# 4.0 The Courts

*The Native person is behind the proverbial "8 ball" when it comes to justice being carried, when the whole justice system is located within another man's society and another man's laws and another man's gavel.*[1]

## Preamble

As the Task Force travelled through Alberta for almost a year to seek information on the criminal justice system, we heard very little criticism of the courts. The false sense could easily have been created that no problems exist with respect to the courts.

Many of the written briefs said little about judges and courts in Alberta. At public hearings, even less was expressed by Indian and Metis presenters, whether for or against the judiciary. This reticence could have been mistaken for total acceptance or even a silent indication of a bill of good health.

The absence of direct criticism of courts is understandable. Direct criticism is not the way of the Aboriginal people. Aboriginals are, by nature, non-confrontational. However, across the country, their mood has changed, as we saw at Oka, Quebec in the summer of 1990 and elsewhere. Today, the mood is one of being 'fed up' with Canadian institutions of government and law. For example, the false conviction and imprisonment of Donald Marshall, Jr. has brought the courts under very close, if guarded, scrutiny by the Aboriginal people.

Expressions of open discontent with the courts in Aboriginal communities in Alberta are rare. A few briefs were received by the Task Force which addressed reasons for this silence. For example, the Federation of Metis Settlements stated clearly:

> *The prevailing attitude present when Judges and Courts were discussed during the meetings and the interviews was one of fear and intimidation.*[2]

Another typical view underscored misunderstanding and alienation:

> *Most of us don't know much about the legal system and aren't informed enough to tell whether or not we are given fair judgement. We have no input or association with the Court system.*[3]

> *Indigenous people have been subjected to the legal system since the time of colonization but have had little opportunity to participate in the*

*legal system. The imposition of law without social sanction from within the Indigenous community has resulted in alienation from the law, in both the legislative and judicial processes.*[4]

Yet another view characterized the courts as:

*...a very scary and intimidating place for a Native person to be. Cultural differences, language barriers, poor counselling, very little or no understanding of the system and an almost total lack of support may all contribute negatively to the outcome of the trial.*[5]

These feelings and views are indicative of some deep underlying concerns.

The Task Force did not receive enough information from Aboriginals or from the courts to analyze thoroughly and discover the underlying reasons for the feelings of uneasiness. Clearly, the judiciary is generally unaware and has not attempted to address the concerns of Aboriginals in any meaningful, innovative or enlightened way. The impact of the criminal justice system on the lives of many Aboriginal people has been devastating. There is no escaping the fact that the courts have played a large role in this process.

It is clear that Aboriginal people do not feel that their views are being considered adequately or that these views are applied in Alberta courts. To them, the "white" justice system is partial and unfair. Aboriginal culture is not reflected or appreciated in the "white" system of justice.

Aboriginal people seek justice by wanting the courts to appreciate and respond to their life experiences. To achieve fairness, everyone in the courtroom, from Judges to administrators, must become informed, involved and interested in the Aboriginal world view.

There is ample statistical evidence to suggest that the Canadian criminal justice system is failing Aboriginal people. This failure was most clearly described in one major conclusion reached in the Donald Marshall Inquiry:

*From all of that, the evidence is once again persuasive and the conclusion inescapable, that Donald Marshall, Jr. was convicted and sent to prison, in part at least, because he was a Native person.*[6]

It would be an error to assume that the participation of more Aboriginal people in the current criminal justice system or the setting up of separate tribal justice systems would provide complete answers. The burden of reform and change must fall on all parties involved. Aboriginals realize that the clock cannot be turned back to the time when they were nomadic family-centred people living in the bush or on the prairies and they are making enormous attempts to adapt to the realities of today. However, they want to do this by retaining as much of their culture as they can. They have, for hundreds of years, willfully rejected assimilation and resisted the efforts of church and state to force them into mainstream Canadian society. We see that resolve continuing.

It is the responsibility of both the dominant Alberta society and the Aboriginal population of Alberta to assist each other in finding the accommodations that will allow Aboriginals, as minorities with distinct cultures, to live in peace and harmony in the larger society.

## Aims and Objectives of Courts of Law

Courts are tribunals for resolving disputes. They are established to determine contested rights or claims between or against persons, or to determine their penal liability when charged with offences prosecuted by agents of the Crown.[7]

According to Jerome Frank, the primary function of a Court is:

> *to render specific decisions of specific disputes, in order to bring about their orderly settlement, so as to prevent brawls which might cause social disruption. The Court is thus a peace-preserving device. It stops subversive aggression, keeps the peace, by deciding controversies. It meets crises of maladjustment by peaceable adjustments of conflicts. Just as, in our democracy, we have substituted political elections, peaceful revolutions, for revolutions by force, so we have substituted a sort of judicial or Courtroom duel for private war.*[8]

Associate Chief Judge Murray Sinclair of the Provincial Court of Manitoba remarked on Aboriginal views of the courts of Canada:

> *It is fair to say that aboriginal people generally regard the courts of our country as tools of oppression and not as vehicles of dispute resolution and positive influence.*
>
> *The vast majority of aboriginal contacts with the justice system even today involve appearances in our criminal courts as accused.*[9]

The concept of the court as a "peace preserving device" is quite consistent with the Aboriginal perspective. However, the Task Force was reminded that

> *in any discussion of the [Blood] tribe's traditional justice system that one must not apply a pre-existing Western European intellectual framework, because tribal customs and traditions developed independently and outside of the European cultural and intellectual heritage. Non-Indian academics schooled within the Western European educational system attempting to ascertain the meaning of tribal customs and traditions generally look for characteristics which remind them of a more primitive form of European concepts and institutions, such as, law, property and contract. That is to say, that they are essentially ascribing their own meaning to tribal customs and traditions, instead of perceiving their true nature and meaning from within the tribal context and world view.*[10]

The Blood Tribe's traditional notion of justice was explained to us:

> *Traditional approaches to justice were based upon the principle that every person should be given his due. This involved a reference to the tribal moral standard of the tribe. Acceptable behaviour was ascertained in light of the competing interests of the tribe. However, individual and group interest, if the occasion arose, would be sacrificed in favour of the greater tribal interest as a totality. As a result, social sanctions developed to protect individual interests as well as tribal interests, along with the appropriate machinery to enforce social sanctions. For the Blood Tribe this instrument was the IKUNUHKAHTSI which was called upon to settle disputes, carry out punishments, maintain order and tribal equilibrium, and to guard against and/or expel external aggression. The IKUNUHKAHTSI were normally composed of tribal chiefs or headmen, religious leaders, elders and/or respected warriors.*[11]

In both oral and written presentations, the Task Force was constantly reminded of the irrelevance of the Anglo-European system of justice to many Aboriginal people in Alberta. The Metis use a Cree term, "keum" or "keyam," which, simply put, means "that is okay, let it be that way."[12] Whenever the justice system does something to them, they shrug and say, "keyam."

Perhaps the most powerful reminder came from Mr. Rupert Ross, a Crown Attorney who practises in Kenora, Ontario, when he compared the court system to the historical, traditional Native system:

> *[For the Indians] the function of their dispute resolution was the real resolution of disputes. At the end of their process the disputants would, it was hoped, return to peaceful and co-operative co-existence, their "bad feelings" gone. They expected our courts to accomplish the same when they invited us into their communities. Little did they know that we don't even pretend to that goal. Our society is a society of strangers. Our judicial process doesn't aim at restoring friendship and harmony, for they don't exist in the first place. We aim only at deterring harmful activity. It is little wonder that an elder recently complained that the court doesn't do what it should do, that it only passes sentence, collects fines, takes off and "leaves us with the problem." ... In other words, they expected that our judicial system would accomplish - or at least aim for - the goal they had always felt was paramount. They were willing to put up with the "unethical" requirements of our adversarial process to see that goal attained. They have now come to realize that we don't even aspire to that goal. It is now the judgement of many bands that the price inherent in adopting our process is too great in light of that failure. Many want us to leave, taking our unproductive, perhaps destructive, judicial system with us. More voices join in the call for "self-government."*[13]

Clearly, until alternative systems are developed for Aboriginal people, the courts will have to adapt, evolve, and take into account the respective world views of Aboriginal peoples. Even without alternative systems, the dominant society will always have to adjust and deal with Aboriginal issues because many Aboriginals live in both cultures.

# Findings and Recommendations

## Term of Reference:

## Courts 4(c)

***to examine existing levels of community input and assess the feasibility of permitting a greater degree of participation by knowledgeable and respected Indian and Metis people in the sentencing process.***

### Ownership and Accountability of Courts

In the mid-1970's, when the Honourable Mr. Kirby conducted his study, it was clear that Alberta was going through a transition stage in the delivery of court services throughout the province.

The goal of the changes seems to have been to make the system professional, and to standardize and centralize it. This meant the eventual elimination of lay Judges and the incorporation of a more professional circuit court system. In many cases, the result was the removal of community involvement from the justice system. The Elizabeth Fry Society of Calgary addressed best the debilitating effects the removal of empowerment has on a community as a result of, for example, the establishment of circuit courts.

> *The greatest positive impact one person, society or government can have on another is to empower the other to be responsible for him/herself. Our current Criminal Justice System presents itself as an arbitrary user of power and control in the lives of the community.*

*This reality becomes even more painful when it is appraised by informed and interested groups within the community: The evaluation is poor. Our system has power; it does not empower.*[14]

Appointments to the Bench were limited to members of the legal profession with at least ten years of practice in good standing at the Bar. The practice of having lay Judges and a panel of lay persons advising a Judge was viewed by the Honourable Mr. Kirby as contrary to government policy. It would be "incompatible with the concept of the equality of all before the law which is fundamental to our system of justice."[15] When he addressed the Task Force, the Honourable Mr. Kirby stated that he had changed his view since he wrote his Report some twelve years ago. He saw room for lay persons to be more active in the criminal justice system. An example would be that of lay persons serving on lay sentencing panels and advising a Judge.[16]

As we state repeatedly in this Report, there are calls for a return to a more community-based delivery of all services within the criminal justice system.

Since the Honourable Mr. Kirby reported, Aboriginal lay persons have been advising judges in courts on sentences. This practice was recently instituted in Alberta by a Provincial Court Judge at Hinton. A similar committee advises the court on sentences of young offenders in Fort Chipewyan. The community and court endorse this practice.

Canadians, in general, hold the criminal justice system in high regard. This is understandable because for many, the system reflects their predominantly European heritage. This statement does not apply to Aboriginals.

*For them the courts, police, prisons and lawyers represent elements of a foreign system - our "injustice" system. The values represented by basic tenets of the general private and public law are not values to which they adhere. The emphasis on individuals and on personal rights as against the interest of the community is not shared by many aboriginal peoples living in Canada. The legal system is not viewed as a protector of what they hold dear, but, rather as an enforcer of non-aboriginal law upon them.*[17]

Aboriginals do not experience the courts as being accountable to their communities.

*Judges and Prosecutors must know the people and communities on whose behalf they are acting. They too must be accountable to the people.*

*These comments apply especially to Judges. These people are mere mortals like the rest of us. However, they pass judgement without knowing the circumstances that exist outside the walls of their Courtroom. Too often, offenders are dealt with in too lenient a fashion, released and sent back to the community to taunt and aggravate their victims and create more trouble and hardships for the community.*[18]

*We believe that a means of accountability should be imposed upon the judiciary. It is perhaps through this avenue, the perceptions of justice versus the facts of justice will come to light. We propose to implement a volunteer court monitoring program.*[19]

An underlying message of discontent is that the courts are too detached and not responsive to community needs.

A number of studies and reports by groups, royal commissions and governments, criticize strongly the treatment Aboriginal people have received at the hands of the criminal justice system in general, and the judiciary in particular. Judges, however, do not review and

address collectively the effect they have on Aboriginals. It has been stated that Judges do not understand what happens beyond the courtrooms because to maintain "judicial independence," they have been set apart from the communities they serve.

The Task Force frequently asked Aboriginal community leaders and others if they had ever met with a Judge to discuss in general terms how the court dealt with offenders who may have been creating havoc in their communities. The majority had never met a Judge in circumstances other than appearing in court. For most, the Chairman of the Task Force was the first Judge with whom they had ever met. We are of the opinion that criticism of the apparent detachment of Judges is problematic for the Judges themselves. Their legal training with respect to the law has included the principle of their independence. However, some legal scholars believe that Judges carry their separateness too far. As we say elsewhere, there can be no ownership or community involvement without the participation of the actors in the criminal justice system. Community meetings are an effective vehicle for learning about the particular and peculiar circumstances of a given community. We believe that this principle applies to Judges as well.

Donald J. Rosenbloom, a Vancouver lawyer, spoke about this theme to a large group of Judges from across Canada at a Western Judicial Education Workshop held in May of 1990 at Lake Louise, Alberta:

> *The Native and non-Native communities in Canada exist as two solitudes. All the trappings of judicial process and the judiciary's self-imposed arm's length relationship with the community at large even further distances the Native community from the predominantly white judiciary. This magnification of the schism between these solitudes impairs the Court's ability to effectively administer justice to the Native segment of our community and impairs the ability of Native people to understand the judicial process.*
>
> *You know the old saying about not criticizing until one has "walked a mile in the other person's moccasins". Well, the judiciary hasn't done much walking in Native moccasins and, for that matter, the Native community has not had much opportunity to walk in your judicial shoes.*
>
> *And both of you have come out the losers. The Native people have for the most part been denied sensitive and creative methods of disposing of their legal problems. But the losses to the judiciary may not be so obvious. Firstly, without knowing more about the Native culture and having personal contact with their communities, you discharge your judicial responsibilities less effectively than you would otherwise. But more importantly, you are denied the opportunity to learn about the Native cultures on a one-to-one basis through friendships and social activity.*[20]

Mr. Rosenbloom stated he would be interested in a survey to establish how many Judges had actually visited an Indian reserve for reasons other than the court, or how many Judges have actually spent time with Aboriginal people in a social, non-judicial context. The Task Force only conducted an informal survey of the communities we visited. We did not come across any example of Judges in a social, non-judicial context with Aboriginals.

