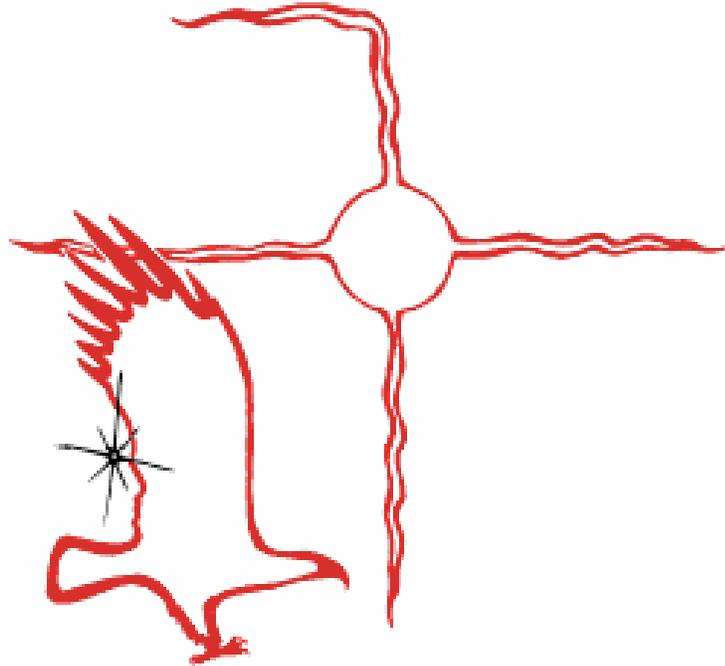
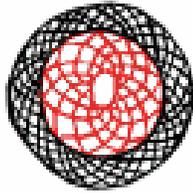
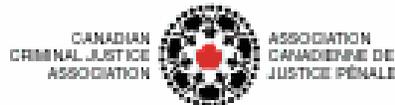


# Aboriginal Peoples and the Criminal Justice System



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## EXECUTIVE SUMMARY

The policies, positions and observations developed within this paper will serve as a catalyst for further discussion with Aboriginal peoples, non-governmental organizations, the judiciary, law enforcement and correctional agencies, and governmental departments, at the federal, provincial, and territorial levels.

The Report examines the historical legacy of assimilation. Aboriginal people in Canada today are facing many problems that can be traced back to the impact of European assimilation. The European capitalist system differed greatly from the customs of Aboriginal people and, when imposed upon them, altered their way of life economically, politically, and socially. The collapse of the fur trade further changed the lifestyle of the Aboriginal people by increasing their dependence on European economies.

Loss of the traditional Aboriginal way of life went beyond simple economic factors. Health problems, the pressures of foreign cultures and religions, and the introduction of new technologies also led to the demise of Aboriginal habitat and lifestyle. In addition, residential schools, which prohibited the use of First Nations languages and observance of Aboriginal culture and tradition, imposed neglect, abuse and mistreatment upon many Aboriginal children. These historical factors, as well as present socio-economic conditions, have contributed greatly to disproportionate levels of Aboriginal incarceration, poverty, unemployment, alcohol abuse, and domestic violence, and to the absence of stable business infrastructures. Indeed, the behaviour of most Aboriginal offenders frequently reflect social rather than criminal problems.

The demographics described help to illustrate the difficulties confronting Aboriginal peoples today. Although the life expectancy of Aboriginal people is on the rise, it is still approximately 6.5 years lower than for non-Aboriginals. Aboriginal people represent approximately 3% of the Canadian population but they now make up approximately 16% of Canada's federal offender population. The number of incarcerated Aboriginal inmates in federal and provincial facilities, particularly in the Prairies, is still increasing though many of the crimes committed are minor offences.

Various difficulties confronting Aboriginal people within the Canadian judicial system have been addressed over the past twenty years but, unfortunately, many problems still exist. High levels of Aboriginal incarceration, one of the most serious problems, is aggravated by inadequate government funding and limited rehabilitation options and resources, and the overall justice system still does not address the cultural needs of Aboriginal peoples.

For the majority of people within Canada, research points to an increasing connection between socio-economic disadvantage and involvement in the criminal justice system. Aboriginal communities are faced with numerous social and economic disadvantages, resulting in a correlation with high levels of Aboriginal incarceration. Poverty and reliance on social assistance are prevalent in Aboriginal communities where approximately half of the children live in poverty. In addition, almost one-third of all Aboriginal people over 15 years of age relied on

social assistance for at least part of 1990. Disenchantment with formal education, largely due to negative experiences at residential schools, different learning styles and the need, in many areas, to go off-reserve and away from family support in order to attend high school, have resulted in lower educational levels among Aboriginal people.

Unemployment within First Nations communities is 10-20% higher than that found in the non-Aboriginal population of Canada. Poor living conditions are also common in communities where overcrowding, inferior construction of houses, the lack of clean water and safe waste disposal exists. Community development has been restricted by the difficulty First Nations people encounter in raising the capital required to establish business ventures. Consequently, First Nations communities have not been able to develop the business infrastructures necessary to accommodate their purchasing needs, and as a result money is not re-invested into their communities.

High rates of alcohol abuse are also found in Aboriginal communities, where one in five people are admitted to hospital for an alcohol-related illness on an annual basis. Domestic violence is also common as 80% of Aboriginal women have stated that they have experienced some form of physical abuse at some point in their lives.

There are different federal, provincial, and territorial approaches aimed at reducing the rate of Aboriginal incarceration, each attempting to make the justice system more responsive and culturally sensitive to their needs. These include expanded Aboriginal policy and program initiatives within the judicial system, cross-cultural education for those involved in the justice system, and the use of diversion, alternative measures such as sentencing circles and community justice committees and healing lodges. The implementation of these approaches reflects a growing understanding that Aboriginal offenders have unique needs and require alternative programs.

Although steps are being taken to attempt to resolve the problems that exist between Aboriginal people and the judicial system, the resolution of many Aboriginal struggles with the judiciary might result from returning the mechanisms of control back to their communities. Aboriginal self-government is an attempt by Aboriginal peoples to regain the authority necessary to determine their own fate. Self-government initiatives would recognize First Nations people as distinct nations and could provide the authority for Aboriginal communities to determine and control their culture, language, educational, health and judicial processes.

# INTRODUCTION

Aboriginal offenders are disproportionately represented within the current judicial system. They face an adversarial environment that does not understand or represent their needs. This report will review the historical and socio-economic conditions that altered the Aboriginal way of life, contributing to the high levels of Aboriginal incarceration. It will also examine the concerns Aboriginal peoples have with the present judicial system, will review several Aboriginal justice programs now implemented and will pose issues for further consideration and discussion.

## Part I: HISTORICAL FACTORS

### Differing Views on Land Ownership

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

The original European settlers' capitalist view of land ownership differed greatly from the Aboriginal holistic philosophy in which all things are inter-related and development is viewed as encompassing the following four dimensions: physical; mental; emotional; and spiritual<sup>i</sup>. The Europeans did not understand the Aboriginal spiritual attachment to their land. First Nations communities considered land to be a gift from the creator, and not simply a commodity. The concept of land ownership was foreign to Aboriginal culture as they could not comprehend owning these lands, and firmly believed that they were provided for the collective use and benefit of all living creatures<sup>ii</sup>.

### Capitalism

At the time of European settlement, a blending of European and Aboriginal capitalism took place. European settlers brought and made available many products never before seen by Aboriginal people<sup>iii</sup>. First Nations communities supplied fur for European traders and developed a powerful and lucrative market based on this demand for fur. The European demand for fur significantly altered the way of life for a large segment of the Aboriginal population.

At the same time, the allure of European products and the power of European capitalism brought about sudden changes in the traditional Aboriginal way of life<sup>iv</sup>. The acquisition of metal tools allowed First Nations people to hunt and gather more efficiently, in addition to adopting new agricultural practices, ultimately enhancing their productivity<sup>v</sup>.

The Europeans thus introduced a new economic order closely resembling the one they had brought from Europe. They introduced production economies, encouraging Aboriginal

communities to exploit their resources in exchange for European goods<sup>vi</sup>. The infusion of imported products upset the traditional balance that had maintained Aboriginal peoples' self-sufficiency for thousands of years. This was also the first step away from their traditional way of life, creating a dependency on an array of products external to their natural environment<sup>vii</sup>.

## **Treaties**

As Aboriginal people began to recognize the value of their land, they concluded it would not serve their long term interests to part with their assets although they had tremendous value in trade. Unfortunately, the collapse of the fur trade left many bands desperate for income, which, ironically, was needed to purchase products from Europeans. For many Aboriginal communities, the only way to generate essential income was to sell their land to non-Aboriginal settlers.

In the post-Confederation era, the new federal government played a central role in many questionable land transactions. The government repeatedly paid Aboriginal communities low, unfair prices for their lands<sup>viii</sup>. For example, the silver mines at Cobalt, which sold for less than \$40,000, produced over \$206,000,000 in precious metal for the federal government during its first eighteen years of operation<sup>ix</sup>.

