Section 8:

Justice Reform: Governance and Implementation

A Paper prepared by Merrilee Rasmussen Q.C.
For the Saskatchewan Commission on First Nations and Métis Peoples and Justice Reform

September 2003

Justice Reform: Governance and Implementation

Introduction

25 years ago there was no "Justice Department" in the Government of Saskatchewan.[1] There was an Attorney General's Department, and the Attorney General fulfilled a constitutional/historical role that was originally about prosecuting contraventions of the law and advising the Crown.[2] In 1983, "Justice" sounded like a good name for a department; other jurisdictions in Canada had adopted the name and Saskatchewan didn't want to be left behind.[3] But what did a Department of Justice do that an Attorney General did not?[4] And what have we done to our understanding of the concept of "justice" by linking it to the activities of the Crown's law officers?

The last 25 years is also a period of time in which there have been a number of so-called justice inquiries in various Canadian jsurisdictions, including Saskatchewan. They have all made numerous recommendations, and many of those recommendations have been implemented, here and elsewhere. These include: the Royal Commission on Aboriginal Peoples (RCAP), The Manitoba Justice Inquiry, The Saskatchewan Indian and Métis Review Committees, The Marshall Inquiry, the LaChance Inquiry, Justice on Trial (Alberta), 1993 National Round Table, and in addition to the formal reports of these inquiries, there have been numerous other papers produced and endless writings. And yet, the "justice" statistics remain as dismal as ever. This is not to say that changes have not been made, they have. However, the sad reality is that the changes have borne little fruit in terms of having an impact on the lives of Aboriginal people in a positive way. The statistics of the last century on incarceration, poverty, and unemployment for Aboriginal people still hold true today.[5]

The focus of this paper is on a process for implementation of the recommendations of the Commission on First Nations and Métis Peoples and Justice Reform. It proceeds from the idea that justice is about much more than the criminal process itself. It conceptualizes governance as facilitating the ability of people to make or influence the decisions that affect their lives and therefore a necessary component of effective implementation. Finally, it conceives of implementation as a process that is on-going and permanent and proposes a vehicle by which that can occur.

Justice

It is important to emphasize the impoverishment of understanding and expectation that results from conceiving of justice as those things that happen when the police charge a person with an offence. This is borne out in the testimonies provided by Aboriginal peoples themselves to the numerous inquiries and commissions studying them and justice, including this one. The machinery of the criminal justice system deals only with the tip of the "justice" iceberg: the failures of other institutions and systems in society. It is possible, and desirable, to improve the machinery, but mere tinkering with the machinery is not sufficient to produce the depth and quality of reform that will have an impact on outcomes. It is only the beginning.

The objective is not just to make the criminal justice system efficient, as has been done, for example, by allowing persons who have committed "minor" quasi-criminal offences to plead guilty by mail and pay a fine[6], but to endeavour to place an enduring emphasis on the conditions that will secure prevention. It is, indeed,

[1]The first Department of Justice Act was enacted in 1983. See S.S. 1983, c. D-18.2.

[2]See Dale Gibson, "Development of Federal Legal and Judicial Institutions in Canada", Manitoba Law Journal, (1996) 23 Man. L.J. 450-495.

[3]No doubt following the federal model established in 1868, which established the concept of a Minister of Justice responsible to Cabinet and to parliament and an Attorney General responsible to carry out the historic duties of the office of the attorney general in England, chief among these being responsibility for the prosecution of offences. See ibid, at paragraph 15.

[4]The offices of Minister of Justice and Attorney General are combined in the same person, thus in a practical sense blurring the distinction between them. The names themselves suggest a division between the technical and the political.

[5]See current demographic data for Saskatchewan on-line at http://www.graa.gov.sk.ca/aboriginal/html/relations/urban/AbDemog2003/index.htm.