Mr. Rosenbloom continued by admonishing the Judges:

> *When we confront the fact that many of you have spent a significant amount of time dealing with Native-related incidents, isn't it a sad commentary that so few of you have had the*

*privilege to really know Native people and their cultures.*

*But one might easily respond that the judiciary's general lack of familiarity with Native culture, Native political issues, and Native social problems is not the basis for these depressing statistics [Over-incarceration of Natives].*

*Well, it is my belief that a bench better informed of these issues will be more sensitive to the root problems within the Native communities which in turn will lead to positive results.*[21]

It is clear to the Task Force that the situation has changed substantially since the Honourable Mr. Kirby filed his Report in 1978. The Indian Association of Alberta addressed these changes when it argued for a First Nations Justice System and presented its views on the legal basis for such a system. It is clear that Indian Nations want more than mere accountability; they want to run their own systems of justice.

*The political growth of First Nations has reached the point where many of our First Nations are now asserting the inherent right to self-determination which was never surrendered or given up in the treaties.*

*Since Justice Kirby presented his report, "Native People in the Administration of Justice in the Provincial Courts of Alberta in 1978" the political, legal and constitutional position of First Nations in Canada has changed dramatically.*

*Our aboriginal and treaty rights are now incorporated into the constitution of Canada in Section 35 of the Constitution Act 1982 which provides:*

*"s. 35(1) The existing aboriginal and treaty rights of aboriginal peoples of Canada are hereby recognized and affirmed."*

*Our legal rights have been recognized by the Supreme Court of Canada, which made several rulings with far-reaching implications. The Supreme Court of Canada rulings provide directions for the federal and provincial governments to recognize, respect and uphold Indian aboriginal and treaty rights. The Supreme Court decisions are a guide for the federal and provincial governments' conduct in dealings with Indian First Nations.*

*The Indian First Nations aboriginal and treaty rights clearly include the right to make rules that govern conduct on our own lands and give us a say in how the laws of Canada affecting First Nations are to be enacted and enforced.*

*Just as Canada follows both common law and statutory law, Indian First Nations have our own traditional law and may also establish our own statutory laws.*

*Federal and provincial governments must stop treating First Nations as subservient and subordinate peoples. We have rights by virtue of our aboriginal heritage and our solemn treaties with Her Majesty the Queen. The federal and provincial governments must recognize these rights and treat us accordingly.*

*We maintain the outside governments cannot unilaterally impose their criminal justice system upon us. As co-signatories to the treaties, we have the right to determine our role and relationship as partners in the treaty agreement.*[22]

If the status quo is maintained, as will be necessary in many areas for some time to come, we believe that Judges will have to start networking with Aboriginal communities to bring down the barriers between the two "solitudes" described by Mr. Rosenbloom. Mr. Rosenbloom has suggested that, as a good start, each judicial district have a Judge or a committee of Judges to promote judicial Aboriginal liaison. We believe such a committee system would be of benefit in Alberta and adopt it as our recommendation.

### The Task Force Recommends:

**4.1 That the supervising Queen's Bench Justice for every Judicial District in Alberta establish a committee of Judges composed of Queen's Bench Justices and Provincial Court Judge(s) to establish and monitor liaison between the judiciary and Aboriginals.**

**4.2 That Alberta Judges respond actively to opportunities to attend Aboriginal social and cultural events.**

**4.3 That Aboriginal communities invite Judges to attend social and cultural events.**

**4.4 That Judges participate in and provide input into inter-disciplinary committees when Aboriginal issues are discussed.**

**4.5 That Chief Justices and the Chief Provincial Court Judge establish a channel of communication with leaders of the Indian and Metis Associations.**

## Lay Courts and Justices of The Peace

Several Indian and Metis communities are seeking their own Aboriginal justice systems. Studies have been undertaken to achieve those ends in Alberta. To many, such systems are part of self-government. We are aware of two Indian Nations which have studied an Indian justice system for their reserves.

The Saddle Lake Band has worked on the issue of tribal justice since 1984, when the Alberta Law Foundation assisted with funding for the development of a model of an Indian justice system for the Saddle Lake Reserve.

The Blood Tribe of the Blackfoot Nation has also developed a model of an Indian justice system specific to its people, customs, and traditions. They hope the model will be adopted on their Reserve eventually.

It should be made clear, however, that there are sceptics within the Indian community. Not all see tribal justice systems as a cure-all.

> *We are of the understanding and the knowledge that the coming thing of the future is the TRIBAL JUSTICE SYSTEM. That, in fact, it is being touted as the answer to the problems we as native peoples face in this society today. It is in keeping with the furtherance of the FEDERAL GOVERNMENT'S plan of assimilation. Now, they want us to become directly responsible for the offenders in our ranks. SELF-DETERMINATION IS OK, AS LONG AS IT DOESN'T LEAD TO SELF-TERMINATION! Somehow, we are of the opinion that this new plan will not bode well for Native people... A TRIBAL JUSTICE SYSTEM costs money. Who is going to guarantee its funding?*
>
> *The concept of a TRIBAL JUSTICE SYSTEM at this point is a scary one. It would take a considerable amount of training and education before the Native community is able to take control of the judicial process in an effective manner. We would like to stress that the lowering of standards to admit Native people to take control of the judicial process is a furthering of the racist doctrine of, "Second-class citizens." That, just because Native people would, in effect, be taking care of their own, that the standards acceptable in the mainstream of society should not be sacrificed in the race to implement this idea. We are of the opinion that the*

*responsibility of Native offenders that would in effect, be directly maintained by reserves and colonies, is a sound idea, as long as there is a guaranteed funding structure to ensure the high quality of service that has to be an inherent component in such a venture.*[23]

The taking over of criminal justice in Aboriginal communities presents a very real dilemma for some Aboriginals. While there are compelling arguments and a very evident need for the involvement of Aboriginal people, there are Aboriginals who argue that Aboriginal control must not mean that standards are lowered. The Task Force is of the opinion that any standards set could also incorporate other qualifications such as knowledge of culture and language. The possible charge, that to do so will promote racism by keeping Aboriginal people in the position of "second class citizens," must be met squarely.

In addition to being told of tribal justice initiatives toward the development of Indian justice systems, the Task Force received requests for the return to Aboriginal communities of lay courts within the existing system.

The Lesser Slave Lake Indian Regional Council saw an urgent need for Indian Justices of the Peace, particularly in the area of judicial interim release. This would be a step toward the ultimate goal of establishing a Cree tribal justice system.

*The Regional Council does have one recommendation which we believe would have the greatest impact, and for which we can make the most persuasive arguments. Simply put, the Regional Council wants to have Indian Justices of the Peace. Police would be required to call them when an Indian person is arrested, and Indian people would be able to expect the same consideration that their non-Indian counterparts are perceived to get.*

*The presence of properly trained Indian Justices of the Peace will deter the police from laying unsupportable or even silly charges. This will also encourage police to more often exercise their discretion and release a charged person on a Promise to Appear, without taking them to the police station. It makes the process more accountable and justice more visible to the Native communities. The Indian Justices of the Peace would be appointed by Order-in-Council, and paid like any other Justice of the Peace.*[24]

The Regional Council seeks to establish training programs for appointed Justices of the Peace through the Faculty of Law at the University of Alberta.

When they made their recommendation for the training of Indian Justices of the Peace, the Lesser Slave Lake Indian Regional Council sought the support of the Task Force for this recommendation. We give our full support to the effort. Any move to return justice to the community is a good move in our view. The process initiated by the Lesser Slave Lake Indian Regional Council would achieve that end.

The Regional Council also urged us to examine Section 107 of the Indian Act. This Section provides for two Justices of the Peace having the same authority as a Provincial Court Judge to deal with certain criminal matters. In support of their argument, the Council also pointed to Clause 18.0.9 of the James Bay and Northern Quebec Agreement, which provides:

*Justices of the Peace, preferably Crees, are appointed in order to deal with infractions to by-laws adopted by Cree local authorities and other offences contemplated in section 107 of the Indian Act. These appointments are subject to the approval of the interested Cree local authority.*[25]

Again, the Task Force is pleased to endorse any move that will bring justice closer to the people. The proposed initiative has a developmental quality. The benefits of training will give the process credibility and lower the chances of failure which have affected other jurisdictions. Proper training should eliminate the fear that Indian Justices of the Peace will be considered "second class." The process will take some time. In our view, working gradually toward the goal will have a better chance of success.

In the community of Fort Chipewyan, the Task Force met a well-organized and interested group of leaders who represented the Cree, Chipewyan, Metis and non-Native populations of this unique community. The Task Force was asked to consider and examine the decentralization of the court. The circuit court, which visits Fort Chipewyan on a fly-in monthly basis (now increased to twice monthly) is not seen as the way to dispense justice in the community. The Task Force was asked to: *"review the magistrate system that was previously used within the community."*[26]

An even stronger plea for the return of lay judges came from the Federation of Metis Settlements:

> *If there were more Native judges, the feeling of being discriminated against because of nationality would be significantly reduced. Native people feel very uncomfortable appearing before judges who know nothing about Native people. To help solve this problem the Alberta Government should bring back the practice of training and hiring lay judges. This program took place in the 1950's and 1960's. Mostly senior police officers were chosen for this program. The program was implemented because of a shortage of qualified judges in the north. The late Judge Bernard Barker is a good example of this. He was a veteran Police Officer who became a judge through this program. He was the judge in the High Prairie and Slave Lake areas for over twenty years. He was highly regarded by his peers and was considered a competent judge by most people.*
>
> *This type of program should be revived as there is certainly a need for these types of judges. Considering the high number of Native people going through the court system a special program should be set up for the training of Native lay judges. This would help reduce the fear and intimidation many Natives go through when appearing in front of a judge.*[27]

The Canadian Human Rights Commission also advocated lay Judges:

> *An area of even lower aboriginal representation is the judiciary, whose impact on Indian and Metis lives through the court system is obvious and profound. In view of the evident difficulty of hiring qualified native judges for the mainstream system in the short or medium term, consideration should be given to training native lay judges for dealing with aboriginal cases. Both Indian and Metis groups have expressed interest in such an initiative.*[28]

The Kirby Report advocated against the involvement of lay persons:

> *The practice of having lay judges in the Provincial Court and the Family and Juvenile Courts is being discontinued in this province as a matter of government policy. Not only would it be contrary to this policy to have a panel of lay persons to advise a judge in his or her deliberations or to have an Indian judge without legal qualifications, it would be incompatible with the concept of the equality of all before the law which is fundamental to our system of justice.*[29]

The Honourable Mr. Kirby reversed his position on lay persons when he appeared before the Task Force. Yet, his previous opinion is reflected in current policy in Alberta. In most of the Indian reserves and Metis Settlements, we heard a general

condemnation of the "white" system of justice. Clearly, the Aboriginal people desire more involvement in the system. This is the basis for the request for Indian Justices of the Peace and for a return of the local Magistrate or lay Judge, who would preferably be Aboriginal.

The Kirby Report stated that the appointment of Indian Justices of the Peace would be of assistance, and recommended that:

> *A program involving the training and appointment of Indian Justices of the Peace with limited jurisdiction should be implemented on a trial basis.*[30]

The Task Force has not found any evidence that such an undertaking has had any appreciable effect in improving the conditions of concern to Aboriginals.

We have reviewed the Government's responses to the Kirby Report of 1980 and 1989, and the up-date in 1990. Currently, there are only four Aboriginal Justices of the Peace. Two of these are in Fort Chipewyan. We would be understating the case if we said the program was unsuccessful. The results show that, regardless of the ways in which the government recruited and trained the Justices of the Peace, its efforts to implement the Honourable Mr Kirby's recommendation clearly lack commitment.

It would not be useful for the Task Force to simply repeat the Honourable Mr. Kirby's recommendation. Yet, many Aboriginal people are looking for answers by means of more local control. We offer as a suggestion that government reconsider a system of lay Judges, or initiate a vigorous and effective training program for Indian Justices of the Peace as suggested by the Lesser Slave Lake Indian Regional Council. This would mean that Justices of the Peace are given responsibility for hearing summary conviction cases (not including dual procedure offences) in their communities.

The Alberta Section of the Indigenous Bar Association called for more participation of Elders and lay persons in the criminal justice system:

> *Given the limited number of Indigenous resource personnel with formal training, the criminal justice system must adjust its employment criteria to provide for increased participation of Indigenous lay people, especially Elders. Selection criteria for employment of Indigenous personnel could be based on factors such as familiarity with Indigenous spirituality, customs and traditions, but their roles in the criminal justice system should not be restricted by their lack of formal training.*
>
> *Elders and lay persons, as members of the Indigenous community, appreciate the role of the extended family and understand community standards. Consequently they can be effective, if employed, in assisting a person in resolving problems which may lead to criminal behaviour.*
>
> *In the adjudication of serious crimes, the assistance of respected Elders and lay persons would lend greater legitimacy to the process. Accordingly, efforts should be made to provide for Indigenous people's involvement in the adjudication of serious crimes. This is separate and distinct from the recommendation regarding the appointment of Indigenous judges.*[31]

Again, it is suggested that the criminal justice system adjust its employment criteria. We agree, and add that this must be done carefully so that Aboriginal employees in the criminal justice system are not faced with a label of "second class."

The Indigenous Bar Association further recommended the appointment of indigenous Judges. The Task Force is in full agreement with this recommendation.

> *The appointment of Indigenous Judges would provide for greater participation by Indigenous people in the adjudication process. This is needed to ensure acceptance by the Indigenous community of the premises upon which the criminal justice system is based.*[32]

Such appointments would assist in eliminating the many delays experienced in the current system. At the same time, they would provide for local input into the adjudication phase of criminal justice.