Although land treaties signed between the federal government and First Nations communities frequently provided the Aboriginal bands with large tracts of land for their use and occupation, the size of these "Indian Reserves" were not guaranteed. Many were reduced in size as more land was needed for non-Aboriginal settlement<sup>x</sup>. These treaties did not award fair prices for lands, or grant the money to individuals who best represented the bands' interests.

Colonial Europeans' unfulfilled desire for Aboriginal land eventually led to an institutionalized policy of assimilation after Confederation, as reflected in the *Indian Act of 1868*. The Act initiated the federal government's responsibility for nearly every aspect of Aboriginal peoples' economic, social, and political lives.

## **Loss of the Traditional Aboriginal Way of Life**

The traditional First Nations way of life was also weakened by several non-economic factors. Aboriginal communities experienced new health problems with the advent of unfamiliar foods, beverages, and diseases<sup>xi</sup>. Furthermore, change was brought on by the imposition of foreign cultural and religious values, eventually dominating First Nations communities<sup>xii</sup>. Inevitably, the traditional Aboriginal way of life gradually eroded because of powerful outside influences.

Initially, First Nations communities maintained a degree of self-sufficiency amidst these changes. However, the collapse of the fur trade and the end of the buffalo hunts (another traditional activity eliminated by European settlement) created a situation in which Aboriginal communities were unable to participate in the new economy as they had before<sup>xiii</sup>. In a few short decades, First Nations people, formerly self-sufficient and autonomous, became dependant on the new economic order<sup>xiv</sup>. Future generations of First Nations people grew up dependent on the European way of life and the Aboriginal acceptance of "modern" technology meant the erosion of their habitat, their way of life and their culture.

## Education

Aboriginal styles of learning and education were not overwhelming deterrents to survival during the era of the fur trade, as First Nations people displayed astute business skills. However, with the decline of the fur trade and the gradual movement within Canada from an agriculturally based society to one dominated by an urban industrial foundation, formal European style education became very important. Unfortunately, Aboriginal people did not possess, and were not in a position to readily acquire new technologies and skills required to make this transition<sup>xv</sup> to an urbanized, industrialized lifestyle.

This is partly because the world view and philosophy of the First Nations peoples, and consequently their learning and teaching styles, were so fundamentally different from the European traditions. The understanding of the cyclical nature of life, the view that all things work together simultaneously and interconnected, with resultant interdependencies, the need for balance, and the connection with the creative and spiritual world are key elements that underpin the Aboriginal world view. They contrast strongly with the hierarchical, logical, linear and rational viewpoints of most European and many other non-Aboriginal cultures. Cause and effect are not perceived in the same way as in scientific rationalist theory. These factors have significant impact on learning. The challenges and negative impact of such issues on Aboriginal students is compounded by overt and systemic racism within the educational system, poverty and marginalization, and language and other cultural barriers.

## Residential Schools

After the adoption of the 1867 *Constitution Act*, Canada instituted a policy of Aboriginal assimilation, designed to transform Aboriginal communities from "savage" to "civilized"<sup>xvi</sup>. Residential schools played a significant role in this "transformation". Canadian law forced Aboriginal parents, under threat of prosecution, to send their children to these schools. The residential schools prohibited the use of Aboriginal languages as well as the observance of their traditions and customs. Restricting children from speaking their language was seen as a key element in "civilizing" them. Some of the schools did attempt to use positive reinforcement to encourage assimilation, but usually children who did not conform were punished, often by beatings.

In addition to this assimilation policy, there were many administrative problems with the residential schools. The majority of the institutions were mismanaged, inadequately funded, provided inferior educational services, and often were unable to attract qualified personnel, as many were isolated and offered low salaries. Staff worked long hours, not only instructing the children, but also supervising their work, recreation and personal care. The stress and fatigue of the residential school environment may have de-sensitized the staff to the children's misery<sup>xvii</sup>.

The children were often under-nourished and poorly clothed with several schools viewed as "workhouses", as many children missed classes due to their obligations to work on the school farm<sup>xviii</sup>. The 1996 *Royal Commission on Aboriginal Peoples* observed that the children probably enjoyed a better diet and quality of life before arriving at the residential schools<sup>xix</sup>. As a result of their suffering, hundreds of children ran away or died trying, with some resorting to suicide.

One of the most warring aspects of the residential schools was abuse. Mistreatment, neglect, and abuse by the staff were common<sup>xx</sup>. The approach of the residential schools has been well-documented: "discipline was curriculum and punishment an essential pedagogical technique<sup>xxi</sup>. Children were punished in many ways including beatings by hand or with whips, and/or chained, bound and deprived of food<sup>xxii</sup>. Many cases of sexual abuse were also reported.

Unfortunately, Aboriginal communities today are still dealing with the aftermath of the residential school experience. One Aboriginal leader and residential school graduate, George Manuel describes the schools as "*the laboratory and production line of the colonial system.*"<sup>xxiii</sup> The *1996 Report of the Royal Commission on Aboriginal Peoples* states that the residential schools were not only a tool in the colonialization process but they were also a major force in the marginalization of Aboriginal communities<sup>xxiv</sup>.

## Summary

The historical problems of many Aboriginal peoples stem directly from assimilation, which fundamentally changed the economic, political and social life - indeed the very culture - of First Nations people. Assimilation policies were based partly on the European belief that Aboriginal people were uncivilized and incapable of governing themselves. As a result of the devaluation of their language, traditions, and customs after this experience, Aboriginal people began to suffer cultural uncertainties. This cultural crisis can be linked to specific internal problems that currently plague Aboriginal communities including disproportionate levels of Aboriginal incarceration, poverty, unemployment, alcohol abuse, domestic violence, and an absence of economic self-sufficiency and business infrastructure.

## Part II: DEMOGRAPHICS

### Population

The following demographics analysis portrays the changing composition of Aboriginal people in Canada and provides an illustration of the systemic nature of the barriers they must overcome. The Department of Indian and Northern Affairs Canada states that in 1992, the registered Indian population comprised 1.9% of the total Canadian population. The total registered Aboriginal population has risen from 230,902 in 1967 to 533,461 in 1992, a 13 1% increase. With the reinstatement of status through Bill C-31, the registered Aboriginal population is expected to reach approximately 755,200 in 2005, a 4% increase from 1992<sup>xxv</sup>.

Nearly eight out of ten registered Aboriginal people lived on-reserve in 1967, with this proportion dropping to less than six out of ten in 1992. The high growth rate for the off-reserve population between 1986 and 1989 is attributed largely to the reinstatement of Aboriginal status under Bill C-31<sup>xxvi</sup>.

There is considerable diversity within the First Nations population in terms of history, language, and culture. There are eleven major linguistic groups and more than fifty languages are spoken<sup>xxvii</sup>. In 1991, the Aboriginal Peoples Survey reported that, for the population aged 15 and over reporting Aboriginal identity in Canada, 139,375 reported speaking an Aboriginal language.

The Aboriginal population does not form a homogeneous group culturally, geographically or by way of status. According to the 1982 Constitution Act , Aboriginal peoples includes the Indian, Inuit and Métis peoples. Statistics Canada's 1996 Census reported that Aboriginal peoples constitute 2.8 percent of Canada's population. Of that 69 percent are self-identified Indians, 26 percent are Métis and 5 percent are Inuit<sup>xxviii</sup>.

### **Birth Rate**

The Aboriginal population in Canada is growing more rapidly than the non-Aboriginal population. The average number of children born to Canadian women overall is about 1.7; the fertility rate for registered Aboriginal women is approximately 2.9 children. By the year 2005, the registered Aboriginal population is projected to increase to 755,200, a 42% growth from 1992<sup>xxix</sup>. This represents a projected growth rate almost 50% greater than the non-Aboriginal population during the same time period.

### **Life Expectancy**

The life expectancy of Aboriginal men is roughly 7 years shorter than that of the average non-Aboriginal Canadian male. The life expectancy of Aboriginal women is approximately 6.5 years lower than that of the average non-Aboriginal Canadian female. Inuit have the lowest life expectancy of all Aboriginal peoples, followed by those living on-reserve<sup>xxx</sup>.

#### *Life expectancy at birth (1991)<sup>xxxi</sup>*

	Male	Female
Non-Aboriginal	74.6	80.9
Aboriginal	67.9	75

#### *Infant mortality rate (per 1000 births)<sup>xxxii</sup>*

Status Indians	17 (1986)
Inuit (NWT)	28 (1986)
All Canadians	8 (1986)

Life expectancy for Aboriginal people is increasing and is expected to continue to grow. From 1975 until the year 2015, it is expected to increase by approximately 14 years for both sexes. Between 1960 and 1990, infant mortality rates for the registered Indian population dropped from 82 to approximately 10 infant deaths per 1,000 live births. In 1991, the rate increased to almost

12 infant deaths per 1,000 births. This rate may present an actual increase, or may simply reflect improvements in data-collection procedures in 1991<sup>xxxiii</sup>.