[6]*The Summary Offences Procedure Act* provides for a large number of "ticket" offences. For the most part, the cost of the pre-determined fine is lower than the cost of hiring a lawyer to plead not guilty or even the cost of taking time off work to attend at court unrepresented to please not guilty. In practical terms, it is less costly simply to plead guilty by mail and send in the fine than it is to argue about whether or not the offence was actually committed. "Justice" does not come cheaply.

arguable that by making the criminal justice machinery run smoothly and efficiently the result is to remove the moral dimension from the criminal trial as morality play, thus eliminating the most important aspect of the criminal justice system in reducing the likelihood of repeat offending: the approbation of community. In other words, the focus is on the machine and not on the job the machine was constructed to do. To actually shift the focus back to humanity it is necessary to acknowledge that the goal of "justice reform" is to produce the circumstances in society that will reduce or eliminate the need to resort to using the criminal justice machinery – not merely to improve its efficiency.

Justice, in its pure form, must be more broadly conceived as the ability for all individuals to participate fairly in the benefits of society. Once conceived in this way, justice necessarily requires an emphasis on the conditions that will secure prevention. It is trite to observe, as all our grandmothers have told us in their various ways, that an ounce of prevention is worth a pound of cure. But it is only trite because it is true. Throughout this paper the term "justice" is used in this wider sense. The term "criminal justice system" is used to refer to the machinery of the criminal legal process.

Governance

Responsibility and Control

People, individually and collectively take responsibility for their actions and for the actions of those around them when they have a measure of control over the decisions that affect their lives. This is demonstrated in the research conducted under the auspices of the Harvard Project over almost two decades.[7] Control has to be provided to people directly through their participation in the institutions through which these decisions are made, and indirectly through participation in the democratic process. Participatory democracy provides for meaningful participation in the democratic process and results in positive relationships between governments and people.

Governments and People

Respect and effective representation: The Supreme Court of Canada has told us that the right to vote as enshrined in the Charter does not protect equality of voting power per se but the right to "effective representation".[8] The Court affirmed this view more recently, finding that the right to vote protects the right of the individual to be effectively represented and to meaningful participation in the electoral system.[9] The Court has also stated that in a democracy, power rests with the people.[10] Aboriginal peoples are not effectively represented in federal and provincial government institutions, including Parliament and the Legislature. Nor are they effectively represented through their own governments, largely due to a lack of recognition of Aboriginal and Treaty rights in dealing with other governments and lack of resources.

RCAP recognized the lack of Aboriginal voice as a fundamental flaw and identified the immediate need to provide a voice for Aboriginal peoples as being at the foundation of its recommendations. RCAP was consistent in its call for a "new relationship" at every level – national, provincial and territorial — and particularly where decisions are made that affect the lives of Aboriginal people.

[7]See the Harvard Project on American Indian Economic Development on-line at http://www.ksg.harvard.edu/hpaied/overview.htm. The Harvard Project has conducted a number of studies and applied research to determine what are the necessary conditions for sustainable economic development among American Indian Nations. It has determined as the result of hundreds of projects over the last 15 or more years that sovereignty or self-determination, capable culturally-appropriate governance institutions are key to economic well-being.

[8]Reference re Provincial Electoral Boundaries, [1991] 2 S.C.R. 158.

[9]Figueroa v. Canada (Attorney General), [2003] S.C.J. No. 37.

[10]Ibid at paragraph 30.

Treaties and the Constitution

The numbered Treaties, covering all of the territory that is now known as Saskatchewan, were entered into by the Government of Canada with the Indians in order to facilitate the opening up of the territory to various governmental activities and to settlement. As described in the Order in Council Setting up the Treaty Commission to negotiate Treaty 4,the Government of Canada considered it important to secure the consent of the Indians in the territory to these activities, which it realized would cause them concern.[11] In this sense, the Treaties are foundational documents that permitted the development of the west as part of the new country, Canada.

The Treaties are significant for a variety of reasons, but perhaps most importantly, because they established an intergovernmental process, based on a nation-to-nation agreement that acknowledges that First Nations, who were self-governing at the time the Treaties were signed, would continue to be self-governing in this new context. Although the specific language of the Treaty is not itself enough to determine its meaning (since it does not contain within it any of the understandings of the First Nations that are found in their oral history), nevertheless the text of Treaty 4 is typical in this regard and reveals even from the perspective of the non-Aboriginal signatory these hopes for the future:

> . . . they [the Indian signatories] will maintain peace and good order between each other, and between themselves and other tribes of Indians and between themselves and others of Her Majesty's subjects, whether Indians, Half-breeds, or whites, now inhabiting or hereafter to inhabit any part of the said ceded tract . . .[12]

The Government of Canada and the Federation of Saskatchewan Indian Nations, through the Office of the Treaty Commissioner, have developed a number of common understandings in relation to the Treaties, which they have set out in their *Statement of Treaty Issues: Treaties as a Bridge to the Future*. Both parties to the Treaties in Saskatchewan are agreed that the purpose of the Treaties was to provide for peace and good order, lasting alliances to foster future well-being, and the means of achieving survival and stability, anchored on the principle of mutual benefit.