There is a clear need for a full Provincial Court, composed of an Aboriginal Judge, Aboriginal Crown Attorney, Aboriginal defence counsel (included in a roster of choice), and Aboriginal clerks. Such a court should be appointed, on a trial basis, as a circuit court for Northern Alberta. The Task Force envisions an Aboriginal court operating on the many Indian Reserves, Metis Settlements and Aboriginal communities; for example, in the High Prairie, Slave Lake, Wabasca, Demarais, Trout, Loon and Peerless Lakes areas of the province. If successful, the concept could be expanded to other areas of the province. Such a court would be in keeping with one of several approaches proposed by the Indian Association of Alberta:

> *First Nation judges sitting as a special division of the Provincial Court by agreement between First Nations and the Provincial Government.*[33]

The Task Force believes that the incorporation of tribal justice systems on some reserves in Alberta will divert some Aboriginal accused persons away from the mainstream Canadian system. However, we have noted that an estimated 40% of status Indians are living off reserves. This trend, together with the generally increasing Aboriginal population, will only add to the present problems with the criminal justice system. Improvements in education and socio-economic conditions, and alcohol and drug abuse treatment will also reduce the number of Aboriginals coming in conflict with the law. Still, a percentage of the Aboriginal population will have to go through the system of the dominant society. Implementation of Aboriginal circuit courts throughout the province will ensure, in the long-term, that accused Aboriginals will be dealt with in culturally sensitive ways.

## The Task Force Recommends:

**4.6 That government support the Lesser Slave Lake Indian Regional Council initiative for the training of Indian Justices of the Peace through a certification program, developed in collaboration with the Faculty of Law, University of Alberta, that will apply province-wide.**

**4.7 That a review of lay Judges and their value in remote areas be undertaken to determine if a program of appointments and training of Aboriginal lay Judges for these areas is warranted.**

**4.8 That, when Aboriginal lay persons are considered for appointments as Justices of the Peace, they be fully trained and empowered to hear summary conviction offences in the communities in which they live and serve.**

**4.9 That Justices of the Peace be appointed in the same manner as Provincial Court Judges, with the added input from Indian and Metis Associations and/or communities.**

**4.10** That the Chief Judge of the Provincial Court be given the power to supervise Aboriginal Justices of the Peace.

**4.11** That Aboriginal people be appointed to fill all positions necessary to operate an Aboriginal Provincial Court (Criminal Division) to go on circuit, for example, in the Slave Lake District of Alberta.

**4.12** That Aboriginal people be appointed to fill all positions necessary to operate an Aboriginal Provincial Court (Criminal Division) in a large urban centre.

# Terms of Reference

## Courts 4(a)

*to examine the extent to which Indian and Metis people currently experience difficulty when appearing in Court as a result of their unique languages and culture.*

## Courts 4(f)

*to determine to what extent Indian and Metis people appearing in a court are presently provided with interpreters/translators and to determine if there are tangible benefits to permitting Indian and Metis people to using their own language in the courts.*

The Task Force heard considerable criticism related to the inability of Aboriginals to understand the Canadian judicial process.

Aboriginal leaders, Elders, inmates, young offenders and all who come into contact with the criminal justice system experience the process of being shunted through arrest, bail hearings, remand, trial, and incarceration as one that is impersonal, bewildering, and confusing.

To many Aboriginals, the criminal justice system is an imposed foreign system of law that is not compatible with their way of life. It has no respect for the Aboriginal world view. As a consequence, the criminal justice system has become – or, we have been told, always has been – irrelevant to many Aboriginals. It is necessary to discuss problems with language in general and legal language or "legalese" in particular, interpreters and translators, culture and the Aboriginal world view, and other issues that lead Aboriginals to experience the criminal

justice system as a rather contemptuous and undifferentiated structure.

The Task Force was presented with substantial material which described the cultural differences that exist between the dominant society and Aboriginals. It is in the courts – at hearings to show cause, for plea, sentencing or trial – that Aboriginal people express much of their confusion.

Before addressing specific issues, we want to state that during our visits to provincial courts, we observed that most Judges exhibited patience, understanding and compassion for the Aboriginals in their courts. On the other hand, we also observed Judges who had little time or patience for anyone going through their courts regardless of race. However, on the whole, the Alberta provincial court Judges we met were understanding, even though they represented the dominant society's world view. Judges receive little cross-cultural education. This explains why they treat Aboriginal people in their courts inappropriately despite their good intentions. We realize that the courts are bound to apply the law as it is given to them. This, indeed, is what the courts do.

## Culture, Language, Translation and Interpreters

The issues of culture and language were addressed in the Brief from the National Aboriginal Communications Society:

> *The criminal justice system, and the whole judicial process, does not recognize Aboriginal people, or Aboriginal cultures, or Aboriginal languages, as can be attested to by the alarming numbers of Aboriginal peoples in prison today.*[34]

> *We have long ago determined, as Aboriginal people, that our culture, and our languages, are one and the same. Language is culture, culture is language. And we have also steadfastly clung to the idea and the truth, that Aboriginal culture is different than that of any other culture in this country, and on the face of the earth.*[35]

> *Cultural conflicts exist in the fact that many of your most basic legal concepts like probation, guilty, not guilty, innocence, beyond reasonable doubt, lawyer, judge, civil rights, civil proceedings, court, contract, legal advice, show cause, court reporter, criminal code, highway traffic, summary conviction, jury of one's peers, indictment, plea, bail, and charter of rights, have no equivalent words in any of the Aboriginal languages. The concepts behind the English words are absent as concepts in Aboriginal thinking.*[36]

Representatives from all of the established eight Aboriginal language groups in Alberta commented on the inability of Aboriginals to translate certain English words and concepts, particularly legal ones. Mr. Roy Louis, formerly the President of the Indian Association of Alberta, spoke about this problem when he appeared before the Task Force. The National Aboriginal Communications Society Brief comments further:

> *Aboriginal people have not assimilated. Their identity as separate people, with a vision of reality and destiny, and of themselves and their world, remain an essential feature of their lives.*[37]

> *It's easy to assume that our children are committing suicide at an alarming rate because of drugs, and alcohol. It is also easy to assume that the unemployment rates and socio-economic conditions of our people are horrendous, because our people are lazy. But ladies and gentlemen, I hope and I pray, that you will believe me when I tell you the solution to these and other problems faced by our people today, is simply understanding. You have to understand that these problems are a direct result of this society's failure to recognize and respect the fact that Aboriginal people and cultures are and will remain different and distinct from any other*

*culture, not only in Alberta, not only in this country, but in this world. And until such time as society recognizes and respects those differences, Aboriginal people are condemned to a life of poverty, imprisonment, unemployment, and perpetual dependence for their survival on a non-caring society.*[38]

These comments raise the question of whether a seemingly non-caring criminal justice system will be able to muster the recognition and respect Aboriginals state they require.

Many other submissions gave us special insights into the problems of language:

*Sometimes, if parents are concerned and want to help, they can't. Many parents understand only the Dene Tha language and the whole court is in legal jargon so they are unable to provide support when they do not know what is happening.*[39]

*Skilled translation is needed to make the entire court proceedings well understood to all present, and in both Cree and English languages. The Neeyanan Association should be consulted, as we could arrange for a translator to be available to the court whenever needed.*[40]

*It is often difficult for people to understand how the criminal justice system works, given the cultural and language differences. More educational efforts must be made. This effort could be made through such agencies as Native Counselling Services with workshops and regularly scheduled visits to the Settlement. These services should be available in Cree.*[41]

*Some members of the courts suffer from what we perceive as, "cultural blindness." They are unable to see and hear accurately the Indian victims, the accused, and the witnesses who appear before them. We must then ask the question, "Is the decision of the judge rooted in reality?" If not, then our members have had great injustices committed against them, ironically by people who represent the law.*[42]

*How are we to know about laws of a foreign system if they are not interpreted for us in our own language?*[43]

*A great number of Natives are unfamiliar with the "court language" and legal process. We see an interpreter as being a valuable asset not only to the offender, but the court as well.*[44]

*Our people do not understand the judicial system. The whole court proceeding is an alien process, therefore the judgement is not fully comprehended by the client. An enormous problem is the language barrier. English is a second language in our communities, it is very difficult to translate legalese into a traditional language.*[45]

*Most people do not understand what is being said in court. How does one interpret a fundamental concept like guilty/not guilty when the concept does not even exist in the Dene Tha' language? How can the fundamental concept of "justice" be understood and the police be seen as standing for justice when their name in the Dene Tha' language is "Dene Kuelehi", which means: "those who put people in jail" and the Judge is "Dene Kuelehiti", which means, "he is the big boss of those who put people in jail!".*[46]

*Language is not only an issue for natives who do not speak English. The language of the Criminal Justice System is foreign to most Native Canadians. "The Judge said something to me. He used many big words. Then he asked me if I understood. I said no. He said some more things that I did not understand. He asked me again if I understood. This made me feel stupid. Though I did not understand I said yes. I knew I would never understand." This story is typical of the experience of young native people when they appear in court.*[47]

The Task Force received some very clear examples of concrete problems from a lawyer of the Indigenous Bar Association. His comments on interpreters in court were revealing:

*Generally, older Indian people are quite eloquent in their own language. However, when they speak English, their speech is quite limited. This cannot but help to be a factor in assessing credibility. The Indian witness with his or her broken English is frequently pitted against a professional police witness who is familiar with court procedure and who understands what is needed to achieve a conviction.*

*When interpreters are called to assist the process, the present court interpretation system fails. First of all, if the Indian can speak some English, the tendency is for the Judge to say he understands English well enough. The Indian is left with his less than perfect grasp of the English language to present his story and have his credibility assessed against professional witnesses.*

*On one occasion, I had arranged for a Native interpreter from the community for an elderly Indian client. The interpreter who was regarded as a very good interpreter by Indians because of his fluency and his helpfulness to people he translated for but he was not trained in formal court room interpreting and the necessity of presenting the appearance of a neutral translation for the Court. His interpretation was dismissed when he tried to do his task in Indian fashion. From my knowledge of the facts he did not misinform the court but his "word count" differed from the Indian elder and his interpretation was dismissed. The elderly Native on trial was left with his imperfect English to present his defence.*

*On another occasion, mindful of my previous experience, I advised the Court that the services of a Native interpreter would be necessary. In due course an interpreter was found by the Clerk of the Court. Upon receiving the consent of the Clerk of the Court and the Crown, I interviewed the Court appointed Native interpreter to assess her interpreting skills. I discovered that she was a first cousin and a close neighbour of the accused, that she had never received any training in interpreting, and that she had never interpreted in Court before. The court room interpretation was spectacularly unsuccessful.*[48]

There is no doubt that language plays a central and crucial role in enabling people to understand what goes on in Court. It is clear that language problems prevent Aboriginals from having such understanding.

The Sik-ooh-kotoki Friendship Centre commented on misunderstanding:

> *The interpretation of the laws of today and the process and system of how these laws are applied, remains to be misunderstood by the majority of the native people and the rationale behind some of the present laws. The native people through the colonial government applications, the forced doctrinations of the boarding schools and the treatment of the Royal Canadian Mounted Police have not accepted the laws of today and have more mistrust for the laws and the people who represent the legal systems.*[49]

A Justice of the Court of Queen's Bench made the following comments about a personal court experience. This, in our view, clearly describes the problem of language and supports the concerns expressed by Aboriginals with respect to the need for interpreters. She followed with a recommendation which we have adopted:

> *Interpreters - Many years ago, I had an unfortunate experience in Fort McMurray, which I still vividly recall. A Native, accused of a serious sexual assault, obviously had an inadequate command of English to understand the proceedings. An interpreter had been obtained for him. Nonetheless, no standardized trial interpretation techniques had been developed to ensure that the accused was reasonably "present" at his trial. I wrote of my concerns at that time; I hope that the situation with respect to interpreters has been improved.*[50]

Judging from Aboriginal presentations to the Task Force, there is little evidence of improvement in Alberta courts with respect to interpreters.

It may be instructive to note and examine the responses of the Attorney General's Department to a number of questions regarding interpreters raised by the Task Force at the beginning of its mandate:

*Task Force:*
*The availability of interpreter services at prosecutorial interviews, including: qualification of interpreters; location of services; availability of services.*

*Response:*
*Prosecutors in our system do not interview all witnesses. They often rely upon police statements to give them information about what witnesses will say. If a witness who speaks a language other than English is being interviewed, so as to make the services of an interpreter required, we would normally rely upon the interpreter used by the Courts.*

*Court Services has a provincial inventory of interpreters which is revived as the needs are identified.*

*Task Force:*
*What interpreter services are available to Justices of the Peace:*

*Response:*
*The Justices of the Peace have, or have access to, a list of competent language interpreters who are available on a need basis.*

*Task Force:*
*Details on interpreter services for clerks of the Court (outside of the Court sitting).*

*Response:*
*Where interpreter services are required immediately at the counter, an attempt to locate someone within the office/building is made. Also, each Court location has a list of competent language interpreters who are available on a need basis.*

*Native counsellors are available in some locations and they may provide the service if the need arises.*

*Task Force:*
*Details on interpreter services for the Court of Queen's Bench.*

*Response:*
*For the Edmonton and Calgary Court of Queen's Bench, the Witness Central Unit provides all language court interpreters. Outside Edmonton and Calgary, the Court offices have a list of competent interpreters who are available on a need basis, or they may use the original interpreter that appeared at the Provincial Court level, or they may have the Witness Central Unit in Edmonton or Calgary obtain an interpreter.*

*Task Force:*
*Details on the availability of interpreter services for non-represented accused, in the Court of Appeal.*

*Response:*
*The Witness Central Unit provides the service. They have a list of competent language interpreters available on a need basis.*[51]

Clearly, the system of interpretation in Alberta largely operates on an ad hoc basis. The farther removed one is from Edmonton or Calgary, the more problems one can expect to experience with interpretation.