## **Suicide**

Suicide is two to three times more common among Aboriginal people than non-Aboriginal. It is also five to six times more prevalent among Aboriginal youth than non-Aboriginal youth<sup>xxxiv</sup>.

*Suicide (per 100,000 population)*<sup>xxxv</sup>

Status Indians	34 (1986)
Inuit (NWT)	54 (1986)
All Canadians	15 (1986)

In First Nations communities today, suicide is more common among the young and usually results from feelings of hopelessness and despair<sup>xxxvi</sup>.

## **Incarceration**

Prior to the Second World War, Aboriginal prison populations were proportionate to their numbers in the Canadian population. Since that time, Aboriginal representation within the judicial system has increased and continues to grow.

Statistics indicate that Aboriginal offenders represented 11.9 % of the male and 16.7% of the female offender population in Canada in 1992-93 (11.9 % males and 16.7% females). This is considered to be an underestimate of the true number of Aboriginal offenders incarcerated in federal and provincial institutions because some inmates do not identify themselves as such upon entry into a correctional facility. Thus, many criminal justice experts suggest that the true number of Aboriginal people incarcerated in federal and provincial institutions may be higher.

The federal offender population in 1997, including those in the community, totalled about 23,200. Of this total, about 2900 or 12% were Aboriginal offenders. In comparison, Aboriginal people comprise about 3% of Canada's population<sup>xxxvii</sup>. In 1997, the highest percentage of federal Aboriginal offenders by region was in the Prairie region (Alberta, Saskatchewan, Manitoba and the Northwest Territories), where 64% of the total federal Aboriginal offender population was either incarcerated or on some form of conditional release. The Pacific region (British Columbia and the Yukon) was next, with 17.5% of the federal Aboriginal offender population. By contrast, only 4% were in the Atlantic region<sup>xxxviii</sup>.

Aboriginal offenders are more likely to serve their sentence in institutions than in the community. Almost three-quarters (73%-1997) of Aboriginal offenders were incarcerated compared to 61% of non-Aboriginal offenders. While 31% of non-Aboriginal offenders were on some form of conditional release only 21% of the Aboriginal population were in the community<sup>xxxix</sup>.

Further, Aboriginal correctional staff make up only 1.7% of all Correctional Service of Canada personnel, and are also poorly represented in the provincial system, resulting in an Aboriginal staff-to-inmate ratio too low to offer adequate programs for First Nations offenders. They are also underrepresented in management and senior policy and decision making positions.

## **Summary**

The Aboriginal population is growing at a much faster rate than that of the Canadian population, but still has a lower life expectancy than the Canadian average. Aboriginal people also have much higher rates of suicide than the Canadian average and are incarcerated, usually for crimes related to social disorder rather than profit, at a disproportionately higher rate than other Canadians.

The situation demonstrates the inequalities in Aboriginal offender programs and services and points out clearly the need for alternative forms of incarceration, restorative justice programs, staff training and sensitivity to Aboriginal culture. The disproportionate levels of Aboriginal offenders in federal and provincial institutions can in part be attributed to the poor economic base of Aboriginal communities and the low number of Aboriginal people involved in correctional and judicial policy-making programs.

## **Part III: SOCIAL, ECONOMICAL AND POLITICAL FACTORS**

### **Overview**

Increasingly, research points to a correlation between socio-economic disadvantage and involvement in the criminal justice system. A larger proportion of the Aboriginal population in Canada suffers from socio-economic imbalances in comparison to non-Aboriginal Canadians, as demographic and socio-economic data illustrate. Justice programs may not be able to solve the problems generated by underlying social conditions, but judicial programming must take into account the social context in which it functions.

### **Poverty and Social Assistance**

The *Report of the Royal Commission on Aboriginal Peoples* states that Aboriginal people are among the poorest in Canada<sup>xl</sup>. Approximately half of all Aboriginal children, whether on or off-reserve, live in poverty<sup>xli</sup>. According to a 1991 census data on household incomes, more than 60% of Aboriginal households in Winnipeg, Regina, and Saskatoon were below the poverty line<sup>xlii</sup>. About 80 to 90% of female single-parent households in these cities were below the poverty line. Poverty among Aboriginal people is primarily attributable to unemployment, but it is also linked to low paying or part-time work, and continued participation in a hunting and trapping lifestyle<sup>xliii</sup>.

In 1990, approximately 28.6% of all Aboriginal people over 15 years of age depended on social assistance for at least part of the year, compared to 8.1% of the general Canadian population. The *Royal Commission* concluded that unemployment and reliance on social assistance is very high and likely to get higher<sup>xliiv</sup>. Many Aboriginal people told the *Royal Commission* that they despise their reliance on social assistance and wish to be more productive.

Aboriginal people cite certain barriers that prevent them from making the transition from dependency to self-sufficiency:

- the absence of on-reserve employment;
- an inadequate land and resource base to promote economic development ;
- a lack of educational and job skills, and
- discrimination in the labour market<sup>xlv</sup>.

Several viable solutions directed at alleviating poverty and economic dependency among Aboriginal peoples were proposed by the Royal Commission. The recommendations included recognizing past treaties and establishing new ones designed to provide a sufficient land and resource base to promote economic development, extending Aboriginal jurisdiction over economic development, and improving education and job skills training.

## **Education**

A significant barrier contributing to the inability of Aboriginal people to escape poverty stems from their lack of a formal education. Many Aboriginal children are confronted with unemployment and are caught up in the welfare cycle right from birth<sup>lxvi</sup>. In addition, many consider the pursuit of an education to be futile as they believe their job prospects to be extremely limited<sup>lxvii</sup>.

The experiences of Aboriginal children in the residential school system has contributed to a disenchantment with formal education opportunities. Aboriginal children were taught in a "White" educational system, which was better suited for White than Aboriginal children, and did not accommodate or acknowledge the different learning and teaching styles of Aboriginal peoples. Most First Nations children have parents who encountered negative experiences in the formal school system and it is obvious why these parents are reluctant to exert pressure on their children to travel to pursue post--secondary education<sup>lxviii</sup>. Furthermore, since the majority of Aboriginal parents and grandparents received little or no higher education, it is a large step for their children to see any value in pursuing it<sup>lxix</sup>. Those First Nations children from remote communities who do wish to attend high school must often go off-reserve, leaving behind their families and support network. Thereafter, it is difficult for some to return home and bridge their two worlds.

Statistics provide some idea of changing educational levels among First Nations peoples. The percentage of school-age children on-reserve enrolled in kindergarten, elementary and secondary schools has increased from 72% in 1960/61 to nearly 97% in 1992/93. This enrolment increase is due in large part to the decrease in the number of student dropouts. The percentage of First

Nations children who remain in school until grade XII has also increased from about 3% in 1960-61, to more than half in 1992/93.

Compared to the 17% of non-Aboriginal Canadians who did not attend high school, the statistics on Aboriginal people in 1986<sup>i</sup> were as follows (percentage of the population 15 years and over):

Status Indians (on-reserve)	45 %
Status Indians (off-reserve)	24 %
Inuit	53 %
Métis	35 %

The number of registered Aboriginal individuals enrolled in university increased from 60 in 1960/61 to 5,800 in 1985/86. Between 1985/86 and 1992/93, this population increased nearly four times to 21,566 students. However, while the rate of students attending post-secondary education continues to rise, the participation rate of registered Aboriginal student aged 17 to 34 remain below the non-Aboriginal average for the same age group<sup>ii</sup>.

The number of band-operated schools has also increased from 53 in 1975/6 to 353 in 1992/93. The proportion of children enrolled in band-operated elementary secondary schools is increasing (from 4% in 1975/6 to 49% in 1992/93), while the proportion enrolled in federal and other schools is declining (a drop from 41 % in 1975/6 to 5% in 1992/93). (It is noted that many of the band schools are now providing indigenous language classes).

Not only do barriers to education make it difficult for individuals to escape the "welfare cycle", they also impede economic development in Aboriginal communities. Many do not have the knowledge base or expertise to develop effective strategic plans for the economic development of Aboriginal communities<sup>iii</sup>.

## **Unemployment**

A high proportion of Aboriginal people are presently absent from the labour force. In 1986, approximately 57% of on-reserve First Nations and 46% of registered off-reserve First Nations people were not in the labour force, compared to roughly 12% for Canada generally. These differences may be related to lower education and literacy levels among Aboriginal populations. However, the low level of reported employment may be due in part to many Aboriginal people and others not identifying traditional Aboriginal activities, such as hunting, trapping and fishing, as work. Thus, potentially large numbers of Aboriginal people may have been omitted from the occupational categories in the census collections. Fishing, trapping, forestry and other related primary occupations are twice as common among Aboriginal communities compared to the rest of the Canadian population.

## **Lack of Capital**

The economic development of Aboriginal communities has been restricted by their difficulty in raising the capital required to establish business ventures<sup>iiii</sup>, and Indian Act restrictions with

respect to bank loans and securities. On an individual basis, prejudice and discrimination prevent many Aboriginal people from obtaining the financial resources necessary to support a new business<sup>liv</sup>.