This is not to suggest that there is no disagreement about what the Treaties mean. Certainly, the specific content of the Treaty promises in relation to education, or health care, or "justice" are in dispute. However, the fundamental point is that the discussion of these substantive matters must be premised on an acceptance of the Treaties having established this relationship of mutual respect and mutual benefit that can be built on to come to other common understandings.

Whatever the Treaties mean, they are constitutionally protected. That is, section 35 of the *Constitution Act, 1982*, states that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". The courts have held that this affords Aboriginal and Treaty rights a level of protection from interference or infringement by federal and provincial governments that is similar to the protection provided to individual rights through the Charter. In its decision in *Sparrow* the Supreme Court of Canada established the basic framework for section 35 cases.[13] Once the infringement of an Aboriginal or Treaty right is established, it falls to government to prove that the infringement is justified. Justification must include the demonstration that the infringement is for the purpose of securing legitimate objectives and that where possible the Aboriginal peoples who possess the right are able to exercise the right through their preferred means. This entails consultation with the Aboriginal peoples, and therefore discussion and negotiation.[14]

[11]P.C. No. 944, dated July, 23 1874.

[12]The Hon. Alexander Morris, P.C., *The Treaties of Canada with the Indians of Manitoba and the North-West Territories including The Negotiations on which they were based* (Toronto: Belfords, Clarke & Co., 1880).

[13][1990] S.C.R. 1075.

[14]Delgamuukw v. B.C., [1997] 3 S.C.R. 1010 at 1112-1113 per Lamer C.J.C.

Thus, it follows that the most fundamental of Treaty rights, the right to self-government that the Treaties acknowledge and that makes the Treaties possible at all, is constitutionally protected from infringement as are the rights that flow from the substantive content of the Treaties.[15]

Métis

The Supreme Court's very recent decisions in *R v. Powley*[16] and *R. v. Blais*[17], which were released on September 19, 2003, have confirmed what Métis peoples have always known: that they are distinct, rights-bearing communities. According to the Court:

> The constitutionally significant feature of the Métis is their special status as peoples that emerged between first contact and the effective imposition of European control. The inclusion of the Métis in s. 35 represents Canada's commitment to recognize and value the distinctive Métis cultures, which grew up in areas not yet open to colonization, and which the framers of the *Constitution Act, 1982* recognized can only survive if the Métis are protected along with other [A]boriginal communities.[18]

As a result, again according to the Court:

> Section 35 requires that we recognize and protect those customs and traditions that were historically important features of Métis communities prior to the time of effective European control, and that persist in the present day. This modification is required to account for the unique post-contact emergence of Métis communities, and the post-contact foundation of their [A]boriginal rights.[19]

Powley and Blais deal specifically with claimed rights to hunt. But in a way similar to that in which section 35 protects the inherent right of self-government on which the Treaties were premised, the protection of community must also presuppose an inherent right for the community to govern itself. Indeed, much of what is well-known about Métis history is the struggle by them for recognition of their right to govern themselves.

Aboriginal Right of Self-government

The inherent right of self-government arises out of the fact that people exist in a community. It is not created by Treaties, but is affirmed by them and by section 35 of the *Constitution Act, 1982*. This is an important feature of the relationship between the federal and provincial governments and First Nations and Métis people. However, because the relationship does not arise not from the Treaties it is not restricted to Treaty First Nations. As an Aboriginal right, the right of self-government is also recognized and affirmed by section 35 and exists in relation to other Aboriginal peoples.

The Royal Commission on Aboriginal Peoples recognized this, and concluded and recommended that "the right of self-determination is vested in all the Aboriginal people of Canada, including First Nations, Inuit and Métis peoples". Little has been done by governments to respond positively to this recognition. Aboriginal people are often – some would say, usually – left to litigate to have their rights recognized. Indeed, Aboriginal peoples are frequently frustrated by the efforts of governments and their bureaucracies to understand judicial pronouncements about Aboriginal rights in the narrowest possible terms.