A recent decision in a British Columbia Court is a further illustration of the language problem faced in court by Aboriginals. On November 20, 1990 the *Vancouver Sun* reported:

*Lil'wat Indians cited for criminal contempt for blockading the Duffey Lake Road at Mount Currie are entitled to hear legal proceedings in their native language, the B.C. Supreme Court ruled Monday. However, Justice Bruce Macdonald, saying he personally doubted the need for such a service, ruled it was the responsibility of defence counsel, not the court, to provide qualified translators.*

*'I have attempted as best I could to accommodate your requests,' Justice Macdonald told defence counsel Lyn Crompton and Bruce Clark. 'I don't feel full interpretation is necessary for these people to understand the proceedings.'*[52]

Assuming that the quote attributed to Justice Macdonald is correct, his opinion demonstrates a disturbing view of the requirement that the Lil'wat Indians receive service in their own language. The Justice doubted the need and moreover imposed on the Aboriginals the costs of providing their own qualified translators. We wonder where this decision leaves the right to an interpreter as set out in Section 14 of the Charter of Rights and Freedoms which provides:

*A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.*[53]

We recognize that Justice Macdonald has interpreted the Charter as setting out the right to interpretation without specifying who pays for it. In this case, the Justice ruled that the defence must pay. The Task Force believes that Aboriginal persons appearing in court have the right to use their own language. It is the Court and not the Indians or Metis who require the translation. Yet, the Court has held Aboriginals responsible for obtaining translators.

As has been demonstrated repeatedly in Aboriginal presentations to the Task Force, many Aboriginals who are incarcerated go through the criminal justice system without comprehending what is happening to them. The cause of understanding would be advanced in mainstream courts of law if Aboriginal accused persons were able to confront the justice system in their own language, in courts which showed an understanding of the Aboriginal cultural predicament and of the cultural differences between Aboriginals and the dominant society.

Of the Indian Bands we visited in the province, the Dene Tha' Band of Assumption stood out as one which had maintained its unique language and culture. The Dene Tha' was one of the last Indian tribes in Alberta to be affected by advancing white society. Many of the Band's Elders do not speak English. When some Task Force members met with Chief Chonkolay in his home, he spoke to us in his own language. His wife assisted by providing interpretation. The Chief also used his own language when he made an oral presentation to the Task Force and was assisted with interpretation by a Councillor from Meander River.

Many Indian tribes are returning to their language and cultural roots. If our legal institutions do not adapt to this trend, we will simply alienate Aboriginals further. The current gulf between the cultures will be widened. Not surprisingly then, the Dene Tha' offered a specific recommendation to improve conditions in the courts for their communities which they linked to what is happening in the Northwest Territories where they are more closely associated tribally with their brothers and sisters who reside there.

## The Task Force Recommends:

**4.13 That interpretation and translation services for criminal court be provided at public expense to all Aboriginals for whom English is a second language and who require assistance.**

**4.14 That the Government of Alberta together with the Aboriginal community develop interpreting and translation courses for the**

**main Aboriginal language groups in the province, and find uniform ways for the interpretation of legal concepts in the Aboriginal languages.**

**4.15 That the right of Aboriginal people to be heard in their first language be recognized. Translation and interpretive services exist for the benefit of the court and should be paid for at public expense.**

# Term of Reference: Courts (4d)

*to assess the desirability and the extent to which Court sittings should be routinely and/or selectively held in identifiable Indian and Metis communities.*

## Access to Court Sittings

Provision of service from all components of the criminal justice system is seriously hampered and impaired by the remote locations of many Aboriginal communities in Alberta. The manner in which justice is delivered to these communities is usually viewed as serving the convenience of the Judges and lawyers who occupy the most powerful and influential positions in the criminal justice system, while the people to be served by the system are inconvenienced.

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

applied and makes the delayed court appearance redundant.

The dilemma of delayed justice, experienced by Aboriginal communities, was expressed clearly by the Alberta Association of Social Workers:

> *Initial response to crime in a Native community may be swift with the immediate laying of charges. Particularly in remote regions serviced by Circuit Court operations, there may follow a delay of weeks or months before a trial is possible to determine whether the circumstances actually allow for entry into the Criminal Justice System. Sentencing may create another lengthy delay. During all of this time, the community has to reach some accommodation with both the offender and the victim, and deal with the emotions involved such as shame and anger. The time delays necessary to exercise all the features of the Criminal Justice System in the community may well disrupt that community's long-established natural processes of hurting and healing. Obviously, this problem is not unique to Native communities but is likely more pronounced in remote Native settlements.*[54]

Judges of the Provincial Court are appointed by the Lieutenant Governor in Council. In addition to the Chief Judge and eight Assistant Chief Judges, there are one hundred permanent Judges of the Provincial Court, and one supernumerary judge.[55]

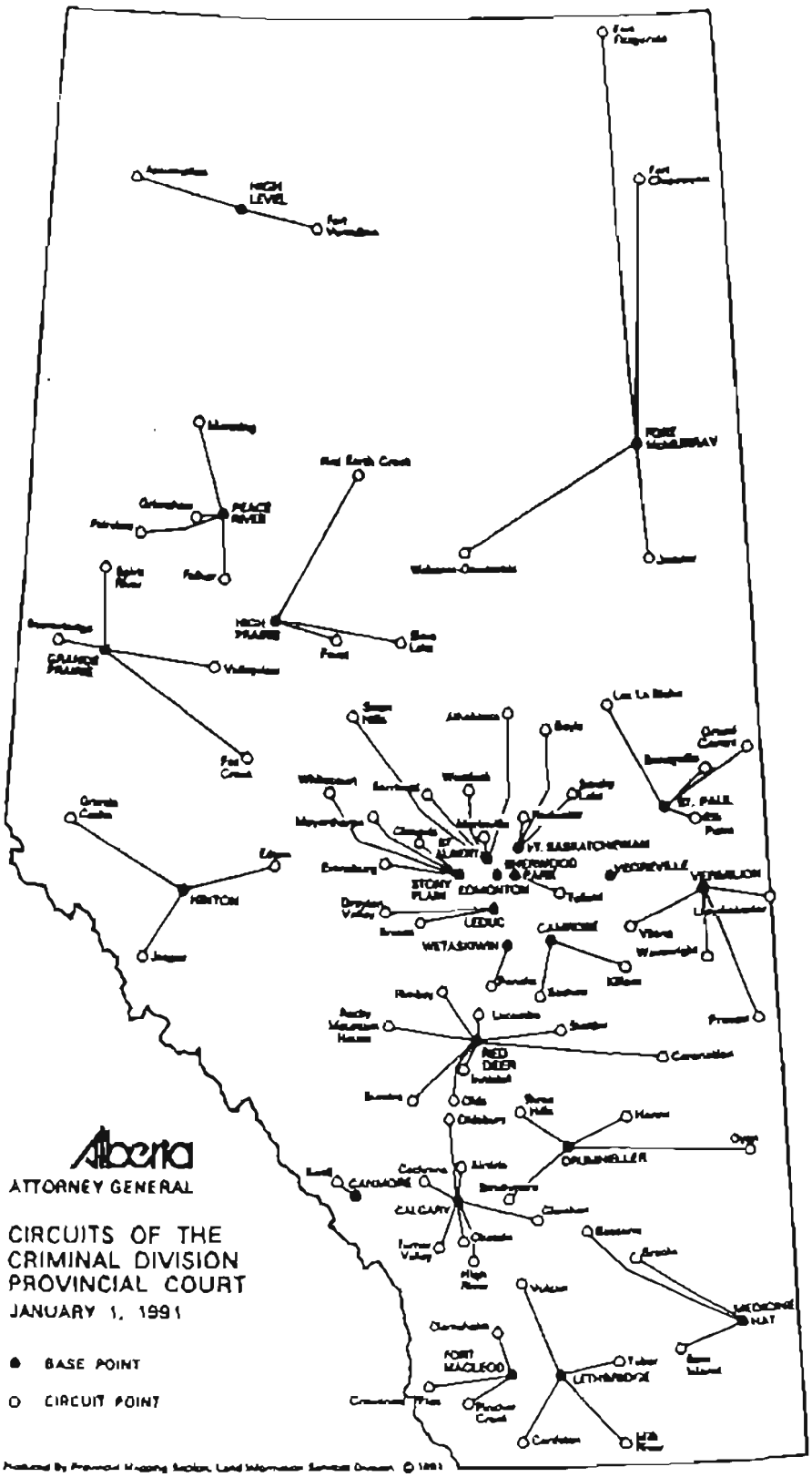
The Provincial Court may sit at any location in the province for the orderly dispatch of the business of the Court. At the present time, there are 24 permanent and 76 circuit locations in which the Criminal Division of the Provincial Court sits (see map, on page 21). The Family and Youth Divisions of the Provincial Court sit in 24 permanent and 63 circuit locations. The Civil Division sits at most of the locations used by the Criminal Division.[56]

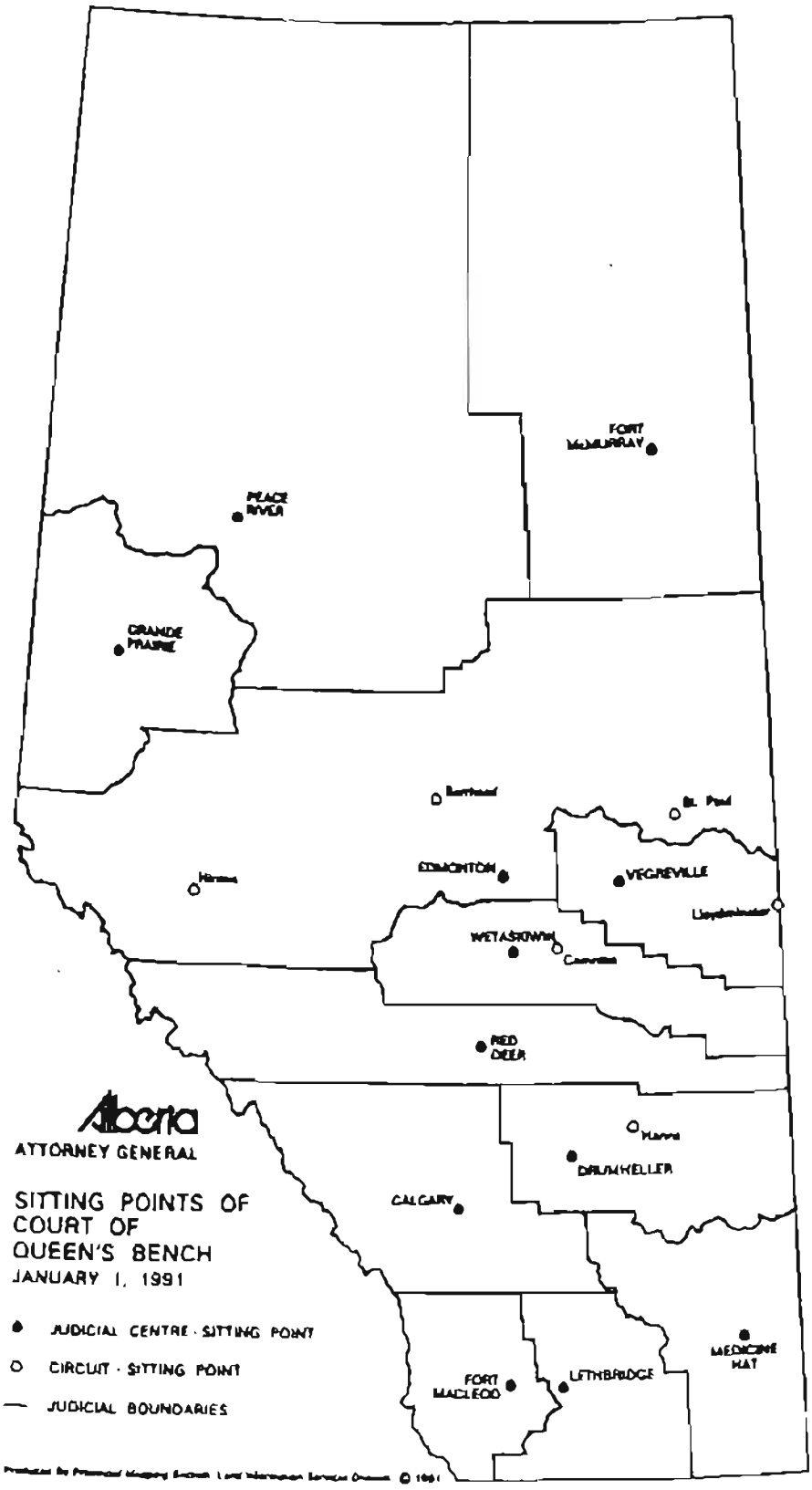
The Task Force did not receive presentations from the Court of Queen's Bench and the Court of Appeal. However, we know that these Courts sit in major centres (see map on page 22). In addition, the Court of Queen's Bench sits in Peace River to serve the remote communities in the far northwest of Alberta, and in Fort McMurray to serve the northeastern part of the province. Accused persons who are not in custody and witnesses who must make their way to these locations to attend, do so at great personal inconvenience and expense. This situation clearly raises the question of who is to be served by the courts.