Federal government policy related to Aboriginal capital is questionable. Although the federal government holds Aboriginal capital for both welfare and development initiatives, accumulated finances enter what is known as the "trust fund" and are invested in government bonds. This money, which is kept out of Aboriginal control, is reputed to be valued at well over \$100 million annually, and is held while many First Nations business ventures do not receive the necessary financial support<sup>lv</sup>. Aboriginal groups or individuals requesting money from the Department of Indian Affairs and Northern Development are regularly turned down. Each request must go through a series of bureaucratic procedures and be approved by the federal government, generally taking between one and five years for a grant to be accepted or rejected<sup>lvi</sup>.

### **Insufficient Business Infrastructure**

Numerous detrimental consequences result from inadequate access to business capital for Aboriginal communities. First Nations communities have been unable to develop the business infrastructure required to accommodate the purchasing needs of their populations. Therefore, when a band does manage to increase its per capita income, the money is not re-invested in the reserve or the band<sup>lvii</sup>. Residents of reserves with money to spend often do so outside the community, since there are so few businesses owned and operated by Aboriginal interests<sup>lviii</sup>. Even when money is spent on-reserve, the community may still not benefit. Of the few on-reserve businesses, many are owned by outside groups<sup>lix</sup>.

In addition to the problems associated with inadequate access to financial provisions, the development of business infrastructure is also impaired by the quality of the land on reserves. With the exception of a small number of resource abundant reserves, most are rural and have a limited primary production capacity<sup>lx</sup>. The majority barely provide any potential for agriculture, forestry, and trapping<sup>lxi</sup>. Less than 10 percent of all arable Aboriginal land of fair to good quality is under cultivation and, under current conditions, well over 300 additional farms could be operating. Although First Nations lands contain over 11,000 square kilometres of forests and commercial yield potential, only a small amount is presently being harvested<sup>lxii</sup>. Thus, a large proportion of the Aboriginal communities' limited existing potential for agricultural and forestry development is not utilized.

### **Land Claims**

Despite historical evidence of unfair practices in obtaining land from Aboriginal people, Canadian governments have been reluctant to resolve land claims disputes. Legal and political barriers have prevented Aboriginal bands from proceeding with many land claims, discouraging economic development within their communities. Because of the structure of the governing bureaucracy and legislation, these claims were either suppressed or simply not defined as bona fide claims<sup>lxiii</sup>. In fact, until the passage of the Indian Act in 1951, Aboriginal communities required the federal government's approval before they could launch proceedings against the

government<sup>lxiv</sup>. In addition, the government prohibited the use of "Indian money" to support a lawyer to pursue a claim<sup>lxv</sup>.

Land claims are further hampered by the fact that the federal government refuses to discuss any claims they feel are inadequately researched<sup>lxvi</sup>. The cost of carrying out such research and any subsequent extended legal battle with the federal government can cripple a band financially. Although the federal government is responsible for providing Aboriginal bands with access to legal services in a claims dispute, these communities are responsible for making payments (including interest) on loans from the Crown, which ironically, are incurred to pursue these claims in the first place<sup>lxvii</sup>. The federal government, given its comparatively unlimited access to financial resources, can "drag on" the claims process through appeals, thus reducing the potential for Aboriginal success in a land claim dispute.

Today, many comprehensive claims, and even larger specific claims, have been resolved through negotiation in order to minimize potential losses through the courts<sup>lxviii</sup>. In view of the negotiation mechanism, many Aboriginal leaders still regard the process as biased in favour of the federal government. As a result of the disparity in the bargaining power of the two sides, negotiations shift toward compromises by First Nations bands.

### **Housing and Living Conditions**

An important indicator of the quality of living conditions is the proportion of a population living in crowded dwellings. The size of the average Aboriginal family tends to be larger than that of an average non-Aboriginal family. Accommodations on-reserve are 16 times more likely than other Canadian homes to have more than one person per room. Off-reserve Aboriginal dwellings are 6 times more likely than other Canadian dwellings to be crowded<sup>lxix</sup>.

In addition to inadequate housing, poor living conditions create additional problems. Testimony and briefs submitted to the *Royal Commission* gave evidence that living conditions, with respect to water, sanitation and housing conditions in many Aboriginal communities, is comparable to developing countries<sup>lxx</sup>. Sydney J. McKay of the Manitoba Métis Federation told the *Royal Commission* that "the only facilities that seem to have the running water in northern communities are the stores, [and] of course the Royal Canadian Mounted Police, fire halls, nursing stations, and teachers residences<sup>lxxi</sup>.

Poor living conditions, lack of clean water and safe waste disposal can lead to higher rates of sickness and possibly death. *The Royal Commission Report* states that poor housing has been linked to infectious diseases, and non-infectious respiratory diseases such as asthma. Over-crowding is a crucial factor in the spread of infectious diseases<sup>lxxii</sup>. *The Royal Commission Report* also notes that water, sanitation and housing conditions affect mental and spiritual health. Over-crowding contributes to mental illness, especially where domestic violence is concerned<sup>lxxiii</sup>.

### **Alcohol Abuse**

Of all addictive substances, alcohol poses the greatest threat to Aboriginal people and their communities. According to the Canadian Centre of Substance Abuse (CCSA), one in five people

admitted to hospitals for alcohol-related illnesses are Aboriginal. The CCSA also reports that alcohol psychosis found in Aboriginal communities is four times the national average.

Alcohol abuse is associated with unemployment, family violence, criminal behaviour, suicides, accidents and the general inability to succeed<sup>lxxiv</sup>. Alcohol abuse is considered one of the single largest contributors to the disproportionate levels of First Nations offenders within the criminal justice system. A recent report on conditions in four northern Ontario Aboriginal communities found that approximately 80 percent of a criminal offences involved alcohol or solvent abuse on the part of the accused<sup>lxxv</sup>.

Aboriginal addiction has been described as: "part of a circle of oppression, despair, violence and self--destructive behaviour that must be addressed as a whole."<sup>lxxvi</sup> According to the *Royal Commission*, the most successful alcohol treatment programs are those that follow a model of holistic treatment, taking all of these factors into consideration when treating alcohol abuse, including loss of self-esteem and cultural identity<sup>lxxvii</sup>.

### **Solvent Abuse**

Solvent abuse also poses a threat to Aboriginal communities, particularly Aboriginal youth and children. In the *First Nations and Inuit Community Solvent Abuse Survey and Study*, almost half (48.81%) of the Aboriginal communities that responded recognized solvent abuse as a problem affecting the entire community<sup>lxxviii</sup>. Solvent abuse is more common in northern and remote communities where social and economic structures may not be as strong<sup>lxxix</sup>, The Study also discovered respondents began using solvents at a very young age with half abusing them between the ages of 4 and 11. Unfortunately, the age of first use is becoming younger<sup>lxxx</sup>.

Aboriginal peoples identified these conditions as contributing to solvent abuse<sup>lxxxi</sup>:

- loss or absence of cultural identity;
- absence of family and/or community support;
- lack of awareness of the effects of solvent abuse;
- lack of spiritual guidance, and
- presence of other forms of abuse, such as sexual, physical, verbal or mental.

Solvents are attractive to adolescents for a variety of reasons. They are legal, inexpensive, often more accessible than drugs or alcohol, and have almost immediate effects (rapid mood elevation can occur within 15-45 seconds). Solvent users can also display a variety of other symptoms such as blurred vision, nausea, and slurred speech with chronic abuse potentially resulting in brain damage, paranoid psychosis, and heart failure.

### **Domestic Breakdown**

The percentage of single parent families among Aboriginal people is about twice the overall Canadian figure. Approximately five times more single-parent families are headed by women than men<sup>lxxxii</sup>.

### *Aboriginal single parent families*

off-reserve	(30% of all families)
on-reserve	(24% of all families)

### **Domestic Violence**

Domestic violence can include physical violence, sexual, psychological, and economic abuse (where women and the elderly are dominated by another family member who controls their finances). A Statistics Canada (1993) survey found that 51% of Canadian women have been physically or sexually abused at least once by the age of 16, and 25% of married women have been physically or sexually abused by their spouses<sup>lxxxiii</sup>. In contrast, a study conducted by the Ontario Native Women's Association reported that 80% of Aboriginal women were victims of violence. Of this total, 87% had been abused physically and 57% had been sexually abused<sup>lxxxiv</sup>. In addition, death caused by a violent act occurs three times more frequently within Aboriginal than non-Aboriginal communities with this rate even higher among the Inuit<sup>lxxxv</sup>.

Sharon Caudron, Program Director for the Women's Resource Centre of Hay River in the Northwest Territories, described the price that children pay when domestic violence occurs - "The cost to our children is hidden in their inability to be attentive in school, in feelings of insecurity and low-esteem and in acting out behaviour which may manifest itself in many ways, such as vandalism, self-abuse, bullying; and often the children suffer in silence."<sup>lxxxvi</sup>

The *Royal Commission* pointed out ways that Aboriginal domestic violence is distinct from non-Aboriginal:

- Aboriginal domestic violence does not rest within the boundaries of the family unit but permeates the whole community;
- dysfunctional family relations can be traced back to deliberate intervention on the part of the Crown to disrupt the First Nations family, and
- devaluing of Aboriginal traditions and language destroys cultural pride and identity and sets the stage for violence within Aboriginal communities<sup>lxxxvii</sup>.