[15]The reference to section 35 is made for the purpose of emphasizing that "Aboriginal and Treaty rights", whatever their specific content (a point about which there is significant debate) are constitutionally protected, and that means that where such rights are infringed, the infringement must be justified. Many critics are of the view that this constitutional protection is of little or no use, either because it doesn't protect the sovereignty of Aboriginal peoples or because it engages Aboriginal peoples in battles that yield little that is positive to Aboriginal/non-Aboriginal relationships. There is much truth in both these points of view. This paper posits a practical process of implementation built on mutual respect, which would set aside these debates to concentrate on the development of positive, inter-governmental relationships out of which positive results are more likely to occur.

[16]2003 SCC 43

[17]2003 SCC 44

[18]Powley, supra note 16 at paragraph 17.

[19]Ibid at paragraph 18.

Intergovernmental Relationships

Relationships between and among federal, provincial and Aboriginal governments are an important aspect of dealing with issues involving Aboriginal peoples, since responsibility in a legal and jurisdictional sense is fragmented among many different governments. In Saskatchewan this fragmentation extends to include northern municipal governments, which in one sense are merely creatures of provincial law and in another are the structures through which meaningful governance over a wide range of issues that are not just local in some parts of the province occurs.

The relationship between and among governments is crucial. These inter-governmental relationships determine voice, priority, financial arrangements, policy, laws, and ultimately respect for difference. Experience demonstrates that decisions made for Aboriginal people by non-Aboriginal governments, and policies and laws developed about Aboriginal people without inclusion of Aboriginal people, do not produce practical improvements in the lives of Aboriginal peoples or in their communities. RCAP's recommendations were designed to create a relationship that would allow for everyone to participate politically and privately, on the premise that when individuals and communities have an avenue through which they can make the decisions that will affect their lives, positive change will occur. Again, this positive inter-governmental relationship has not been fully realized.

Community Development

Although political voice is necessary, it is not the only or ultimate goal, and it is not just the actions of governments that shape communities. The vitality of a community is found in the non-governmental organizations, service clubs, religious groups and other interests, most of which are volunteer-based, that identify and respond to the needs of a community in a concrete way. Indeed, politicians, as representatives of the people, must respond to the needs of the people. Effective politicians must rely on strong communities. The less impact the community has on the elected politicians, the less power the community and its members have to effect change. The voice of the community is reduced to a whisper. Thus, with a heavy reliance on government and without adequate political representation/voice, Aboriginal people/communities can't set their own agenda, decide their own priorities, or impact policy or financial decisions that are then made "for" them. Aboriginal peoples, like all peoples, must have an avenue to effect positive change for themselves. Inclusion, participation and respect are key.

Bridging the Divides

The vision of this Justice Reform Commission: "One Community - working together to create a healthy, just, prosperous and safe Saskatchewan *Meyo Wahkotowin*" is one with which likely all people in Saskatchewan can agree. While we work with our commonalities and shared interests we can also acknowledge our differences and respect them. The dichotomies set up in many situations – urban/rural, Aboriginal/non-Aboriginal, North/South, and so on – do not only or even necessarily represent conflict. In fact, in many ways they are two sides of the same coin. The goal is to ensure all needs of everyone are identified, but to understand that one size doesn't necessarily fit all. The way in which needs are filled may or may not be the same for everyone, except in one important respect: the resolution of concerns must be approached in an inclusive, respectful way. We cannot assume to know the needs and priorities of others and no longer can we ignore them, once they are identified. The bridges that must be built to allow for this are, of course, trust and respect and patience, *Meyo Wahkotowin*.

Implementation

Our society suffers from the McDonald's syndrome – the expectation that it should be possible to instantly gratify every human need. However, the instant hamburger is only possible because of a significant investment in an elaborate infrastructure, consisting of physical buildings, systems, marshalling of human resources, and methodology, that has streamlined its production to an identified, targeted market. There are no instant solutions to any problems. Perhaps more importantly, solutions don't just happen. They must be planned in order to be delivered.