A judge in Fort McMurray stated:

> *We have recently (two years ago) extended our sittings to Janvier in an effort to take the Court to the people. I feel strongly that the Courts should sit in the settlements and have accepted some very poor accommodations in order to accomplish this. There is one place, Chipewyan Lakes, which is not served and provides almost insuperable problems for persons charged with offences there. It is only accessible by air and has no place in which Court could be held. My personal opinion is that all criminal matters should be tried in the place they occur, including High Court Trials. There are enough elements estranging the Native communities from the justice system without adding the factor of removing people from their communities into the mysteries of the system from which they rarely return. For the community, Justice is rarely seen to be done in serious cases. I think we are far too worried about robes and formalities and surroundings to the detriment of the people and their needs and understanding.*[57]

Several Provincial Court Judges met with the Task Force. When asked for their comments on the desirability of Courts sitting on Indian reserves, some made the following comments:


HIGH LEVEL
PEACE RIVER
HIGH PRAIRIE
GRANDE PRAIRE
ROCKY MOUNTAIN HOUSE
HINTON
STONY PLAIN
EDMONTON
LEDUC
WETASKIWIN
RED DEER
DRUMHELLER
CALGARY
FORT MACLEOD
LETHBRIDGE
MEDICINE HAT
VERMILION
Alberta
ATTORNEY GENERAL
CIRCUITS OF THE
CRIMINAL DIVISION
PROVINCIAL COURT
JANUARY 1, 1991
BASE POINT
CIRCUIT POINT


FORT McMURRAY
PEACE RIVER
GRANDE PRAIRE
EDMONTON
VEGREVILLE
WETASKIWIN
RED DEER
DRUMHELLER
CALGARY
FORT MACLEOD
LETHBRIDGE
MEDICINE HAT
Alberta
ATTORNEY GENERAL
SITTING POINTS OF COURT OF QUEEN'S BENCH
JANUARY 1, 1991
JUDICIAL CENTRE - SITTING POINT
CIRCUIT - SITTING POINT
JUDICIAL BOUNDARIES

*Only if necessary [because of] political problems - Band power politics.*

*Mixed emotions if Courts routinely held on Reserves [it] would be more of a feeling of being a part of the community.*

*Courts of all nature should appear in the community.*

*Shame for a serious transgression is a start, Natives feel it more acutely. Offences should be tried where offences occur.*

*Natives will have a sense of ownership.*[58]

It has been stated that the provincial courts hear approximately 93%[59] of the criminal cases in Alberta. Most of these cases would be heard at the 24 permanent and 76 circuit locations in the province. Very few cases are heard on Indian reserves and in Metis settlements.

*To my knowledge there are Provincial Court sittings in three Indian communities as well as two larger Native Centres, the latter being Desmarais and Fort Chipewyan.*[60]

Many Indian leaders have stated that they would welcome court sittings on their reserves. At the same time, we emphasize that several were not in favour of this suggestion.

The Tallcree Band recommended:

*Bring the Courts to the Native communities.*[61]

The opinion of the people of Peerless Lake was presented by the Neeyanan Association. Peerless Lake residents said about their trials and tribulations of attending court:

*For the common incidents, people of the Settlement who must attend Court do so in Red Earth, 78 kms. from Peerless Lake. The Judge comes into Red Earth on Court date (from a larger community) as must the lawyers, etc. When weather and road conditions are especially poor, Court is often cancelled and postponed to a later date. On such occasions the people of Peerless Lake have driven over hazardous road conditions and have had to arrange for babysitters, leaving family and duties at home. That represents considerable hardship and risk ... we strongly suggest that Court be decentralized - preferably to be held in each community, in order to increase peoples knowledge and awareness.*[62]

The Alexander Tribal Government presented a somewhat different problem with attending court in Morinville, a neighbouring community.

*Currently we have developed a stigma which is created by our members who attend Court in Morinville. This stigma only adds to the already existing stereotype held by some townspeople toward the [Indian] community. It then seems appropriate to hold Court in an alternate location, perhaps in St. Albert, Stony Plain, or in our own community. This will help erase the stigma surrounding our community and begin to build a positive character for our people.*[63]

We understand that court sittings took place at Hobbema some years ago. They were discontinued at the request of the Four Bands after several complaints about the stigma Band members experienced when they had to appear in court before their own community members.

Judge N.A. Rolf, of the Provincial Court in Wetaskiwin, said in his written presentation to the Task Force:

*In an initial meeting in October, 1989, at the Four Bands Office in Hobbema, with a few interested people, I asked, "When are you going to ask that Court be held in Hobbema?" In the meeting of November 1, 1989, some of those asked that Court be held in Hobbema.*[64]

Judge Rolf attached to his letter the minutes of a meeting held with Hobbema residents in Wetaskiwin. The minutes show:

> *Members of the group requested the Provincial Court be located at Hobbema to which Judge Rolf responded that eventually it is hoped it will be located there. Another group member responded that the ground work has already been completed in terms of the Attorney General's Department being supportive. At this point in time the support of the Four Bands Chiefs and Council is needed.*[65]

During the hearings, the Task Force asked the Indian Association of Alberta about some of the problems with courts sitting on reserves. We heard that "creature comforts" exist in many communities adjacent to reserves. The comment implied that the courts are unwilling to venture into areas which do not offer all the trappings and comforts of regular courtrooms. Secondly, we heard that Indian people are often ashamed to appear on criminal matters in their home communities. Thirdly, the name "Provincial Court" was distasteful to many Indians who feel that the total responsibility for Indians under the Constitution lies with the federal government; giving any recognition to the Province meant going backward. Fourth, local municipal governments were seen as a hindrance. These governments were seen as wanting to use court houses to build up the town. It was also felt that municipal governments would not want to give up any "business" to the neighbouring Indian community even though Indians provide the court with the largest share of its "business."

The Kirby Board of Review (1978) recommended that in Alberta:

> *Where practicable, Provincial, Family and Juvenile Court sittings should be held on Indian Reserves when those Reserves are not easily accessible to centres in which sittings are held.*[66]

In 1980, the Government of Alberta responded:

> *The current practice of selecting circuit points takes into account general population distribution, including Indian Reserves, so as to minimize the distance from place of residence to the location of Court sittings. As well, discussion on the feasibility of Court sittings on isolated Indian Reserves will be entered into with any interested Band Council.*[67]

In 1989, prior to the commencement of this Task Force, the Government of Alberta up-dated the information on its response to the Kirby Report. Information on court sittings in Aboriginal communities was as follows:

> *The isolated Native communities currently being served by circuit court sittings are Assumption, Fort Chipewyan, Wabasca, Red Earth Creek and Janvier. In addition, there are a number of northern, central and southern communities that are serviced by circuit courts where a substantial Native population exists or resides near by such as: Faust, Slave Lake, Grande Cache, Lac la Biche, Elk Point, Boyle, Edson, Glenevis, Rocky Mountain House, Pincher Creek, Gleichen, Taber and Cardston. At present discussions are being held with the Hobbema Indian Reserve for possible court sittings in the future.*[68]

It should be noted that Red Earth Creek is not a "Native" community. It fits more appropriately in the group of communities "which has a substantial Native population near by."

The up-date shows that, over the twelve year period since the Kirby Report, the Government of Alberta has made provincial court sittings available to four

Aboriginal communities, and has opened courts at circuit points in several communities close to areas where a substantial Aboriginal population resides.

The Indian Association of Alberta made the following comments about court sittings:

> *Regarding Courts, Kirby recommended holding Provincial, Family and Juvenile Courts sittings on Indian Reserves.... The response states Indian Reserves are taken into account when selecting courts' circuit and that the Provincial Government would discuss with any interested Band the feasibility of court sittings in isolated reserves.*
>
> *We must comment that rarely have there been discussions initiated which held out the prospect of genuine opportunity to hold Court sittings on Indian reserves. Only in three instances, Alexis, Assumption and Janvier, are Courts being held on Indian Reserves. In the great majority of instances, the Indian people have to go to the court held in the neighbouring non-Native community. Today, First Nations, more than ever, want to see Indian courts in their communities.*[69]

The Indian Association of Alberta differs with the Province on the number of Indian reserves currently served. This may be because the Province has characterized the sitting as being located in "Native Communities" rather than using the more specific term "Indian Reserves".

Despite this difference in numbers, the courts sit in precious few Indian reserves, and to our knowledge, does not sit at all in Metis settlements.

We are not certain what the Indian Association of Alberta meant when it said that "First Nations, more than ever, want to see Indian courts in their communities." Taken at face value, the statement would seem to refer to tribal courts. However, since it was made in the context of a discussion on provincial court sittings recommended by Mr. Kirby, we have concluded that it may refer to Provincial Court as well.

In any case, Aboriginal people experience a number of hardships in getting to court.

Our review and assessment of this issue has led us to the conclusion that several Aboriginal communities still need to be served by provincial criminal, family and youth courts. Negotiations have to take place with Indian reserves to get their agreement on court sittings in their communities rather than in near-by towns.

With respect to Court of Queen's Bench sittings in remote areas, we must consider more practical reasons than mere "creature comforts." Whenever jury trials are to be held, the facilities must be available to accommodate these special circumstances. However, not all cases proceed to jury trials. Where an election is made for a trial before a Court of Queen's Bench Justice sitting alone, there is no particular reason for the court not to sit where Provincial Court Judges sit.

The Dene Tha' people of Assumption recommended:

> *That a Court of Queen's Bench be established in High Level where it will be more possible for parents to support family members who appear in front of the Court.*[70]

The Task Force considers this a valid argument and recognizes that there are many other reasons to be considered. Several reasons for bringing the courts closer to Aboriginal people have been mentioned earlier.

### The Task Force Recommends:

**4.16 That regular sittings of the Court of Queen's Bench be held in High Level.**

**4.17 That all court sittings be held closer to Aboriginal communities.**

**4.18 That all court sittings be reviewed and located on Indian Reserves, and in Metis Settlements and Metis communities throughout the province, with the concurrence of the community.**

**4.19 That, when elections are made for a Court of Queen's Bench Judge to sit alone, the Court sit wherever a circuit provincial court would sit.**

**4.20 That all courts sit at any Aboriginal community in the province at the request of the parties and the community.**

## Transportation

During the hearings at remote Aboriginal communities, we were frequently told of the difficulties encountered by residents in getting to court hearings at various circuit points in the province.

> *In isolated communities there are often transportation problems to appear in Court. This can result in a "failing to appear" charge. These extenuating circumstances must be considered.*[71]

> *Within isolated communities, a witness who is subpoenaed to a Court case, at times, cannot afford the travel costs. For example, the Court will pay .08 cents/mile, however, this does not adequately cover the actual costs. This is unfair in that if you are subpoenaed, then you have no choice; "you must" attend Court. For example, it costs $120.00 one way in a taxi cab fare from Cadotte Lake to Peace River. Further, the current reimbursement system and also receipts are expected to take five weeks.*[72]

A frequent consequence of these problems is non-compliance with the Young Offender Act and the Charter of Rights and Freedoms.

We are aware that accused persons in remote communities must make their own way to a circuit court point. For fly-in communities such as Fox Lake and Chipewyan Lake, the costs for an accused person to attend court are prohibitive. This generally results in their non-appearance and the issuing of a warrant. The reasonable solution is to take the court to the people. This is done in the Northwest Territories. Alberta should do no less.

It should also be noted that offences against the administration of justice, such as "failure to appear", are 7% higher for Aboriginals than for non-Aboriginals.[73] Clearly, a large number of these offences can be attributed to transportation problems in getting to distant circuit courts.

Bringing the courts closer to the people will help to correct this problem.

### The Task Force Recommends:

**4.21 That the Government of Alberta review the process of court attendance of Aboriginal accused persons, witnesses and jurors, and that allowable expenses to get to court be increased, or transportation be made available.**

# The Right to Counsel

The right to counsel is set out in Section 10(b) of the 1982 Charter of Rights:

> *Everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right.*[74]

To many remote communities in Alberta, these rights are meaningless because there are no lawyers offering services within reach. Although telephone calls are permitted and telephones are required in all police lock-ups throughout the province, detachment commanders of the R.C.M.P. in Desmarais and Fort Vermilion estimate that large numbers of accused Aboriginal people do not exercise their right to contact counsel at the time of arrest. In Fort Chipewyan, the detachment commander estimated that 60% of arrested Aboriginals would not contact counsel, even though they are urged to do so when they are brought into cells and are capable of exercising the right. This situation may suggest that Aboriginals lack confidence in the ability of the legal community to respond to their needs. It also reflects the cultural differences that exist between Aboriginals and white lawyers who, we are told, are generally culturally insensitive.

Accused persons are provided with a telephone list of lawyers to call. In these remote areas, often there are only one or two lawyers on the list. If one is unpopular and the other is away, no contact is made. Various scenarios operate with respect to counsel in northern Alberta. Lawyers are not obliged to be at home to receive calls. Although the police must notify accused person of their right to a lawyer, there are no corresponding obligations for the legal community or government to ensure that a service is provided. A Canadian Civil Liberties Association lawyer recommended in 1975:

> *That the Police have an affirmative duty to advise people, as soon as practicable following arrest, of their rights to silence, to consult a lawyer and to whatever legal aid is available in their jurisdiction.*[75]

In remote areas, legal aid is often simply not available until the accused person gets to court. This means that, for many Aboriginal people, the right to retain and instruct counsel is difficult to exercise, while for others it is simply a meaningless Canadian legal right, made unreal due to geographical isolation.

In urban areas, it is considerably easier for Aboriginal defendants to exercise the right to counsel. A 1989 study in Edmonton determined:

> *Most of the defendants (66.4%) were represented by legal counsel during the Court proceedings although a large portion (35.2%) represented themselves. When broken down by ethnicity the majority of both groups (Natives 61.6% and non-Natives 67.7%) had legal representation in Court. Of the 457 defendants without counsel, 82.7% were non-Native. Whether a lawyer was hired through Legal Aid or privately was not directly observable in Court except when duty counsel was involved.*[76]

We can conclude from these data that, for urban Aboriginal defendants, access to counsel at trial and probably at arrest is not a major problem. However, for a defendant in a remote settlement, chances of receiving legal advice upon arrest is rather slim.

### The Task Force Recommends:

4.22 **That the Alberta Government, through Legal Aid or a public defenders' system, ensure that legal representation is provided to Aboriginal people at every stage in the criminal justice system, from arrest through trial, and that this service be made available on a 24-hour basis and be culturally sensitive.**

# Term of Reference:

# Courts 4(b)

*to determine whether and to what extent differences exist in sentencing practices as between Indian and Metis people and non-Indian and Metis people in the sentencing process.*

## Plea

Many of the oral and written presentations stated that Aboriginal accused persons enter pleas of guilty to criminal charges simply to get matters over with. It was stated that Aboriginals do not wish to be remanded in custody because time on remand is considered "dead time."

