptoms of social disorder such as suicide and substance abuse, are linked to the historical and contemporary experience of colonialism, which has systematically undermined the social, cultural and economic foundations of Aboriginal peoples, including their distinctive forms of justice.

In response to the concerns, five volumes and a number of reports and studies, along with almost 500 recommendations, were produced.

*Looking Back, Looking Forward, Volume I, 1996*, RCAP noted a need for:

- Establishment of a renewed relationship between Aboriginal and non-Aboriginal people in Canada on the basis of justice and fairness.
- Recognition of the appropriate place of Aboriginal peoples in Canadian history.
- Response to past injustices such as residential schools, relocation and discrimination against Aboriginal veterans.

*In Reconstructing the Relationship, Volume II*, the Commission felt:

- The treaties must be honoured.
- The current land base must be expanded significantly.
- Self-determination and self-government must be negotiated.
- Legislation must be enacted to enable each of these goals.

## *Aboriginal Justice Inquiries (continued)*

*In Gathering Strength, Volume III*, the Commissioners emphasized that change would take time and therefore, there was an immediate need for movement on social concerns. The movement required:

- An integrated approach on everything from housing and education to language and health issues and more.

*Perspectives and Realities, Volume IV*, the RCAP Commissioners also proposed a number of recommendations aimed at:

- "Resolution of jurisdictional confusion and fostering a sound, coordinated approach to urban Aboriginal policy." (p. 612) These included consideration of specific groups such as women, Elders and youth.

A statement reiterated by the Commissioners on several occasions was, "There can be no peace or harmony unless there is justice."

## **2. The Aboriginal Justice Inquiry of Manitoba (AJI)**

*The Aboriginal Justice Inquiry* was established by the Government of Manitoba in April 1988 in response to two incidents. The first was the 1987 trial of two men for the murder of Helen Betty Osborne, a trial that came a full 16 years after the murder. The second incident involved the death of John Joseph Harper in March 1988. Harper, the executive director of the Island Lake Tribal Council, died following an encounter with a City of Winnipeg police officer. The next day the police department exonerated the officer despite many unanswered questions.

The *Inquiry* (Hamilton and Sinclair 1991; pp 1, 86-7, 249) reported:

The justice system has failed Manitoba's Aboriginal people on a massive scale. It has been insensitive and inaccessible, and has arrested and imprisoned Aboriginal people in grossly disproportionate numbers. Aboriginal people who are arrested are more likely to be denied bail, spend more time in pretrial detention and spend less time with their lawyers, and, if convicted, are more likely to be incarcerated . . . For more than a century the rights of Aboriginal people have been ignored or eroded . . . Aboriginal peoples have experienced the most entrenched racial discrimination of any group in Canada. Discrimination against Aboriginal people has been a central policy of Canadian governments since Confederation . . . The discrimination against Aboriginal people by our governments and permitted by the general Canadian population represents a monumental symbol of intolerance . . . In short, the current court system is inefficient, insensitive and, when compared to the service provided to non-Aboriginal people, decidedly unequal.

In its report the AJI made 293 recommendations on almost every aspect of the relationship between Aboriginal people and the justice system. It advocated recognition of the reality of aboriginal self-government by the federal and provincial governments. It suggested the creation of a separate Aboriginal justice system with its own criminal and civil laws and a separate system of courts, organized regionally on the model of the tribal courts of the American northwest. It recommended the establishment of Aboriginal police forces for Aboriginal communities and greater numbers of Aboriginal police officers on existing forces. The Inquiry made a series of recommendations dealing with sentencing and appropriate incarceration facilities for Aboriginal people. (Hamilton and Sinclair, 1991: ch. 17)

However, the Inquiry also emphasized Aboriginal people's skepticism with respect to the likelihood of recommendations being implemented. Chief Oscar Lathlin, as he then was, was reported as stating, "This is the biggest fear that we have of this Inquiry, that nothing will be done once the Inquiry is over." (1991, p. 640)

## *Aboriginal Justice Inquiries (continued)*

In 1999, in an effort to respond to the perception that nothing had in fact happened, the Manitoba Government established the *Aboriginal Justice Implementation Commission* (2001) to put the recommendations into action. The priorities for action identified by the Commission included: fulfilling Aboriginal rights and improving Aboriginal relations; emphasizing community and restorative justice; and ensuring crime prevention through community development. A further recommendation was for the establishment of a permanent Aboriginal Justice Commission to work on these issues on an ongoing basis.