Implementation of this Commission's recommendations will not just happen either. Once this Commission has determined its recommendations and chosen a path to take, the most important recommendation it is mandated to make is its direction to "recommend short and long-term implementation strategies and identify a vehicle to oversee the implementation of its recommendations".

All strategies require that over-arching goals or objectives be identified, as well as the means or principles by which those objectives will be reached. Implementation is a three-dimensional action plan that breaks down these larger goals or objectives into manageable pieces, sets out the steps or actions that must be taken to achieve them, and identifies the time frame within which they will be taken and by whom.

The role for the Commission is to identify a common vision and common goals, objectives or accomplishments along strategic directions, together with the measures that will tell us when they have been achieved: we will know this is successful when we have measured outcomes which show, for example, that Aboriginal youth have a higher likelihood of graduating from high school than of going to jail .

RCAP envisioned an Aboriginal Peoples Review Commission as an independent body reporting to Parliament. This Aboriginal Commission was to have a broad mandate, monitor progress through clarification of issues, advocacy and public education and was also to evaluate progress, assess implementation and review and report on Aboriginal issues to regularly assess what has been and remains to be accomplished. The Aboriginal Commission envisioned by RCAP was to last several decades, to advise and to persuade. It was not however, to take individual complaints or to have any decision- making authority.

But what the Report of the National Round Table on Aboriginal Justice Issues[20] makes clear is that implementation can only occur when there is the political will to include Aboriginal peoples in the process of implementation on an equal basis that provides for their effective participation. Implementation of recommendations for justice reform cannot be done "to" Aboriginal peoples; it must be done by and with them.

This Justice Reform Commission's final report and recommendations will of necessity be a work constrained by its time and place. An effective implementation vehicle must be both long-term in nature (because solutions cannot be instant) and sufficiently flexible that it can adapt over time (because the particular activities that need to bee undertaken now are unlikely to be the specific activities that always need to be undertaken). It must also be built on the promise of Treaty and respect for Aboriginal rights, which means it must be intergovernmental in structure. Finally, it must be independent in order to have the capacity "to speak truth to power". With these criteria in mind, an "Intergovernmental Justice Reform Implementation Board"[21] could look something like this:

20RCAP hosted a number of National Round Tables on the theme of Aboriginal Peoples and the Justice System. The Report provides a synthesis of the proceedings and the advice received by RCAP from the participants.

21The word "Board" is used simply to label this mechanism. There is no magic implied by the use of the term. The Board will be whatever the legislation that creates it makes it into: "A rose by any other name would smell as sweet".

Structure and Composition

The Board would be created inter-jurisdictionally by First Nations and Métis peoples, Canada and Saskatchewan. The Board would be an example of pooled or shared jurisdiction. Each of the contributing parties would enact complementary legislation to appoint equal numbers of members to the Board and provide the Board with a common mandate. This would require that non-Aboriginal governments recognize the ability of Aboriginal peoples to establish their own governments and for those governments to enact such laws on their behalf. This is an important, perhaps even critical, step towards realizing positive change. It is the key difference between things done to and for a people and things done by them. It is the necessary link between governance and implementation

The Board should consist of no more than 20 persons in total, so that it can function more effectively and without great cost. The persons named by each of the parties as members of the Board would be chosen for their knowledge of their respective communities and for their ability to function collaboratively and productively. They would not be "representative" of the parties in the sense that the parties would be legally bound by their actions and decisions, although certainly there is an expectation that the parties would be morally bound. Members of the Board would not be expected to simply give voice to the political concerns of each of the parties as reasons not to proceed with any specific activity or action, but would articulate those concerns only in terms of their impact on the manner and prospect of achieving implementation.

Mandate

In general terms, the mandate of the Board would be to provide a mechanism for co-operation among all governments in ensuring that the Commission's recommendations are reflected back to communities and implemented, despite the existence of many types of barriers, and that those recommendations are revised or modified to respond to the concerns of communities, especially over time. The Board would also function on a consensus basis to emphasize the co-operative nature of the enterprise and to allow Board members to speak freely and honestly about issues.

Functions

The Board's function would be to facilitate, monitor and evaluate the process and progress of implementation of the Commission's recommendations and to report on a regular basis to the governments of each of the parties and, most importantly, to the communities. The Board's initial task would be to prioritize and develop necessary actions to implement each of the Commission's recommendations, and to determine a process for involving communities in this prioritization and development, including a determination of what steps should be taken by what parties, and the timeframe within which those actions should occur.