> *There is a history of Metis and Indian people pleading guilty to charges that they may not be guilty of. Some reasons include: plea bargaining, not wanting to spend "dead time" in remand, not aware of legal rights.*[77]

> *People will often plead guilty, simply because they are arrested.*[78]

The Elizabeth Fry Society of Edmonton offered a number of reasons to explain why Aboriginal people are over-represented in the criminal justice system. One of these was:

> *Almost all Native women plead guilty to crimes for which they are accused.*[79]

The Native Brotherhood at Grande Cache had this point of view:

> *Native people don't like remand time. They view it as a waste of time, that they'll never get back. They would sooner plead guilty and get it over with right away. What is the use of fighting a charge when they know they will be pronounced guilty anyway.*[80]

*Even more tragic is the consistent statement of these people to us: "I plead guilty and got a $100.00 fine. If I didn't, I'd have to stay in jail for weeks, I'd probably be found guilty anyways and then still have to pay the fine." The reality for people in this plight is that they are deliberately pleading guilty to offences, irrespective to their real guilt or lack of guilt, in order to get out of jail.*[81]

The Native Counselling Services of Alberta courtwatch study determined that Aboriginal people plead guilty more often than non-Aboriginals. The study showed that 89.5% of Aboriginals plead guilty compared to 75.5% non-Aboriginals, a difference of 14%.[82]

In general, Aboriginal people appear to display a fatal acceptance of the process. We believe that this has never been otherwise. Even the advent of Legal Aid funded counsel has not seemed to have made a difference.

### The Task Force Recommends:

**4.23 That, when imposing a custodial sentence or a fine, the Judge should always take into account time spent in custody.**

## Sentencing

In a study of criminal justice in Canada, the question is asked: "Who is bearing the brunt of justice?" Augustine Brannigan, says that:

*Many criminologists argue that the law is a mechanism for the control and suppression of the lower classes, the poor and the minority groups."*[83]

Brannigan suggests that such a view tends to create cynicism about the nature of law. He outlines an alternative hypothesis. Rather than arguing that the justice system is aimed at the suppression of the poor, he suggests that it operates

*in a way that weeds out the rich, the middle class offenders, higher status occupational groups, the politically prominent and the well educated.*[84]

Brannigan states that this means that those people who are arrested and go to jail are usually guilty of their crimes, but they are not the only elements of society engaged in serious harmful behaviour. He argues that the lower classes, the poor, and minority groups are over-represented in the groups which receive the most punitive treatment by the criminal justice system. Brannigan develops his arguments in four stages:[85]

- the slant of the laws
- law enforcement and social class
- on convictions
- on sentencing

In this Report, we will examine the fourth stage, even though convictions obviously are necessary before any sentence is considered. Brannigan argues that

*criminal convictions do not reflect the only or the most dangerous elements of society or the most dangerous individuals arrested. Conviction is hinged on ability to hire a good lawyer. Status plays a role here as well.*[86]

Our examination of sentencing is primarily based on anecdotal information since the briefs we received did not provide a systematic and specific analysis of sentencing patterns for Aboriginals.

This much is known:

- Aboriginal persons are over-represented in federal as well as provincial jails in Alberta. Provincially, Aboriginals make up only 4% of Albertans, and 30% of incarcerated persons.[87]

- Federally, 10% of incarcerated persons are Aboriginal, although Aboriginals make up only 2% of the Canadian population.[88]

We also know that 78%[89] of Indian men surveyed by the Indian Association of Alberta had been arrested at some time in their lives. Another study showed that 89.5%[90] of Native persons appearing in court pleaded guilty. Ninety-six percent were found guilty.[91]

With such statistics, it should come as no surprise that Aboriginals in Alberta feel discriminated against, or put more strongly, feel persecuted by the criminal justice system. Aboriginals can be categorized as generally poor, and as a minority. Statistics of incarceration bear out the fact that they are "in the cohorts that receive the most punitive treatment by the criminal justice system."

Aboriginals themselves have had much to say about sentencing:

> *Sentencing of aboriginal people in communities adjacent to Reservations is done with personal bias and prejudice.*[92]

> *We feel that very often the Judge in Red Earth hands down inappropriately light sentences for violent or abusive behaviour. The Legal System has taken away any power that people at the local level would have used to correct such anti-social behaviour amongst ourselves. But, when we do leave the conditions to be corrected through legal means, it is only dragged on for years, as we must stand by watching the situations get worse and worse.*[93]

> *Two aspects of sentencing that cause other problems are restitution and the Fine Option program. There is no avenue to enforce restitution other than as a breach of probation or court order. These mechanisms usually result in a low fine if restitution is not made and nothing else. This does not take into consideration the fact that thefts and other crimes against property have a greater effect upon people that, because of their low incomes, cannot afford to replace or fix what has been lost. Such crimes are thus very serious in a poor community and should be dealt with accordingly. Restitution is not an adequate way of addressing the rights of the victim to compensation.*
>
> *The Fine Option Program is not an effective way to punish criminals for the crimes they have committed. Community service means having something to do to a person who would otherwise have no job or other commitments to attend to. There is no sacrifice and thus, no punishment. Additionally, the supervision of Fine Option participants is a strain upon the resources of the community.*[94]
>
> *Establish an Elders panel to assist in the sentencing process of our community members when they come into conflict with the law. This method may cause a great deal of "shame" for the offender because he would be sentenced by both the Court and by respected Elders. This process may in turn give the Court more respect from our community.*[95]
>
> *The Regional Council would like to see more judicial imagination where the sentencing of Indian people is concerned. We submit that the presence of an Indian person before the Court should be a subjective factor to be considered. Further, the Judge should exercise the powers vested in the Court on the Court's own motion, including inviting Indian Elders, Chiefs or other community leaders to assist the Court in reaching a fair sentence.*[96]

The Federation of Metis Settlements also included comments on sentencing. We have included the full passage in our Report because these comments reflected a deep concern with this aspect of the criminal justice system.

> *In general, it is felt by Settlement members that the sentencing procedures are unfair in relation to the Metis. The conclusion arrived at during*

*the meetings and interviews was that there should be more community involvement in sentencing. It was also expressed that traditional values and customs should be taken into consideration during the sentencing procedure. Some of the recommendations follow:*

*Sentencing should be based more on the traditional ways of distributing justice. Traditional approaches to justice delivery, such as shame tactics, could be used for the youth and adult first offenders. The traditional way of doing this was to bring the offender before the whole community to be confronted by elders and the leaders of the village. The offender was then lectured and reprimanded in front of the whole community. When this type of system was used there were very few repeat offenders. This system could work today if the Metis communities became totally involved, with minimal or no interference from the provincial and federal governments.*

*Take more seriously the role that alcohol plays in crimes committed by native offenders. Alcohol is one of the most destructive influence affecting Native communities. It causes and exacerbates many of the social and economic problems that are encountered today. If judges understood fully the negative impact alcohol has had on Native people, they might be more inclined to sentence them to alcohol rehabilitation centres rather than incarcerate them. Because of the unique circumstances that induce many Natives to abuse alcohol, this should be taken into consideration when sentencing is being done.*

*Have more Native input into sentencing procedures. Normally when an offender is found guilty, the Judge has the ultimate say in what type of sentence will be assigned. The only other two individuals who have any influence on what the sentence will be are the prosecutor and the defense attorney. They only give recommendations on the severity of the sentence to be given. Because of their lack of knowledge and understanding of the Native culture, this system is ineffectual when applied to Native offenders. This is why it is important to have more Native input into sentencing procedures.*

*Judges should give Natives more pre-sentence reports. The Settlement people we talked with believe that Natives are less likely to receive pre-sentence reports than non-Natives. When they do receive a pre-sentence report, it is felt that it is more likely to be biased against them than a non-Natives would be. Some contributing factors to this inequality are Natives with unstable family backgrounds, communities with high unemployment, and alcohol and drug abuse. These factors and the prevailing stereotypes about Native people make it difficult to receive a favourable pre-sentence report. The end result could often be a period of incarceration.*

*A solution to this problem is for the Judges and probation officers to not prepare their pre-sentence report solely according to Euro-Canadian standards. They should be receiving input from Native offenders home community. If this is done they will develop a more realistic evaluation of the offenders situation.*

*The problem stems from the method of sentencing. Natives receive lesser sentences when they commit a crime against someone of their own race. In contrast, non-Natives receive harsher sentences for crimes committed against members of their own race.*

*This inconsistent treatment tends to undervalue Natives as people. Settlement members interviewed strongly felt that when they committed a crime against a non-Native they would receive a harsher sentence than if they committed a crime against a member of their own race. This is especially the case if the crime was a violent one. They also believe that if a non-Native committed a crime against a Native, especially a violent one, they will receive a more lenient sentence than if they committed the same type of crime against a member of their own race.*

*At the moment there is not substantial evidence to support these allegations. However, there are ways in which statistics can be kept which would reflect the inequalities in sentencing. Statistics should be kept for even minor offences such as*

*speeding or for failing to wear a seat belt, as well as for major offences like rape and murder. The race of the victim and the offender and the length of the sentence given should be recorded for comparison of crimes committed by Natives and non-Natives. This would be an effective way of discovering sentencing discrepancies to help prove or disprove the allegations that Natives receive harsher sentences for crimes committed against non-Natives and vice-versa.*[97]

The Metis Association of Alberta presented a number of brief comments on sentencing, made in community meetings:

*Judges should order convicted people to attend school while incarcerated.*[98]

*If a Native kills another Native person, the sentence will be lighter than if a Native killed a white person.*[99]

*Far too many Metis people are being incarcerated because of fine default. One should not be further penalized because one is too poor. It costs more money to put people in prison than to sentence them to a fine option program.*[100]

*Judges have far too much discretion with little accountability to the public. Court monitoring should be considered to accumulate enough data to force change. We understand that only an informal system of communication exists where they each get a list of amount of fines for each offence periodically.*[101]

During meetings of the Task Force with some Provincial Court Judges, a different opinion was expressed. The majority of Provincial Court Judges agreed that a "Native discount" operates in sentencing. Some of their comments follow:

*There are differences; some Indians are treated in a differential way. Women are treated with lesser sentences than the men, depending on the nature of the offence.*

*Provincial Court Judges are bound by guidelines and constraints of higher courts but do impose sentences [on Indians] that are generally lower.*

*Females in the North are not sentenced to custodial terms because there are no facilities in the North available to them.*

*Native peoples are sentenced more lightly than others, fines are much lower.*

*I don't treat anyone differently at all.*[102]

The operation of a "Native discount" in sentencing has been noted in other jurisdictions. This would tend to support the view of the Judges. Associate Chief Judge Murray Sinclair of the Provincial Court of Manitoba made these comments when he spoke to an assembly of new Judges in Quebec:

*Interestingly, although it would appear that aboriginal people are charged and incarcerated more frequently than their numbers might warrant, their average sentence is shorter, perhaps reflecting the more minor nature of the offences with which they are convicted and/or greater leniency on the part of the judiciary. In addition, aboriginal inmates tend to have more prior convictions before their first incarceratory sentence, suggesting that judicial efforts at the outset of the accused's criminal career were aimed at keeping him or her out of jail initially. As well, while statistics for most parts of the country are deficient, it would appear that the majority of aboriginal accused appear in urban courts rather than rural ones, and even excluding indictable charges (which are dealt with in judicial centres located in larger towns and cities) the majority of aboriginal inmates are incarcerated by urban courts.*

*However, one looks at the statistics, the numbers speak loudly that the justice system generally is failing the aboriginal community.*[103]

Of course, not everyone agrees that a "Native discount" operates in sentencing to the advantage of an Aboriginal accused person. The Grande Cache Native Brotherhood is an example:

> *Native people are always used as examples of the Courts in order to deter others from committing the same offence. Consequently, they usually get stiffer sentences than non-Native peoples with the same offence.*
>
> *This may be due to their inability to speak for themselves, but the fact still remains in the courts ability to look at the case more realistically and justifiably.*[104]

When the perceptions of the judges and Aboriginals are compared, there are obvious variations. Likely, the real state of affairs in terms of sentencing lies somewhere in the middle.

However, a statistical analysis of court sentencing practices in Alberta and elsewhere in Canada shows that Alberta has the second highest rate of sentenced admissions per 1,000 adults charged in Canada.[105] The figure is 51.5% higher than the Canadian average.[106] These figures tell us that, compared to other jurisdictions in Canada, Alberta judges are very active in sentencing adult offenders to custodial dispositions. Included in these figures are the much higher incarceration rates of Aboriginal offenders. Aboriginals, as stated, make up 4% of Alberta's population but their rate of incarceration is 30%.

One disturbing conclusion resulting from this research is worth noting: with respect to adult offenders, the figures show that Alberta judges exhibit a sentencing rate well above the Canadian average. Furthermore, statistics also indicate a trend of increasing custodial dispositions compared to a decline in charging practices by the police.[107] In other words, while the police are charging fewer people, more people are going to jail.

Can we conclude then that Judges sentence Aboriginal offenders more or less harshly than other offenders? Again, the statistics seem to provide some answers. While Aboriginal offenders are generally given lower sentences by the courts than non-Aboriginals, they spend more time in prison.

> *A comparison of the average length of time in custody spent by adult sentenced offenders (including remand later sentenced offenders) with the average aggregate sentence for such offenders shows that female offenders, on average, spend 45.2% of their aggregate sentence in custody compared to 30.7% for male offenders and that Native offenders, on average, spend 35.4% of their aggregate sentence in custody compared to 29.9% for non-Native offenders.*[108]

# Term of Reference

# Courts 4 (h)

***to determine the extent to which Indian and Metis people are imprisoned due specifically to their inability to pay a fine or use a fine option program.***

The general unavailability of alternatives to incarceration and fines is problematic in the criminal justice system. The problem is particularly acute in the case of provincial summary conviction offences.