### **3. Justice on Trial: The Alberta Task Force Report**

*The Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta* (Alberta Task Force 1991) was not established in response to a specific case. Rather, it was formed to address more general concerns about the impact of the criminal justice system on Aboriginal peoples. These concerns included the disproportionate number of Aboriginal people in correctional institutions and the delivery of criminal justice services to Aboriginal people by non-Aboriginals. The purpose of the Task Force, according to its own terms of reference, was:

To complete a review of the criminal justice system in Alberta as it relates to Indian and Métis people and to provide a report for the Solicitor General of Canada, the Attorney General of Alberta and the Solicitor General of Alberta, which identifies any problems and proposes solutions to ensure the Indian and Métis people receive fair, just and equitable treatment at all stages of the criminal justice process in Alberta. (pg. 1-1)

The Task Force made a total of 340 recommendations in the areas of policing, legal aid, the courts, judges, prosecutors and lawyers, and corrections. Among the recurring themes in all these areas were:

- the need for increased communication and liaison among and between Aboriginal communities and organizations, police agencies and government departments;
- the need for increased and enhanced cross-cultural training for staff within the criminal justice system;
- the need to increase the number of Aboriginal people employed within the criminal justice system;

- the need to develop custodial alternatives and options for remanded Aboriginal accused and sentenced Aboriginal offenders;
- the need to increase elder involvement in the criminal justice system;
- the need to expand the availability of alcohol and drug treatment programs;
- the need to expand Aboriginal community-based resources;
- the need to increase Aboriginal involvement in criminal justice system planning, program development and service delivery; and
- the need to increase public education regarding Aboriginal issues, as well as Aboriginal awareness of the workings of the criminal justice system.

#### **4. The Saskatchewan Indian Justice Review Committee and the Métis Justice Review Committee**

Sask Justice, the Government of Canada, and the Federation of Saskatchewan Indian Nations agreed to establish Saskatchewan Indian and Métis Justice Review Committees in 1991 (Linn 1992a;1992b). The objective was not to address past wrongs, but rather to examine ways to make changes within the present criminal justice system, while encouraging expansion of positive changes already under way.

The Committees recognized both the increasing number of similar studies and the lack of any significant progress in implementing their recommendations. For these reasons, they adopted a short time-frame in which to identify practical solutions and initiatives that could be implemented immediately or within a reasonable period.

The recommendations made in the two reports were identical, except for three recommendations specifically concerning Indian people. Recommendations were directed primarily to making the criminal justice system more responsive to Indian and Métis people. They included matters such as access to programs, employment equity, and participation in decision making.

A more comprehensive examination of this Commission can be found elsewhere in this report.

## *Aboriginal Justice Inquiries (continued)*

### **5. The Law Commission of Canada**

The Law Commission's study was initiated in June 1990. The Minister of Justice asked the Commission to study the *Criminal Code* 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.

The Commission divided its work into an Aboriginal justice review component and a component that reviewed other cultural and religious issues. One of the goals of the study was to propose reforms that would secure formal equality in access to justice. At the same time, however, the Commission attempted to identify when equal treatment before the law necessitated recognition and incorporation of cultural distinctiveness within the criminal justice system.

The Commission (1991; p. 16,75) found:

The present system fails the Aboriginal peoples ... Canada's current sentencing laws are archaic and inadequate ... in our view, the current regime fails to respect the Charter's guarantees of equality and fundamental justice in a number of important respects.

### **6. Ontario Commission On Systemic Racism in the Criminal Justice System**

While the inquiries and commissions considered thus far have been concerned with Aboriginal justice issues, the *Commission on Systemic Racism in the Ontario Criminal Justice System* had a broader focus. It was established in October 1992 to: "inquire into and make recommendations about the extent to which criminal justice system policies, practices and procedures reflect systemic racism." (Commission 1995a; p. 7) Although all racial minorities were considered, the main emphasis of the Commission's work was on the treatment of Blacks.