### **Suicide**

Suicide is a significant concern in many Aboriginal communities, is two to three times more common among Aboriginal peoples and is also five to six times more prevalent among Aboriginal youth than non-Aboriginal youth<sup>lxxxviii</sup>.

According to Aboriginal tradition, suicide was rare in Pre-colonialism times because it was viewed as unacceptable. Those who did commit suicide were generally the sick or elderly who felt they could no longer contribute to their community and their deaths were perceived as acts of self-sacrifice. In First Nations communities today, suicide is more common among the young and usually results from feelings of hopelessness and despair<sup>lxxxix</sup>.

The following factors are often linked to suicide<sup>xc</sup>:

- continuous family disruptions and instability
- family history of mental health problems
- alcohol and/or drug abuse
- physical and/or sexual abuse, and
- extended periods of grief

## **Self-government**

Self-government initiatives reflect an attempt on the part of Aboriginal communities to regain the power to determine their own futures. Autonomy objectives vary among First Nations communities, requiring Canadian governments to provide a flexible framework to accommodate responses to diverse Aboriginal demands and interests. Self-government entails empowering Aboriginal peoples with control over their culture, language, heritage and recognizing them as distinct peoples. The federal government supports "community self-government," which provides band councils with more autonomy. The provincial and federal governments must make negotiating self-government and land claims with Aboriginal groups a priority.

It has become increasingly clear to Aboriginal people that the Canadian criminal justice system is not addressing their needs at a satisfactory pace, including their demands for more control and authority in resolving criminal disputes within their communities. Self-government would return control of Aboriginal communities back to Aboriginal authorities to decide upon appropriate judicial decisions. The fight to self-government includes the right to a separate Aboriginal justice system based upon Aboriginal values, philosophies, customs, and traditions. The issues of crime, punishment, and judicial policy, invariably debated in non--Aboriginal communities, needs to be examined in Aboriginal communities, as they decide for themselves what is best for their community and those harmed by crime. An independent Aboriginal justice system should incorporate the values, philosophies, activities and practices of Aboriginal communities and ensure the delivery of culturally relevant programs and services including certain justice, law enforcement and correctional programs.

## **Summary**

The social and economic conditions outlined in this section attempt to illustrate a correlation between these factors and Aboriginal criminal conduct. Poverty, inadequate educational opportunities, unemployment, poor living conditions, alcohol abuse and domestic violence, among other factors, all contribute to constrain cultural identity and promote feelings of hopelessness and despair. It is clear that the Canadian criminal justice system presently is not meeting the needs of Aboriginal peoples. It is acknowledged that simply establishing First Nations self government will not fully resolve all Aboriginal judicial problems but this change in policy should be regarded as a very positive step.

## **Part IV: ABORIGINAL PEOPLE AND THE JUSTICE SYSTEM**

### **Overview**

Over the past thirty years, there have been numerous studies, reports and justice inquiries across the country, and a growing body of statistical information, that confirm that Aboriginal peoples experience disproportionately high rates of crime and victimization, are over-represented in the court and the correctional system, and further, feel a deep alienation from a justice system that is to them foreign and inaccessible, and reflects both overt and systemic racism. And the costs, in both human and fiscal terms, are seen to be not only exorbitant, but also spiraling.

Through persistent dialogue with various levels of government, Aboriginal communities across Canada have gradually begun to explore the possibility of administering various components of the criminal justice system. This has been a slow process, with the greatest strides achieved over the past two decades. Unfortunately, many problems still exist within the current relationship between Aboriginal offenders and the judicial system. Of principal concern is the disproportionate number of Aboriginal offenders in the justice system and the necessity to find methods to remedy this situation.

Aboriginal people often experience some of the following problems with respect to the criminal justice system:<sup>xcii</sup>

- Aboriginal accused are more likely to be denied bail;
- more time is spent in pre-trial detention by Aboriginal people;
- Aboriginal accused are more likely to be charged with multiple offences, and often for crimes against the system;
- Aboriginal people are more likely not to have legal representation at court proceedings;
- Aboriginal clients, especially in northern communities where the court party flies in the day of the hearing, spend less time with their lawyers;
- as court schedules in remote areas are poorly planned, judges may have limited time to spend in the community;
- Aboriginal offenders are more than twice as likely to be incarcerated than non-Aboriginal offenders;
- Aboriginal Elders, who are also spiritual leaders, are not given the same status as prison priests and chaplains, in all institutions, and
- Aboriginal people often plead guilty because they are intimidated by the court and simply want to get the proceedings over with.<sup>xciii</sup>

Criminologists Mary Hyde and Carol LaPrairie discovered that Aboriginal crime is very +different from non-Aboriginal crime. Their study found a higher proportion of violent and social disorder offences were committed by Aboriginal than non-Aboriginal offenders. Fewer property offences and almost no crimes for profit, such as drug trafficking, fraud, and armed robberies, were committed by Aboriginal people. Petty offences constitute the majority of

Aboriginal crime and, of the violent crimes committed, a high proportion (a minimum of 41.4%) were directed against family members.<sup>xciii</sup>

A study of Aboriginal admissions to provincial correctional centres revealed that 50% of the offences committed by these offenders were alcohol-related. Only 10% of crimes committed by all Aboriginal offenders were against persons, with the majority of these being against other Aboriginal people. These trends indicate that Aboriginal offenders are incarcerated in the provincial correctional system for minor infractions and reflect social, rather than criminal, problems.

### **Disproportionate Levels of Aboriginal Incarceration**

Canada's criminal justice system is rooted in a strong reliance on incarceration and, as a result, Canada is placed among the highest users of imprisonment in the world. Despite declining levels of most forms of crime, the Canadian public still supports incarceration and harsh punishment for criminal conduct. This emphasis on incarceration as punishment has had a detrimental effect on offenders, particularly Aboriginal offenders, on whom confinement places particularly onerous pressures, given their traditional relationships with the land.

In addition to the conditions that contribute to crime (poverty, poor education, unemployment, marginalization, substance abuse, sexual abuse and other forms of violence, dysfunctional families etc.) which are particularly prevalent in Aboriginal communities, several other factors contribute to the disproportionate levels of Aboriginal incarceration. These include limited rehabilitative options and resources, imprisonment of First Nations people for offences against the system such as fine default, fail to appear, non-compliance with restriction etc., and inadequate funding for community-based, proactive approaches to crime prevention. Further, a justice system that is not responsive to the experiences and needs of Aboriginal people also contributes to the high Aboriginal incarceration levels.

### **Language as a Barrier in the Criminal Justice System**

During court proceedings, communication problems can result in an unfair trial for the accused Aboriginal individual. The Canadian criminal justice system conducts proceedings in English or French and this can be a barrier if the accused does not understand the charges, the plea options or the availability of counsel. The following comment was made in a survey on Aboriginal involvement with the law:

"It appears that they have little understanding of their legal rights, of court procedures, or of resources such as legal aid and most Indian people enter guilty pleas because they do not really understand the concept of legal guilt and innocence, or because they are fearful of exercising their rights. In remote areas the Aboriginal people appear confused about the functions of the court, particularly where the Royal Canadian Mounted Police officers also act as Crown prosecutors, or where the magistrates travel about in police aircraft."<sup>xciv</sup>

Although many First Nations people today are educated in English or French speaking schools, for those who do not understand English or French, many problems can arise. The justice system does not provide pamphlets, signs or informational videos in Aboriginal languages and those who speak only Aboriginal languages are not permitted to be jurors. Translation is provided only for the accused and the court party, thus excluding other community members. Problems can also occur when the individual called upon to interpret for the Aboriginal offender is not trained for this task and has limited knowledge of legal concepts.

### **Aboriginal Values and the Justice System**

The divergence between Aboriginal and Euro-Canadian values has also contributed to the high proportion of incarcerated Aboriginal offenders. Many values common to First Nations groups are fundamentally different to the non-Aboriginal justice system.

The following are values common to many Aboriginal communities:<sup>xv</sup>

- desire for community harmony;
- avoidance of confrontation and adversarial positions;
- preservation of relationships;
- reluctance to show emotions;
- generosity and sharing;
- respect for others and individual freedom (non-interference);
- teaching through example (non-interference and conflict avoidance values), and
- respect for life (human and otherwise).

Aboriginal peoples have traditionally used ridicule, avoidance, shaming and teasing to maintain order and community harmony. Historically, measures such as banishment and the death sentence were resorted to only where the actions of an individual had placed the survival of the community at risk.