Shared Jurisdiction

There are several potential areas of shared jurisdiction between Canada, Saskatchewan and First Nations that the Board could be empowered to develop and implement with community involvement.

1. Police Complaints: The process for police complaints is presently regulated under the *Royal Canadian Mounted Police Act* federally and under *The Police Act, 1990* provincially. Each of them has a very similar procedure for taking and investigating complaints. Many of the concerns that have been expressed about the criminal justice system relate to the actions of police, especially in relation to their treatment of Aboriginal persons. The FSIN has established a Special Investigation Unit to vette complaints about police, and has received more than 2000 complaints.

2. Child Advocate: The recent tragic case of "Baby Andy" illustrates the need for solutions that cross jurisdictional boundaries. The investigation of this case was carried out co-operatively, and suggests the need for a more permanent co-operative function to deal with issues that impact more broadly on the circumstances of children in care, especially given that two thirds of the children in the care of the Provincial Minister are Aboriginal children.

3. Ombudsman: The function of an ombudsperson is to investigate complaints from members of the public that government administration has been unfair in its dealings with them. It is apparently a natural next step in terms of ensuring that all governments act fairly and to address potential systemic concerns sooner rather than later.

4. Human Rights Commission: For jurisdictional reasons, human rights complaints may proceed under either federal or provincial human rights legislation through commissions statutorily created. The addition of Aboriginal jurisdiction and a shared process for rights violations, regardless of the jurisdiction in which they occur provides another opportunity for jurisdictional co-operation

These situations are provided as possible examples of areas in which shared jurisdiction can be a positive and productive means of addressing concerns. In all of them, all parties share common interests in ensuring that the rights of all people in the province are respected by all others and by their governments. In these cases, and in any others that the Board my identify, the Board would play a role to assist in developing the necessary legislative mandates and inter-agency protocols to enable the shared jurisdiction model to function.

Justice Reform Implementation "SWAT" Team

While the need for reform is a constant one, and the primary instrument for change is a permanent institution in the establishment of an Intergovernmental Justice Reform Implementation Board as a vehicle for implementation of the Commission's recommendations, the Board will require an effective liaison with communities, and communities will require access to the Board's ability to implement and influence change at the community level.

The Board would establish an inter-disciplinary team whose function would be to respond to the needs and demands of communities on an ad hoc basis. The team would comprise individuals with varying educational, experiential, and cultural backgrounds who would assist communities as requested with needs assessment and capacity building so as to develop effective institutions for implementation at the community level. In specific terms, the mandate of the Team would be to develop implementation boards locally. It would be accessed by communities directly by request, or would be deployed to communities to respond to identified needs. Its immediate function would be to "triage" concerns so as to identify issues or matters requiring immediate attention and determining what measures are required to deal with them. Its secondary function would be to direct the community to existing resources or, where those resources are lacking, to raise the identified need with the Board for it to assist communities to develop longer-term solutions.

Proposal

A draft outline of proposed legislation, including commentary on its provisions, is attached as an appendix to this paper. It is suggested as a starting point for discussion by the Commission of implementation in concrete terms.

Summary and Conclusion

Our shared Saskatchewan history teaches us about the value in diversity and in respect. Respect for difference is at the heart of positive change for Aboriginal peoples.

The Justice Reform Commission report must be a blueprint for action to effect this positive change. The Justice Reform Implementation Board is a mechanism by which to pick up the torch and carry on, together with communities, to develop and implement measures aimed at preventing involvement with the criminal justice system, and at improving the working of the criminal justice system so that real justice can be achieved for all.

Proposed Legislation
Model legislation to be enacted by each of First Nations, Métis peoples, Canada and Saskatchewan

An Act respecting a Vehicle for the On-going Implementation of Justice Reform within Saskatchewan

The concept proposed is that the exact same legislation be enacted by the governments of all of the peoples involved. For non-Aboriginal peoples, these governments are the Government of Canada and Saskatchewan. For Aboriginal peoples, these governments are the legislating bodies constituted by Aboriginal peoples to speak and act on their behalf. The governments of Aboriginal peoples have been generally denied to them since the time of Treaty-making in the territory that is now Saskatchewan. Non-Aboriginal governments will have to work with the representatives of Aboriginal peoples to develop and recognize their governments and ultimately to recognize the laws they enact.