The Commission determined that systemic racism or "racialization" was widespread within the Ontario criminal justice system. For the Commission (1995b; p. 40), racialization was described as a process "by which societies construct races as real, different and unequal in ways that matter to economic, political, and social life."



The Ontario Commission found that racialization produced different outcomes at every stage of the criminal justice process. Numerous instances of overt and systemic discrimination involving the police, the Crown, the courts, and the correctional system were documented. The Commission also determined that the differential treatment afforded to racialized groups could not be justified on the basis of so-called "legal" variables, but instead, was influenced by "extra-legal" considerations relating to race.

The Ontario Commission (1995b; pp. x, xi) recommended an "equality strategy" to bring about racial equality within the justice system:

This framework has four key elements: anti-racism training of justice system personnel; employment of racialized persons in the administration of justice; participation of racialized persons in the development of justice policies; and monitoring of practices for evidence of racial inequality . . . The elimination of systemic racism . . . will require integrating the principles of inclusion, responsiveness, and accountability into all aspects of the criminal justice system, together with an overriding commitment to restraint when invoking judicial sanctions.

Specific recommendations pertaining to the corrections system included: the appointment of an Anti-Racism Coordinator with a broad mandate to bring about change (research, audits, development and implementation of anti-racism strategies, etc.), the abolition of racial segregation of prisoners, the standardization of staff training, the development and implementation of non-discriminatory pre-trial and post-sentence policies, and the provision of culturally appropriate services.

## 7. Other Reports

Numerous other reports and inquiries have reached conclusions similar to those detailed above. For example:

- A review by the Canadian Bar Association (1988; pp. 76-77) comments that: "The reality under current justice regimes is one of gross inequality of treatment for Native people."

## *Aboriginal Justice Inquiries (continued)*

- The principal purpose of the *Royal Commission on the Donald Marshall, Jr., Prosecution* (1989) was to determine why Donald Marshall was wrongfully convicted and to make recommendations which would ensure that such a miscarriage of justice did not happen again. Among the more general findings in the 1989 report was that the criminal justice system failed Donald Marshall at every point from his arrest and conviction up to and beyond his acquittal by the Supreme Court of Nova Scotia.
- *The Osnaburgh-Windigo Tribal Council Review Committee* (1990; p. 103), pointed out that "It is recognized that some Euro-Canadian police officers possess racist attitudes towards Native persons . . . These racist attitudes stem from a lack of understanding and knowledge of cultural differences between natives and non-Native people."
- *Aboriginal Peoples and Criminal Justice* (1991), a report by the Canadian Bar Association, recommended increasing the number of Aboriginal workers in the courts, overcoming the language and cultural barriers and increasing community involvement in the justice system. It went further to suggest that those Aboriginal communities with the ability to run viable alternative justice systems should be allowed to undertake such initiatives.
- *Saskatchewan Aboriginal Justice Strategy - The Origins, Rationale and Implementation Process: An Evaluation Report*. 2000. This report is a review of the Saskatchewan Aboriginal Justice Strategy (SAJS) which has been in place since 1993, with roots back to the 1980s. Justice was one of five areas to be targeted under this policy framework. Saskatchewan's concern with Aboriginal justice issues resulted from the identification a large over-representation of Aboriginal people in its justice system relative to their population, a young and growing Aboriginal population and a massive problem of crime in Aboriginal communities all of which are contributing to rising economic and human costs.

The SAJS has four main areas of activity: crime prevention and reduction, building bridges to Aboriginal communities through community-based justice development, employment equity and race relations, and self-determination/self-government issues. The Strategy was to be a five-year action plan, but a 1998 Interim Report suggested the program be extended into a long-term plan. The goals of the government strategy are as follows:

- Recognize and respond to the unique needs of Aboriginal accused, victims and communities;
- Involve Aboriginal people in the continuing development of the justice system;
- Reduce the rate of Aboriginal involvement in crime, as victims or offenders, by working co-operatively to address the root causes of crime;
- Develop justice services that are responsible to and representative of the Saskatchewan population; and
- Reflect the culture and values of Aboriginal people in justice policy and services.

The report explains the SAJS and its evolution. Evaluation is a central part of the strategy. The main conclusion is that the SAJS has the lead role in Aboriginal justice reforms and that the strategy has been fairly well implemented.