In his article "Justice and Aboriginal People", James Dumont contrasts Aboriginal values with non-Aboriginal values:<sup>xvi</sup>

<i>Aboriginal Values</i>	<i>Non-Aboriginal Values</i>
Get along with group (conformity)	Get ahead, or on top of the group
Get ahead for the group	Get ahead for oneself
Focuses on the present	Focuses on the future
Does not show fear when faced with difficult situations	Does not always face difficult situations with an impassive face
Uses nature and maintains reverence for it (has respect for and a relationship with the	Uses nature for personal

land)	
Awareness of the Creator	Spirituality is often in the background of one's life
Acts of religion are spontaneous and can occur at any time	Religion is compartmentalized (eg. Religious acts are restricted to certain days of the week)

Conflicts arise when Aboriginal values mix with the Canadian justice system. In many Aboriginal communities it is unacceptable to express emotions such as anger, grief or sorrow. According to Rupert Ross, in his book, *Dancing with a Ghost*, this tendency to put forward an emotionless front may be traced back in history when the survival of an Aboriginal community depended on the suppression of any emotions which could potentially threaten the family, tribe or clan. Ross, a Crown prosecutor with extensive experience working with Aboriginal people, found that Aboriginal witnesses often described traumatic events in a flat emotionless fashion.<sup>xvii</sup> This tendency can often be misunderstood by the court and by psychiatrists responsible for writing psychiatric assessments of offenders. As Ross indicates, many of the assessments indicate that Aboriginal offenders are "Unresponsive", "uncommunicative", and "uncooperative".<sup>xviii</sup>

Judge Murray Sinclair notes that the legal concept of innocence/guilt is not granted the same importance by Aboriginal cultures as it is in the Canadian criminal justice system. In Aboriginal communities, guilt is usually secondary to the main issue: the primary concern is that 'something is wrong and it has to be fixed.' Because the main objective is the restoration of harmony rather than the imposition of punishment, the accused is more likely to admit wrongdoing. Judge Sinclair suggests that perhaps this explains why so many Aboriginal people plead guilty when in court.<sup>xcix</sup>

The following table demonstrates the conflict between Aboriginal and non-Aboriginal values in a court setting:<sup>c</sup>

	<i>Western justice</i>	<i>Traditional Aboriginal justice</i>
<b>Justice system</b>	-Adversarial	-Non-confrontational
<b>Guilt</b>	-European concept of guilty/not guilty	-No concept of guilty/not guilty
<b>Pleading guilty</b>	-The accused has the right against self-incrimination. Thus, it is not seen as dishonest to plead not guilty when one has actually committed the offence (interference come into play here)	-It is dishonest to plead not guilty if one has committed the crime  (values of honesty and non-interference come into play here)

<b>Testifying</b>	-As part of the process, witnesses testify in front of accused	-Reluctance to testify  (it is confrontational to testify against the accused while in his/her presence)
<b>Truth</b>	-Expectation to tell the "whole truth"	-It is impossible to know the "whole truth" in any situation
<b>Witnesses</b>	-Only certain people are called to testify in relation to specific subjects	-Everyone is free to give their say.  -Witnesses do not want to appear adversarial and often make every attempt to give answers that please counsel, thus often changing their testimony
<b>Eye contact</b>	-Maintaining eye contact conveys that one is being truthful	-In some Aboriginal cultures, maintaining eye contact with a person of authority is a sign of disrespect
<b>Verdict</b>	-Accused is expected to show, during proceedings and upon a verdict of guilty, remorse and a desire for rehabilitation	-Accused must accept what comes to him/her without a show of emotion
<b>Incarceration / probation</b>	-Means of punishing/rehabilitating offender	-Completely absolves Aboriginal offender of responsibility of restitution to victim
<b>Function of justice</b>	-Ensure conformity, punish deviant behaviour and protect society	-Heal the offender  -Restore peace and harmony to the community  -Reconcile the offender with victim/family that has been wronged  -Punishment is not the objective

**Aboriginal**

**Youth**

Many Aboriginal youth today face numerous obstacles. They live near or below the poverty line, many of their families are dealing with histories of substance, violence and illness, they have limited access to educational or recreational facilities, and they have few employment opportunities. The ensuing hopelessness, despair, and boredom often leads to petty offences and, for some, going to jail can be an escape from a desperate situation.<sup>ci</sup> As a result, Aboriginal youth face an increasing number of charges and young offenders issues have been of primary focus in recent Canadian criminal justice debates.

Aboriginal youth are faced with a hurdle that non-Aboriginal youth do not encounter: "They must try to adapt to mainstream Canadian society while at the same time attempt to learn and retain their traditional culture."<sup>cii</sup>

Further to input from Aboriginal leaders, and consistent with Sections 4 and 69 of the Young Offenders Act, a number of alternative measures programs and Youth Justice Committees were established within Aboriginal communities. These initiatives aim to keep youth out of the court system and firmly rooted in their communities. However, referrals to alternative measures have not been widely used in cases involving Aboriginal young offenders. This can be seen in the results examined by the Cawsey Task Force in Alberta. This task force studied youth offenders between the years of 1986 and 1989 and found that only 11.1% of Aboriginal young offenders were referred to the alternative measures program, compared with a 33% referral rate for non-Aboriginal offenders.<sup>ciii</sup> In addition, Aboriginal youth offenders spend, on average, longer periods of times in custody than non-Aboriginal young offenders for the same offences.

Aboriginal young offenders living in remote communities often experience:

- difficulties with acquiring legal counsel for trial,
- trial delays due to scheduling and transportation problems of judges, and
- complications in the maintenance of detainment facilities for youth offenders separate from those for adult offenders because of their remote locations.<sup>civ</sup>

As a result of these obstacles and the discrepancies in applying alternative measure to Aboriginal youth offenders, Aboriginal communities have been spurred on to take the initiative to implement alternative measure programs as well as Youth Justice Committees to assist their youth.

The *Report of the Royal Commission on Aboriginal Peoples* clearly demonstrated the judicial system has not always been just or fair to First Nations peoples. The federal and provincial governments have recently undertaken a number of initiatives (as discussed in Part V) designed to reduce the number of Aboriginal offenders within correctional facilities. A comprehensive strategy must advanced and implemented in order to deal with the over-representation of Aboriginal inmates in provincial and federal correctional institutions.

## **Summary**

The Canadian criminal justice system is based on Euro-Canadian values and, as a result, often conflicts with Aboriginal values. High levels of incarceration, increased focus from law

enforcement, language barriers, conflicting values and conceptual frameworks regarding crime and punishment, as well as particular issues faced by First Nations youth, all contribute to the failure of the criminal justice system to meet the needs of Aboriginal people.

## **PART V: CHANGES WITHIN THE PRESENT SYSTEM**

### **Overview**

For the past several decades, Aboriginal offenders have been labeled and identified as a people having special needs. This is a reflection of both the high levels of Aboriginal incarceration within the correctional system, as well as the special status of Aboriginal culture within Canada. As a result, specific Aboriginal programs and policies have been developed at the federal, provincial, and territorial levels. These initiatives are based on the assumption that disruption and/or loss of culture are at the root of Aboriginal crime. Some policies and programs have and are being developed based on a belief that a renewal in culture is the solution.<sup>cv</sup>.

Present federal government policies and initiatives are premised on consultation with Aboriginal political bodies, provincial and territorial leaders. The aim is to build an enhanced relationship between all the participants involved with Aboriginal justice issues that is based on trust, dignity, and equitable participation. Therefore, according to federal mandates, policy objectives for improved justice administration for Aboriginal people must be practical and focused on the achievable with all participants willing to support reform.

Following the First Ministers Conference on Aboriginal Affairs in 1987, the federal government began to assume a leadership role in formulating a commitment to establish a new relationship with Aboriginal peoples, a partnership based on respect and trust. It was envisioned that through such a partnership, a practical agenda for reform could be shaped and implemented. In 1996, the federal government reiterated this commitment in these words in the Red Book, *Creating Opportunity*:

The government is committed to building a new partnership with Aboriginal peoples that is based on trust, mutual respect and participation in the decision making process. (p. 98)

The role of the government will be to provide Aboriginal peoples with the necessary tools to become self-sufficient and self-governing. (p. 97)

The government will assist Aboriginal communities in their efforts to address the obstacles to their development and to help them marshal the human and physical resources necessary to build and sustain vibrant communities. (p. 97)

The government will act on Aboriginal justice issues as a priority and will consider

major reforms to the present justice system to accommodate the unique cultures of Aboriginal peoples. (p. 102)

During the nineties, the federal government introduced initiatives designed to break new ground in the provision of justice services to Aboriginal peoples, in order to make the system more responsive to Aboriginal concerns, needs and aspirations. Four innovative strategies introduced sweeping changes in the areas of policing and law enforcement, justice and sentencing, and corrections.

The Correctional Service of Canada commenced implementing the recommendations of the 1987 Task Force on Aboriginal Peoples in Federal Corrections. It also initiated the Task Force on Federally Sentenced Women, which recommended the establishment of a Healing Lodge for Aboriginal Women, and entrenched the vision that moved the concept of incarceration beyond punishment. In 1991, the federal government also introduced two new policies, the First Nations Policing Policy, which brought Indian policing to on-reserve communities, and the Aboriginal Justice Strategy, which introduced innovations in sentencing, diversion and dispute resolution.