Our statistics show that in 1989, 7,628 offenders were reported as admitted to Alberta Provincial Correctional Centres because of fine default. Of these, 66.4% were non-Aboriginal, and 33.6% were Aboriginal (2,563). Of the 6,752 male fine defaulters, 69.5% (4,693) were non-Aboriginal, and 30.5% (2,059) were Aboriginal. Of the 876 female fine defaulters, 42.5% (372) were non-Aboriginal and 57.5% (504) were Aboriginal.[109] We consider the figures for incarcerated Aboriginal women for fine default to be shocking.

Unemployment rates for Indians on reserves are staggering, ranging from 80 - 90%. We do not have figures for off-reserve Aboriginals, but they are also estimated to be high. Most unemployed Aboriginals are on welfare. It is not difficult to arrive at the conclusion that incarceration in default of a fine is totally inappropriate for Aboriginals who are not part of a wage economy.

The general principles which guide sentencing discretion are the protection of the public, the deterrent effect and the rehabilitation of the offender.

Imprisonment as a method to enforce payment of fines by Aboriginal offenders meets none of the principles of sentencing.

The Indian view of monetary penalties or fines was expressed as follows:

> *The majority of the Native people do not view the economics of penalties and fines with the same conceptual understanding and reasoning as non-Natives. The sentences and incarceration periods based on the amount of fines, in the majority of the cases do not deter the Native person from repeating a wrong doing or does not have a rehabilitation effect.*
>
> *The poverty level of the Native people is high, so one can expect that the Native person will not pay the penalty costs and will have no other alternative but to choose to be incarcerated. The poverty stems from unemployment and the lack of a solid education foundation.*[110]

A study completed in 1982 described problems with fine default related to provincial statute offences:

> *Most of the Provincial crimes and regulations for which Native people are being convicted and incarcerated provide only for summary conviction penalties -- fine and/or incarceration. Because the majority of offences committed by Natives are of this type, alternative sentencing discretion is limited.*[111]

With respect to provincial crimes in Alberta, Judges have no alternatives for summary conviction penalties apart from fines and in-default periods of incarceration. Legislative change will be necessary to ease this burden on poor Aboriginal offenders.

In its 1987 Report, the Canadian Sentencing Commission noted that the current substantive provisions and judicial practice with respect to default work against the concept of equality of results where fines are concerned.[112]

The Commission also noted that in the case of both indictable and summary conviction offences, the Criminal Code permits, but does not direct, the sentencing court to impose a period of incarceration in default of payment of the fine. The Commission noted also that the Criminal Code (Section 646) has been amended to allow an offender to apply for an extension of time to pay the fine, but that there is no general test to determine if the offender's default relates to a refusal as opposed to an inability to pay.[113]

These provisions for fine default are particularly onerous and discriminating against Aboriginals in Alberta because most are poor.

The Sentencing Commission recommended a reduction in the use of imprisonment for fine default. There is little evidence of that recommendation, made in 1987, being implemented in Alberta.

A number of speakers at our community meetings spoke with disdain about a practice associated with the problem of fine default. They stated that some Judges keep a "black book" on offenders. Apparently, these notations are used in determining whether an accused will be granted time to pay for fines levied. By means of the "black book" system, a Judge keeps a tally on those who have failed to meet the time limits on previous occasions. When appearing in court again, accused persons do not get time to pay if their names have been entered in the "black book" previously.

This practice means that many Aboriginals get an automatic jail sentence. For a person who is not part of the wage-economy and receives welfare, this sentencing is discriminatory. It should not continue.

# Term of Reference

# Courts 4(e)

*to determine whether alternatives to imprisonment that may be available to non-Indian and non-Metis people are also available to Indian and Metis people and whether there are any barriers to their having access to those programs.*

During our many meetings with inmates in the province, we heard much about the inappropriateness of pre-sentence and pre-disposition reports prepared on Aboriginal adult and young offenders. These reports were generally characterized as culturally insensitive, as most are prepared by "white" probation officers who do not understand the Indian and Metis cultures. The comments of the Federation of Metis Settlements about pre-sentence reports which we quoted earlier describe clearly the problems which result.

In the short-term, these problems must be addressed by training more Aboriginal probation officers, and by requiring the courts to call for more pre-sentence and pre-disposition reports.

Much attention was given to alcohol and substance abuse among Aboriginal offenders. Many presenters told of Aboriginal people hurt, sick, or dying, and deplored the lack of action in this area. Pleas were made for more action by the courts in terms of sentencing, to assist in the elimination of alcohol and substance abuse.

The Federation of Metis Settlements not only described the problem, but also demanded that affected persons be sentenced to treatment rather than to incarceration only.

The most compelling arguments for treatment of alcohol and substance abuse were made in the Brief from Poundmaker's Lodge, an Aboriginal alcohol and drug treatment centre near Edmonton:

> *There is a need for substantive changes to the way in which the Criminal Justice System addresses Native people; there is a need for Police, lawyers, prosecutors, and justices to see the 'illness in the human-being' rather than 'the drunken Indian'. In most Native communities across Canada, 80 percent of the people have a problem with alcohol. Sending our people to jail, or placing them on probation, rather than sending them for treatment, only enables Natives to continue to hurt themselves and their families.*[114]

It is not surprising that Poundmaker's major and first recommendation to the Task Force was

> *that, new legislation be enacted which ensures that strong consideration be given to sentencing the Native adult and young offenders to treatment for their addiction. To assist the Judge in this matter, there should be, as part of the pre-sentencing report, an 'Alcoholism Assessment' completed by a reliable organization, to determine the degree of addiction, and the likelihood of success in treatment. Moreover, the new legislation should include severe 'penalties' if the offender does not want to take treatment.*[115]

Compelling arguments for sentenced treatment were also made by Daniel Beatty (Pawis):

> *Alcohol Related Offences*
>
> *With such a high percentage of alcohol related offences being directed to Natives in Court, would it be too liberal to consider the alcoholism factor over the criminal factor in cases where the pre-sentence reports have indicated so beyond a doubt? Like the physician who prescribes the wrong medication for an ailing patient, in alcohol related cases, the Courts could take into their consideration the most equitable dispositions and practice this consistently. The cost of sentencing an offender to mandatory drug and alcohol treatment and personal development centres could decrease dollars spent on current correctional 'warehousing' and would also indicate that the Courts are focusing on 'preventative and remedial justices' rather than the commonplace 'closet' therapy which keeps alive the revolving door.*
>
> *I believe that a number of offenders would benefit from the positive aspect of treatment in a facility designed for this purpose and also be spared the risk of adopting the institutionalized patterns of behaviour outlined in the previous section on Classification.*[116]

The existing facilities are too limited in proportion to the problem for Judges to make treatment a condition of sentence. We understand that the provincial Solicitor General's Department has contracted for only six beds from Poundmaker's Lodge for the use of provincial inmates who are seeking treatment while incarcerated. Consequently, there are long waiting lists and many inmates are not sent for treatment.

Another problem is that of "enforced treatment." Many argue that this approach will not work if a person is not ready or willing to take treatment.

A practical solution was offered to the Task Force on several occasions. It was suggested that Judges might adjourn the passing of sentence for 28 days, or for whatever length of time is necessary, while accused persons voluntarily admit themselves to treatment.

Apart from legal ramifications, we see two problems with this approach. The first is that circuit court Judges are generally rotated every three months. It is also

specified that a Judge who takes the plea must pass sentence. For those Judges who are at the end of a rotation, it would be difficult to adjourn sentencing if they were not returning for three months and were not prepared to return earlier. Offenders caught in these circumstances would probably miss the opportunity to have their case adjourned for treatment.

Secondly, beds in treatment centres are in short supply. It would not be possible to handle the expected large number of clients.

It has been suggested repeatedly that money would be much better spent on treatment rather than on incarceration. Perhaps it is time for Alberta to consider converting one of its many prisons to a treatment facility.

The fine option program is not always available in Aboriginal communities because of the unavailability of supervisors, or because programs are not operated in the communities themselves. The Lesser Slave Lake Regional Council commented:

> *Some of our member Bands have complained that the locum of fine option and community hours served is away from the communities, so that there is no net benefit to the people who were harmed by the Indian offender's actions. Yet when those hours are to be served on Reserves, inadequate supervision, or local pressure has meant that only fractions of the service were actually completed. This is another area in which the Regional Council can play a key role.*[117]

It has also been suggested that the fine options program is not popular with Aboriginal people because it limits their ability to be assisted by their extended families. A straight fine can be paid with assistance from other family members, whereas community service work can only be done by the convicted offender. For these and other reasons, it seems that Aboriginal offenders do not make as much use of the fine option program as non-Aboriginals. Another reason for the lack of use of the program is that the work is done with the knowledge of the community which causes Aboriginal offenders to feel shame. As a result, many Aboriginals prefer the choice of jail, to which they no longer attach a stigma.

Victim surcharge provisions were adopted by amendments to the Criminal Code on July 31, 1989. Revenue raised by surcharges remains with the Province for the purpose of providing services and programs to assist victims of crime. The maximum surcharge under Section 727.9 of the Criminal Code is 15% of the fine. When no fine is imposed, the maximum is ten thousand dollars. Under Sub-Section 2 where an offender establishes undue hardship to the satisfaction of the court, would result from an order the court is not required to make the order. Only a very few comments were made in briefs and oral presentations about victim fine surcharges. In addition, the Task Force had very limited exposure to courts in action. For these reasons, the impact of surcharge provisions on Aboriginal offenders was difficult to ascertain. We came across some instances of imposition of a surcharge. The Task Force hopes that victim fine surcharges are not imposed when offenders are on welfare and poor. We have already suggested that fines are not appropriate sentences for poor Aboriginals. Similarly, we suggest that surcharges are not appropriate.

We were made aware that victims fine surcharges cannot be worked off in the fine option program. We learned that, to improve the situation, the Solicitor

General of Alberta lets offenders who are arrested for fine default, serve one day in custody and applies that amount to the victim fine surcharge.

The Task Force was told by a Court of Queen's Bench Justice that convicted persons in northern Alberta do not have the same access to intermittent sentences as they would have in Calgary and Edmonton. The Honourable Justice stated that this situation impacts disproportionately on the Aboriginal population, and went on to say:

> *Apart altogether from the issue of whether intermittent sentencing should continue as a sentencing option in Canada, the major concern I was raising ... is that within Alberta the lack of availability of facilities to serve intermittent sentences for women and for persons outside Edmonton and Calgary tends to create systemic inequalities of treatment among convicts. Because of the population distribution in Alberta, these systemic inequalities would tend to weigh more heavily on Native women and men than on the population at large. If intermittent sentences were struck from the Code, all Albertans would stand on an equal footing at the outset of the sentencing process; at the moment they do not.*[118]

Based on this observation, the Justice recommended that the matter of the unavailability of resources to carry out Parliament's intention with respect to intermittent sentences be brought to the attention of the Solicitor General. We have adopted this recommendation.

## Absence of Statistical Data

The Task Force offers a number of observations on the inability to collect statistical data from the courts. The absence of statistical data has been identified as a problem. Availability of statistical information on Aboriginals would assist in understanding the reasons why Aboriginals come in conflict with the law. Associate Chief Judge Murray Sinclair simply says:

> *[While] statistics for most parts of the country are deficient, it would appear that the majority of Aboriginal accused appear in urban courts rather than rural ones and even excluding indictable charges ... the majority of Aboriginal inmates are incarcerated by urban courts.*[119]

The Federation of Metis Settlements noted:

> *Keep more detailed and comprehensive records and statistics of crimes committed by the Metis/Indian and non-Natives for the purpose of comparison. At present the statistics kept on Metis, Indian and non-Native offenders are too superficial to be a good indicator of any unequal treatment from the Courts when sentencing. The available data only indicates the number of inmates, their racial origin, the types of crimes committed and the average lengths of sentences. With this type of information system, it shows Native offenders as being treated equally. This system can actually portray Native offenders as receiving more lenient sentences than non-Natives for the same types of offences committed. This is misleading because the race of the offenders victim is not included.*[120]

The following observations were made based on research done by the Task Force. With respect to sentencing practices, police record "persons charged" data but these records do not show ethnicity. The courts cannot produce person-based information and do not collect information on a person's ethnic status. Consequently, it is impossible to determine the effect of the courts in the sentencing process beyond general trends, particularly the effect on Aboriginal people. For example, the number of adults charged by the police for all offences, with the exclusion of provincial traffic offences, decreased by 9.1% during the five-year period from 1985 to 1989, whereas the number of

sentenced admissions to adult provincial correctional centres increased by 15.2% during the same five-year period.

If meaningful comparisons are to be made between the different components of the criminal justice system in their treatment of Aboriginal people, then all components of that system must collect the same type of information. This information must be person-based and include ethnic status. It is not acceptable to collect only charge-based information which is used, for example, by the courts to administer the court system.

The Canadian Centre for Justice Statistics collected a broad range of person-based information on youth courts in its National Youth Court Survey. This information, unfortunately, does not include data on the ethnic status of offenders. It does, however, reflect conviction rates and sentencing decisions. The collection of such information with respect to criminal courts would be a major improvement.

Any major study or system that attempts to collect data to analyze the sentencing of Aboriginal offenders must also take into account the ethnic status of the victim. Certain sentencing information on Aboriginal people is found in the federal and provincial correctional systems. However, this information is limited to those offenders who receive custody dispositions or are admitted into custody because of fine default. The information shows, for example, that Aboriginal offenders admitted to provincial correctional centres have a lower average aggregate sentence than non-Aboriginal offenders. It should be noted that the bulk of these offenders are male. Male Aboriginal offenders tend to have a higher average length of time in custody than non-Aboriginal offenders. Once again, no data have been collected on offence type, prior convictions, or ethnic status of victims, making an in-depth analysis more difficult.