The purpose of suggesting that legislation be enacted on behalf of all peoples in exactly the same form is to "park" the constitutional debate about jurisdiction. Aboriginal peoples take the legal position that they have comprehensive jurisdiction to enact laws directed in a holistic way to their own peoples. This view is not shared by non-Aboriginal governments. The debate over where the jurisdictional lines are drawn "in fact" will rage forever. Implementation of the Commission's recommendations cannot be held hostage to a resolution of this dispute. However, if all governments enact the same laws, it will be constitutionally true that wherever the jurisdiction may rest, it has been invoked to support the validity of the law enacted. In this way, the theoretical questions can be left to the theorists, while practical steps forward are taken.

Of course, the very first thing that must be done by the representatives of the peoples involved is to develop this legislation. What is presented here is only a framework or an outline within which negotiation will be required; it is not presented as a final solution.

Short title

1. This Act may be cited as *The Saskatchewan Justice Reform Implementation Act*.

Definitions

2. [*to be inserted as required*]

It is noted here that definitions in a statute are included to provide a convenient way in which to tie down with some precision the meaning to be given to words and phrases used in the statute. It is emphasized that the words and terms that are defined are defined for the purposes of the statute only. Words that are not used in the statute would not therefore be defined. Definitions to be included must derive from the substantive provisions of the legislation as they are developed.

Purpose of the Act

3. The purpose of this Act is to establish an ongoing structure for the implementation of the recommendations of the Justice Reform Commission, which recommendations are set out in Schedule A, by and with the Aboriginal peoples for whose benefit the recommendations have been made, in a process that is consensus-based, respectful of Aboriginal peoples and that provides for their equal and effective participation and that is flexible so as to adapt over time to their changing needs and aspirations.

It has become unfashionable to include material in schedules attached to legislation, but it is important that the actual content of the Commission's recommendations be physically attached to the legislation. This will have the result of making the recommendations more easily accessible and will emphasize their specific importance.

This provision is also intended to signal that the process of implementation is perpetual (although we know that legislation can be repealed or altered) and that the process is flexible. While we will establish an entity that will be called here a "board" it is not the board that is permanent but the structure for reform.

A consensus-based approach requires that all parties agree; it is not "majority rule". This may take longer. Consensus decision-making is not fast, but it produces the right result.

Establishment of Intergovernmental Justice Reform Implementation Board

4. The Justice Reform Implementation Board is hereby established as a body corporate.

The corporate structure itself is not especially capable of responding to the unique needs and demands of the implementation process at is envisaged. However, it results in the creation of a fictional "legal person" that has the ability to take valid action as a matter of law. This is the jurisdiction question again at the "micro" level. Another approach would be to identify these necessary powers in the legislation rather than to rely on the implied powers granted at law to corporations.

Appointment of members of the Board

5.

Each of the legislating partners will have to have a means by which they determine persons to be appointed to the Board who will speak for or represent the interests of the appointing party. This is necessary for the Board to have credibility in its actions with all governments.

The number of persons to be appointed by each government will have to be limited and equal so that the Board is not too large and unwieldy. They should possess exemplary communication and diplomatic skills, as well as being knowledgeable about the substantive matters with which they will be called upon to deal. They should be persons who are problem solvers and not problem finders. If the wrong people are appointed, the Board will not work. However, it is difficult to state these things legislatively and probably not effective. If a government chooses to appoint inappropriate persons it will say something negative about its commitment to change. It is the type of matter that is better resolved politically than legally.

The arbitration board model could be borrowed from with respect to the appointment of a chair. The arbitration tribunal is usually composed of a person appointed by each of the employer and the employees with a chair who is agreed to by the persons appointed by the sides. In a similar way, once all the representatives of all of the governments are determined, they could agree to the appointment of a chair for the Board. Again in the arbitration context, if the sides cannot agree within a reasonable time frame, some third party will be designated to make the decision. It would be rather inauspicious if the parties in this case could not agree on a chair, but provision could be made for the issue to be determined by a court or similar body in the absence of agreement.