### **First Nations Policing**

The First Nations Policing Policy (FNPP) was introduced by the federal government in June 1991 to provide First Nations communities on Indian reserves, certain Indian communities on Crown land and Inuit communities across Canada with access to police services that were professional, effective, culturally appropriate and accountable to the communities they serve.

The FNPP, administered by the Department of the Solicitor General since April 1992, operates on the principle of partnership. Under the policy, the federal, provincial and territorial governments and First Nations communities negotiate tripartite agreements for police services that meet the particular needs of each community.

An independent review of the first five years of operation of the FNPP found the policy framework to be "relevant, sound and on-track". The review also found that provincial, territorial and most First Nations partners believe the tripartite process is the most effective way to address First Nations Policing at this time.

The federal government reaffirmed its ongoing commitment to the FNPP in 1996, and approved minor revisions to highlight its public safety dimension, to support First Nations to become self-sufficient and self-governing, and to maintaining partnerships with First Nations based on trust, mutual respect and participation in decision-making. It also assumed responsibility for promoting more effective policing for Aboriginal Peoples residing off-reserve. Policy principles pertaining to the implementation of the FNPP address such issues at the quality and level of service; responsibilities and authorities, responsiveness to First Nations cultures and needs, police service options, selection of police service models, implementation of new arrangements, police accountability and independence. police oversight, legislative framework, and cost shared arrangements.

Aboriginal policing has become an important first step in addressing the need to make the justice

system more responsive and culturally sensitive to the requirements of Aboriginal people. Some of the benefits of these programs include:

- decreased number of arrests;
- decreased tension when an Aboriginal police officer is involved, and
- combination of police training with an officer's knowledge of and commitment to the community.

However, it is also note that many First Nations police forces, such as the Dakota Ojibwa Police, the first tribal police force of its kind, established in 1978, face problems caused by ongoing funding uncertainties. Many forces have been unable to plan adequately for the long term and experience high attrition rates because of low salaries and the pressures to provide police services for Aboriginal officers among family and/or friends on-reserve. They also do not always have proper detachment offices or housing. As with many of the federal and provincially funded programs (not necessarily limited to criminal justice initiatives), insufficient resources to adequately implement new programs appear to only compound the problems experienced in Aboriginal communities. Non-Aboriginal political bodies are beginning to recognize the importance of supporting policies designed to address important Aboriginal criminal justice issues and to maintaining their commitment to fund these programs.

### **Aboriginal Justice and Aboriginal Representation Within the Judicial System**

In 1991, the federal government also approved the Aboriginal Justice Initiative, and the Department of Justice became responsible for its implementation. During the first five years, it conducted a wide range of consultations with Aboriginal communities, and supported over 600 projects exploring new approaches in the provision of justice services. In 1996, the initiative was renewed as the Aboriginal Justice Strategy, and the Department of Justice was mandated to:

- Negotiate the justice components of agreements negotiated under the Aboriginal Self - Government Policy
- Negotiate agreements pertaining to the administration of justice with 25-30 First Nations, Inuit and North of 60 degree latitude Métis communities intending to enter into self-government negotiations within five years;
- Negotiate agreements that would give the Aboriginal community in up to 12 urban and rural communities off reserve a significant role in dealing with the Aboriginal accused;
- Establish an Aboriginal Justice Learning Network to serve as a vehicle of communication between the mainstream justice system and Aboriginal communities.

A range of Aboriginal justice strategies and initiatives are now being implemented across the country. These include:

- increased appointments of Aboriginal judges, justices of the peace, police officers, corrections officers/workers and court workers;

- establishment of Aboriginal justice of the peace courts under the Indian Act;
- cross-cultural education of non-Aboriginal judges, lawyers, police, corrections officers/workers, and
- incorporation of Aboriginal processes such as diversion programs, elders panels, and sentencing circles into the present criminal justice system.

As a result of having so few First Nations people working within the judiciary, many Aboriginal accused of a crime appear in court without properly understanding their rights, court procedures or the adversarial nature of the system. Expanding the Aboriginal representation within the judiciary:

- leads to a greater understanding of Aboriginal values and traditions,
- influences their participation in court in a positive manner,
- improves relations between criminal justice authorities and Aboriginal peoples;
- is of economic and social benefit to individual communities, and
- generates pride among Aboriginal communities.

The employment of Aboriginal court workers has aided Aboriginal offenders in many ways. Aboriginal judicial employees assist offenders with improving their understanding of the justice process, they help the accused find counsel and interpretation for counsel, assist with preparations for bail hearings, pre-sentence reports, and provide recommendations for probation orders.

The *Manitoba Justice Inquiry* suggests the enactment of an *Employment Equity Act* to ensure that Aboriginal peoples are hired at all levels within the justice system, with targets that reflect the numbers of Aboriginal offenders served by the judicial system in any given area. *The Inquiry* also "presses the need for more Aboriginal lawyers. In 1988, there were 43,000 lawyers across Canada and yet there were fewer than 200 First Nations lawyers.<sup>cvii</sup> In order to hire more Aboriginal judges, more Aboriginal lawyers are required.

Over the past 10-15 years, the majority of both provincial and federal government spending on Aboriginal justice programs has been invested in creating a representative criminal justice system.

### **Sentencing Circles**

Sentencing circles are a good example of a culturally-sensitive approach to justice. Many Aboriginal offenders, after their initial contact with the criminal justice system, complain of the judicial system's inability to offer culturally appropriate rehabilitation. Increasing levels of Aboriginal crime have also prompted changes with the judicial system. As a result, the past several years have seen a shift in policy, within many levels of governments, to a judiciary that responds not only to the cultural needs of Aboriginal offenders, post-arrest, but also the initiation of proactive crime prevention programs. One such approach designed to meet Aboriginal cultural needs is the sentencing circle program.

Sentencing circles first gained the attention of the Canadian criminal justice system in the early 1900s within the Yukon Territorial Court. The initial case involved a repeat offender for whom the conventional judiciary offered little to no option for rehabilitation, but with whom a community circle process proved effective. Sentencing circles involve the accused, his or her family, judiciary representatives, members of the accused First Nations community, and if the offence involved a victim, he or she may also participate. The circle does the following:

- approaches the conflict in a culturally appropriate manner;
- contributes to a wide ranging examination and exploration of ways to change the circumstances of the offender;
- brings together the resources of family, community, and institutions to find a solution, and
- makes recommendations to promote law-abiding behavior rather than punishment for the criminal act.

Many Aboriginal communities are developing *community justice committees* to address matters related to criminal behaviour.

### **Alternative Measures for Aboriginal Youth**

Provincial and territorial governments have recognized the importance of proactive approaches to crime and created new policy designs to meet the needs of First Nations youth. The following are descriptions of the types of programs dealing with Aboriginal young offenders intended to promote healing and their community reintegration.

#### *Diversion Programs*

In some communities, Diversion Council have been developed to deal with youth who have been charged with summary or minor indictable offences. The committee meets with the accused, his/her parents, the victim and the police authority. This program is set up to reflect concepts prevalent in Aboriginal justice including the importance of community and the concept of reconciling the parties in conflict. The youth can be required to offer an apology and/or pay restitution to the victim, or perform community service.<sup>cvi</sup> Both options keep the young offender out of the court system and in the community where he/she can be supported.

These types of programs allow for stakeholders to have their voices heard on the issue at hand. In addition, the community is provided the opportunity to play a role in the outcome.

#### *Bush Camps*

The premise of a bush camp is to remove the youth and place him/her in a remote camp to receive training in bush crafts and traditional ways of life and survival. The initial step of the program removes the youth from the community affected by the crime. The offender is then taught to play a useful role within the community and gains a sense of belonging and achievement. Upon completion, the programs allow for a successful re-integration process of the youth into the community.

The last 20 years has seen a strong acceptance of bush camps as a means of rehabilitation for both Aboriginal and non-Aboriginal youth. Due to the strong First Nations cultural connection with the land, it is believed these programs are of greater benefit for Aboriginal than non-Aboriginal people.<sup>cviii</sup>

### *Aboriginal Youth Justice Committees*

Aboriginal Youth Justice Committees (YJC) have increased in popularity across the country with provincial and territorial governments. Section 69 of the YOA provides legislative authority for the formation of YJCs. The committees consist of a selection of volunteers working together with various parts of the criminal justice system and community agencies to deal with the young offenders in a particular community. YJCs are formed with representative members of the Aboriginal community and a respected elder. Their objective is to identify the needs of the accused and recommend an appropriate sentence before the courts.

YJCs are an alternative to formal judicial proceedings and can serve a variety of functions. These responsibilities range from implementing culturally appropriate alternatives to court proceedings, mediation between parties of a crime, encouraging victims to participate in the criminal justice system, and providing an avenue of community empowerment by giving them an active role in the administration of the judicial process.