Term of office and remuneration of members of the Board

6. (1) Appointments to the Board shall be for a term of three years.

(2) No member of the Board may be appointed for more than two consecutive terms of office.

(3) A member of the Board holds office until his or her successor is appointed.

It is important that persons serve on the Board for a long enough time to be effective, but not so long that they become entrenched in their thinking. Three years may be too long or too short. Two consecutive terms may not be enough. The point is simply that there should be limits.

Remuneration is a more difficult question because it is a question about money. Obviously Aboriginal participation will be dependent upon funding and funding arrangements will have to be negotiated. However, whatever cost-sharing arrangements are established there should be a budget allocation to the Board on an annual basis to carry out its responsibilities. If it is starved for funds it will be effectively controlled, and this will compromise both its independence and its effectiveness.

Objects of the Board

7. The objects of the Board are to:

(a) advise and make recommendations to the appointing governments on the implementation of the recommendations of the Justice Reform Commission;

(b) involve any persons, groups, organizations or other entities in the implementation of the recommendations of the Justice Reform Commission;

(d) develop and oversee planning for the implementation of the recommendations of the Justice Reform Commission; and

(e) advise the appointing governments in the administration of funding for the implementation of the recommendations of the Justice Reform Commission.

These objectives as stated are rather vague and lacking in power. However, what is critical to implementation is the political will of the governments involved. If the appropriate people are appointed to the Board, if they positively seek solutions rather than reasons why things won't work, if the mechanisms they develop for implementation are common-sensical, if they reach across jurisdictional boundaries with a co-operative spirit, and if they achieve conclusions based on consensus, their recommendations will be adopted because they make sense, they meet the needs of the parties and they respond to the interests of the parties. If the Board simply becomes another body that can impose itself on others through power rather than reason, it is less likely to be effective.

Interjurisdictional co-operation

8. The Board shall identify areas in which the appointing governments can work together interjurisdictionally to achieve common goals and shall develop strategies to achieve interjurisdictional co-operation.

One means by which the Board can have a significant impact is to develop areas for interjurisdictional co-operation. Examples of these are set out in the body of the paper. All of them, like the Board itself, rest on the idea that if the arguments about jurisdiction are set aside practical accomplishments can be achieved.

Facilitation, monitoring and evaluation

9. The Board shall identify the measures by which the success of the implementation of the recommendations of the Justice Reform Commission may be measured, and shall develop a process to monitor and evaluate implementation of those recommendations, including the provision of reports to the public and to the appointing governments.

An important aspect of implementation is monitoring and evaluation. There must be an identification of the objectively verifiable results that will be produced from successful implementation and the measures to assess them. On-going monitoring and evaluation enables implementation to be adjusted where it is not achieving the targeted results.

The provision relating to public reporting may have to be stronger, as the ability to report directly to the public is a feature that provides a degree of independence to the Board. The appointing governments would not then be able to keep things from being publicly known.

Procedures

10. The Board shall determine its own procedures.

Chair

11.

As noted above, the chair should be a person in whom all of the appointing governments have confidence. The best way to achieve this is to require that the chair be agreed to by all of them.

Reports and advice

12.

Appointing governments will each require an annual report from the Board, but in addition the Board should be able to provide other reports, whenever it considers it necessary of appropriate, both to the appointing governments and to the public.

Creation of community task teams

13. (1) The Board shall establish an inter-disciplinary community task team consisting of persons with varying educational and experiential backgrounds to assist communities to identify needs and develop capacity to organize and establish effective institutions for implementation of the recommendations of the Justice Reform Commission within the community.

(2) At the request of a community, the Board shall assign the community task team to assist the community in any ways that the community requires and to identify and priorize activities necessary to respond to the community's needs.

Agreements

14.

If the Board is not a body corporate it will require the authority to enter into agreements generally in order to achieve its objects.

Regulations

15.

It may be useful to have some ability to flesh out the legislative framework through regulations. Usually in a single jurisdiction, the power to make regulations will be given to the minister or the cabinet. In this case there will be multiple enacting jurisdictions working co-operatively, so any necessary regulations should be delegated to be made by the Board.

Coming into force

16.

The legislation should be effective once it has been enacted by all of the parties.