Criteria eligibility differs from committee to committee, but there are general parameters for deciding if a youth is eligible to have his/her case heard before a YJC, including:

- the youth must be 12-17 years of age at the time of the offence;
- he/she must have no prior criminal record,
- the offence must be deemed appropriate for the program (eg. property offences or theft), and
- the youth must accept responsibility and consent to participate in the program.<sup>cix</sup>

A committee considers all the evidence and arguments presented before them and decides upon a disposition. There are a number of possible decisions a YJC can hand down, including:

- a written or verbal apology to the victim;
- community service work,
- a written essay related to the offence, and/or
- abiding by curfew restrictions and/or counselling.<sup>cx</sup>

Although many benefits are derived from YJCs, there are several obstacles facing their widespread and successful implementation. Administrative expenses as well as those incurred by committee members are frequently not covered because of inadequate funding. Financial limitations also hinder a committee's ability to network and share information on a national scope. Finally, eligibility restrictions limiting the use of the committees to first time non-violent offenders excludes a large number of youth who could benefit from the program.<sup>cx</sup>

### **Federal Corrections**

The Corrections and Conditional Release Act (CCRA-1993) is the only piece of correctional legislation that includes implementation provisions for the delivery of Aboriginal correctional programs and services. It states that CSC shall "provide a range of programming designed to address the needs of Aboriginal offenders and contribute to their successful reintegration into the community."<sup>cxii</sup> Sections 79 to 84 of the CCRA recognize the special needs and unique environments of Aboriginal offenders and require the National Parole Board and the Correctional Service of Canada to develop policies and programs sensitive to Aboriginal needs and circumstances.

The Correctional Service of Canada (CSC) has played a leading role in developing and implementing ground breaking initiatives to advance Aboriginal Corrections over the past decade. The CSC Commissioner's Directive, Aboriginal Programs (1995) contains five policy objectives involving individual rights of Aboriginal offenders and their cultural practices. It directed that Aboriginal-specific programs be implemented, replacing regular existing initiatives or in addition to existing programs, when the circumstances deemed it necessary. Conditions where a replacement program was regarded as appropriate included situations involving language becoming an interfering factor, and differences in cultural approaches to learning becomes too large a hurdle to overcome.<sup>cxiii</sup>

Other innovations introduced by the CSC include the hiring of native liaison officers, the provision of Elders' spiritual services in institutions; and the operation of correctional facilities and healing lodges by Aboriginal communities. The Okimaw Ochi Healing Lodge for federal women offenders is a unique correctional facility designed to incorporate Aboriginal approaches to healing, personal growth and safe reintegration. The Pe Sakastew Centre for male federal offenders operates in a similar fashion.

CSC has developed other strategies to further advance Aboriginal Corrections. Key initiatives presently underway include the following:

- *A National Aboriginal Strategy* to ensure the provision of programs and services to meet the specific correctional needs of Aboriginal offenders and to increase the number of Aboriginal offenders safely and successfully reintegrated into the community. It addresses the development and implementation of Aboriginal programming in institutions, including those delivered under contract by Aboriginal organizations or individuals, and ensures that they are culturally designed and promote holistic healing.
- *Framework for the Enhanced Role of Aboriginal Communities*: A framework has been developed to provide the administrative parameters under which some or all of the federal correctional components can be transferred to Aboriginal communities
- *An Aboriginal Research Forum* brings together experts presently working in the field of Aboriginal research with a specific focus on correctional programs and practices.

CSC and National Parole Board (NPB) Advisory Committees have advisory boards whose duty it is to advise these agencies about Aboriginal issues. Both have mission statements and various policies addressing issues and concerns relating to the social and cultural differences of

offenders.<sup>cxiv</sup>

## **Provincial/Territorial Programs**

Some provinces, such as Ontario, Alberta, and British Columbia have designated justice branches or directorates to deal with Aboriginal issues and develop appropriate policies. The Aboriginal-specific policies found within the provinces and territories follow the same general principles/philosophies found at the federal level.<sup>cxv</sup> The only significant differences between the policies implemented at the different levels would be the number of programs offered.

Aboriginal specific programs include Native Liaison Services, Traditional Spiritual Practices, Substance Abuse Treatment, Aboriginal Literacy and Educational Programs, Cultural Skill, Community Reintegration, Sweat Lodge Ceremonies, Employment Training, and Anger Management and Family Violence Programs.<sup>cxvi</sup> The programs offered depend upon the demands within specific regions of the country.

## **Summary**

Different approaches are presently directed at reducing the number of Aboriginal people involved in the criminal justice system. Creating a representative judicial system, cross-cultural education for those involved in the system, and sentencing circles are some successful initiatives. It is important to recognize that within the First Nations justice approach, there is a diversity of traditions and processes to choose from and utilize appropriately. For example, sentencing circles appear to be foreign to the Inuit people but they understand its underlying healing approach. In addition, many alternative measures programs are in place designed to provide culturally suitable rehabilitative options for Aboriginal youth.

Aboriginal programs and policies have been developed at federal, provincial, and territorial levels, recognizing Aboriginal offenders have specific needs. The policies are important in developing treatment programs culturally appropriate for First Nations offenders. Aboriginal and non-Aboriginal correctional officials should be urged to be more active in taking advantage of legislation benefiting Aboriginal offenders. For example, Section 81 of the CCRA provides the opportunity for formal agreements between the Solicitor General of Canada and Aboriginal communities to take responsibility for the care and custody of Aboriginal offender.

## **CONCLUSION**

Historically, Aboriginal people have been subjected to a of forced assimilation. With time, Aboriginal people have become dependent upon the political, economic, and legal structures of the governing society. The Canadian judicial and correctional systems became mechanisms of social control with which to impose the way of life on Aboriginal people.

Aboriginal peoples have greatly suffered at the hands of the non-Aboriginal criminal justice system, a system that is culturally inappropriate for them. As a result, Aboriginal people are today faced with disproportionately high levels of incarceration. In addition, socio-economic factors affecting many Aboriginal communities (unemployment, lack of education, alcohol abuse, poor living conditions) are generally the precursors for criminal activity.

It is important to effect changes within the criminal justice system to respond to the needs of Aboriginal peoples, and eventually return the mechanisms of control back to Aboriginal communities, so that they may determine their own destinies.

## **PART VI. POINTS FOR DISCUSSION**

Impact of the Report on the Royal Commission on Aboriginal Peoples and the Government's response to the Report

A comprehensive, integrated and planned network of community support services for aboriginal offenders should be established.

Planning should be undertaken to identify resources to design appropriate community based service and co-ordinate these services across Canada. This will help Aboriginal offenders to live in their communities with the greatest degree of self-determination and self-reliance.

The reduction of the number of Aboriginal offenders within institutions must be a priority. An all-encompassing strategy must be developed to deal with the over representation of these offenders in provincial and federal institutions.

To help decrease Aboriginal incarceration, judges need to make use of sentences that avoid jail and respect Aboriginal culture. As alternatives to incarceration, judges should consider restitution, community service orders as well as decreased imposition of fines for those who can't pay.

In order to encourage rehabilitation, more Aboriginal youths must be referred to alternative measures programs.

Some proposed solutions to poverty and economic dependency among Aboriginal peoples are:

- recognition of past treaties and establishing of new ones to provide a sufficient land and resource base to promote economic development;
- extending Aboriginal jurisdiction over economic development,
- improving education and job skills training;
- eliminating obstacles which disadvantage Aboriginal job applicants

Justice programs may not be able to solve the problems generated by the underlying social condition, but justice programming must take into account the social context in which it functions.

More Aboriginal people need to be involved in every aspect of the justice system. We need to see the appointment of more Aboriginal judges, justices of the peace, police officers, prison guards, corrections officers, court workers and administrative staff.

The government needs to establish employment targets where Aboriginal people are concerned.

Employers could consider as part of their hiring requirements a proven ability to learn as opposed to the attainment of a specific level of education. Employers hiring for positions which require extensive contact with Aboriginal people should place the greatest emphasis upon knowledge of Aboriginal languages and culture.

Aboriginal students must be encouraged to attend post-secondary institutions, including law schools. Where admission to law schools is concerned, the schools should take into consideration life and work experiences and maturity level as well as the LSAT score and grade point averages. In addition, a one-year pre-law program could be beneficial in assisting Aboriginal students in gaining admission to law school in greater numbers.

There is a dire need for cross-cultural training within the justice system. It is essential for judges, police officers, lawyers, etc., to have a greater understanding of Aboriginal culture, values, traditions and history, as well as the socio-economic conditions which account for the over incarceration of Aboriginal peoples. Cross-cultural training has been made available to some police departments and civil servants, but very little has been offered to lawyers and judges.

Cross-cultural training should address the issues of racism and discrimination within the criminal justice system.

Aboriginal program and services must be developed to meet the demands of Aboriginal peoples. The federal government must encourage flexible, social and criminal justice programs, rather than imposing their justice system upon Aboriginals.

Support for Aboriginal justice system should include the values and philosophies, activities and practices of aboriginal organizations which delivers programs to Aboriginals.

Aboriginal people across Canada have an inalienable right to govern their own judicial affairs.

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