It is clear that the courts, of all the components of the criminal justice system, suffer from the most serious lack of information on accused offenders. When requested to provide such information on a province-wide basis, the Alberta Attorney General's Department indicated that:

> *the CAP/MIS reports provide the information (other than the distinction between summary conviction and indictable) by the number of cases commenced and/or charges initiated.*
>
> *Ethnic Status - Unknown*
> *Gender - Not Available*
> *Number of accused persons - Not Available*[121]

It is beyond the mandate and resources of this Task Force to conduct an in-depth study of sentencing practices with respect to Aboriginal accused persons. However, we offer the following observations.

A. The court system, as it relates to adult criminal offences, is unable to provide meaningful person-based data on the activities of the courts. No information is available on ethnic status.

B. Considerable information is available on the youth court system. However, rather than being available from the Alberta Attorney General's Department, it can be obtained through the youth court survey conducted by the Canadian Centre for Justice Statistics. Data on ethnic status are not available.

C. The judiciary was unable to provide person-based data related to ethnic status.

D. No detailed information on the various components of the criminal justice system has been collected anywhere to provide an overall picture of the functioning of that system.

## The Task Force Recommends:

4.24 That the Province of Alberta establish Elder sentencing panels to assist Judges in the sentencing of convicted Aboriginal persons.

4.25 That alternatives to incarceration for fine default be explored specifically for poor Aboriginal offenders, and most specifically for female Aboriginal offenders.

4.26 That Judges refrain from keeping "black books" in order to determine payment terms for Aboriginal habitual fine defaulters.

4.27 That more pre-sentence and pre-disposition reports be ordered by Judges for Aboriginal adult and young offenders, and that these reports be culturally sensitive and reflective of the community sentiment.

4.28 That accused Aboriginal persons with alcohol and drug addictions be recommended for treatment at the time of sentence, and that such recommendations be endorsed on the warrant of committal.

4.29 That, when and where appropriate, the Judge adjourn the passing of sentence to allow the accused person to obtain treatment, and that when it is demonstrated that the accused has received treatment, the Judge take this information into consideration when imposing sentence.

4.30 That pre-sentence reports on Aboriginal offenders with an apparent alcohol or drug problem include information about the accused person's problem and treatment that may be available.

4.31 That an adequate number of treatment facilities for Aboriginal offenders with alcohol and drug addictions be established in Alberta.

4.32 That more Aboriginal probation officers be recruited and trained to enable the criminal justice system to respond to the provision of culturally sensitive information in pre-sentence and pre-disposition reports.

4.33 That the Government of Alberta address the problem of the unavailability of appropriate facilities in rural and remote Alberta, to permit the carrying out of intermittent sentences which have a disproportionate impact on Aboriginals.

# Term of Reference

# Courts 4(g)

*to examine whether and the extent to which differences exist in the provision of bail, release on own recognizance or other forms of conditional release prior to trial or adjudication between Indian and Metis people and non-Indian and non-Metis people.*

## Judicial Interim Release

The presumption of innocence unless guilt is proven in a properly constituted court is a fundamental right of any accused person. This right has been codified in the Canadian Charter of Rights and Freedoms. Section 11 (d) provides that any person charged with an offence has the right

> *to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.*[122]

The Charter further provides in Section 11 (e) that any person charged with an offence has the right:

> *not to be denied reasonable bail without just cause.*[123]

The Criminal Code of Canada requires that an arrested person be brought before a Justice within twenty-four hours, or, if a Justice is not available within that time, as soon as possible thereafter.[124]

The intent of the provision is to expedite the release of legally innocent people and to avoid situations where people spend more time in pre-trial detention than is warranted.

During 1989, a study was conducted in Edmonton by Native Counselling Services of Alberta to examine more closely how Aboriginal accused persons were treated in the court system. This study found that, regardless of their criminal records and regardless of the type of offence with which they were charged, Aboriginals were more likely to be held in custody than to be released with a summons to appear.[125]

Native Counselling Services of Alberta suggested that, without bail, an accused person is subjected to many hardships:

- *he will not be able to prove himself by seeking employment.*
- *he will not be able to seek treatment before his next Court appearance.*
- *he may lose his job.*[126]

Several other hardships are involved, especially for those accused persons in remote areas who are denied bail. Because of geographical isolation, the criminal justice system has to remove these people from their home communities and house them in facilities in larger centres such as Peace River. When trapping and hunting is a major part of the life of accused persons, their very livelihood and that of their family is threatened if bail is denied.

Other considerations are that incarceration may make it more difficult to engage a lawyer and that assistance in the assembling of evidence for a defence to the charge is more difficult.

In many Alberta centres, judicial interim release is carried out by Justices of the Peace or Hearing Officers.

Some of the issues involved in a bail hearing were outlined in a 1986 study:

*An accused brought before a Justice of the Peace for a bail hearing is presented with three options. He or she may:*

1. *adjourn the hearing for a few hours in order to obtain legal advice or representation from his/her lawyer;*

2. *adjourn the hearing to the next available court date in order to obtain legal advice or representation from duty counsel where upon his/her hearing will take place in provincial court before a provincial court judge;*

3. *go ahead with the hearing at that moment and represent him or herself.*

*Characteristically, three people take part in the bail hearing: the accused, a J.P. and a police officer who acts as a crown prosecutor. In all but five situations the Crown must prove that the accused should be detained if it wishes to oppose release. The five charges where the onus is reversed are: (1) an indictable offence committed while the accused was awaiting trial on another indictable offence; (2) an indictable offence where the accused is not a resident of Canada; (3) failing to appear, failing to abide by conditions of bail and failing to attend for purposes of identification and fingerprinting; (4) trafficking, possession for the purpose of trafficking, importing or exporting a narcotic; (5) murder or conspiracy to commit murder.*

*The bail hearing results in either the accused being detained in custody or being released on a bail order. If the Crown does not oppose release the Justice must release the accused on an undertaking to appear. The Crown can only oppose release in order to ensure an accused's attendance in court (primary grounds) or if detention is necessary for the protection or safety of the public (secondary grounds).*

*There are five types of orders a judge can make, in addition to an undertaking to appear, if the Crown opposes a straight forward release:*

*i) Undertaking to appear with conditions - conditions may be attached to an undertaking such as: no contact with the victim, to stay within city limits or, as in the case with young offenders, imposition of a curfew.*

*ii) Release accused on own recognizance with no cash deposit of surety specified - a recognizance is a promise to pay a specified amount of money set by the J.P. if the accused fails to appear in court when directed. A recognizance may be entered into either with or without conditions.*

*iii) Own recognizance with surety - a surety is another person who assumes a monetary obligation to ensure that the accused attends court when required. If the accused fails to attend, then the surety may be required to pay the money. Again, this order may be with or without conditions or deposit.*

*iv) Cash bail - the Justice may order that an accused be released only after a specified amount of money is deposited with the court.*

*v) Order that the accused be detained in custody. (Bail denied).*

*In any of the first four instances, should the accused fail to attend court at the specified time and place, the monies or valuables are forfeited and the accused faces a new charge of failing to appear.*[127]

It may be of use to refer to some of the findings of the 1986 Native Counselling Services of Alberta study:

*The greatest disparity between the Native and non-Native experience of bail outcome [in Edmonton] is the fact that many more non-Natives (31.5%) as compared to Natives (5.6%) were released on their own undertaking or on a recognizance.*[128]

*The single biggest problem many Natives face when going through a bail hearing is their general inability to understand bail hearing procedure.*[129]

*Closely related to the problem of people's inability to understand bail hearing procedure is the problem many Natives (17.6%) and non-Natives (11.0%) experience in giving an adequate self-representation before the J.P. It follows that if a person is confused by the bail hearing process, he or she will be unaware of the kind of information the J.P. needs from them... In many cases, for example, the accused enters the court room and once having heard the charges read, attempts to plead guilty or not guilty believing the bail hearing to be his or her trial. Information that the J.P. wants, however, is such that would convince that J.P. that the accused will appear for court and that the accused is not a threat to the safety of the community. Information necessary to secure a lighter bail release includes showing that the accused has a permanent address and job, is part of a recognized stable community, has no failing-to-appear charges and does not possess a lengthy criminal record. Invariably, the J.P. attempts to draw out such information from the accused through questioning. However, on the basis of the study's findings, it is apparent that the J.P. does not always uncover all relevant information.*[130]

The major findings of the Native Counselling Services of Alberta bail hearings study for both Edmonton and Calgary were summarized as follows:

*In summary, the major findings of the Edmonton study are as follows:*

1) *A number of individuals had difficulty understanding bail hearing procedure and as a result appeared to be bewildered by the experience.*

2) *A number of individuals were unable to represent themselves adequately during their bail hearing.*

3) *Some individuals were unable to raise the bail money necessary for their release.*

*In summary, the major findings of the Calgary study are as follows:*

1) *Although contradictory evidence exists, it appears that the J.P.'s were able to obtain adequate information and a fair outcome through careful questioning of the accused.*

2) *Native female young offenders were over-represented in the sample. Of the twelve female young offenders observed in bail hearings, 41.7 percent were Native.*

3) *A number of Native young offenders could not be released because they were unable to contact a responsible adult who was willing to supervise them.*[131]

The briefs received by the Task Force did not cover judicial interim release in any great detail, but a few commented on problems peculiar to their area. The Lesser Slave Lake Indian Regional Council wrote, for example:

*Interim release is another area that requires considerable change. Here, too, there is a perception of bias or racism by "white" Justices of the Peace. There have been instances where bail was denied to individuals from the reserve whose residency, employment and lack of a criminal record all were favourable indicators that the person could be released on their own recognizance. Simple inquiries to the Band office about the person would have sufficed. Once again, this issue is particularly disturbing when it involves Indian persons whose English is poor at best. In fairness, "white" Justices of the Peace tend to know the members of their community, but for obvious reasons are not connected to Indian reserve communities.*[132]

Bail was also addressed in several briefs:

*Aboriginal and Metis people view bail, release on your own recognizance or conditional release different. In that it is not our way and is imposed upon us so we have to abuse it. A program to address this should be developed to emphasis the lack of a positive role model and how it contradicts basic Aboriginal philosophy.*[133]

*Bail is set too high for a Native's modest income - they're usually on welfare and their welfare cheque goes to pay for the food and rent - none left over for bail.*

*Bail is denied because they're unemployed, no financial backup, no current address, past failing to appear, criminal record, and of course, you can't trust an Indian to appear in court if bail is set.*

*It is an established fact that a person out on bail stands a far better chance on their trial, not to mention the discomfort that's eliminated for himself and his family.*[134]

The Task Force notes that there is disturbing evidence

*that the denial of bail has a significant effect on both the likelihood of a conviction and on the severity of any sentence that is ultimately meted out.*[135]

The Elizabeth Fry Society of Calgary also addressed the issue:

*Even though the courts have deemed a person to be manageable in the community pending trial, the lack of financial resources or a bail assistance program keeps those with a low socio-economic status, in prison. Metis and Native peoples are highly representative of this group who cannot meet bail, even though available.*[136]

The Task Force heard from four Hearing Officers, one of whom had completed a study in Calgary for the purpose of determining "what differences, if any, were noticeable between Natives and non-Natives presented by the Calgary Police Service for bail hearings."[137] Some of the conclusions of this study are worth noting:

*There was a noticeable tendency for the Natives studied to adjourn themselves, in custody, to the next sitting of Provincial Court, in order to receive assistance from the Native Court worker.*

*In one instance, the Native accused appeared, and requested an adjournment in custody so that Native Courtworkers could represent him. This request was made prior to the charge being read or the Crown even indicating whether or not they intended to show cause.*[138]

*For those Natives who had cash bail ordered after the Bail Hearing, a no deposit surety bail was ordered in all but one case...Previous experience, not documented in this study, has indicated that a surety bail posted by a relative, or senior family or band member would ensure court appearance and compliance with any court orders made.*[139]

*The Crown objected to release in 62% of the non-Native cases studied, and in only 52% of the Native cases. These statistics tend to indicate that Native accused, are remaining in custody, and not taking advantage of opportunities to hold show cause hearings before a Hearing Officer. At no time during this study, was there a Native Courtworker available to assist a Native accused with his first appearance before a Hearing Officer.*[140]

A number of conclusions can be drawn from our review of judicial interim release for Aboriginal accused persons. Aboriginals are less likely to be released than non-Aboriginals. They do not understand the process and are more likely to be found guilty. They are over-represented in the jail population. They do not have money for cash bail. As we have seen earlier, many Aboriginals simply plead guilty to "get it over with" because remand time is regarded as dead time or simply a waste of time. Consequently, the judicial interim release process bears heavily on them as a group.

## The Task Force Recommends:

**4.34 That the suggestion of the Elizabeth Fry Society of Calgary be adopted to reinstate the Bail Assistance Program, and that it be modified to one specific to**

Aboriginals because of their specific problems with respect to bail.

**4.35** That culturally sensitive bail criteria be developed for Aboriginal accused persons.

**4.36** That an Elder sponsorship alternative to bail be studied and developed.

**4.37** That cash bail requirements not be applied to poor Aboriginal accused persons, in particular not to those who are living on welfare.

**4.38** That, where cash bail is appropriate, Band Councils establish a fund for assistance to Reserve residents.

## Adjournments, Trials and Appeals

Little was said in briefs from and oral presentations by Aboriginal people about adjournments, trials, or appeals. We did not attend any trials of Aboriginal accused persons nor did we observe any appeal hearings. We did, however, observe a number of cases involving Aboriginal accused persons being adjourned for a variety of reasons.

Adjournments seem to occur often to permit an accused person to retain or consult counsel. Adjournments may also be the result of non-attendance of witnesses when trials are scheduled to go ahead. Native Counselling Services of Alberta commented:

> *It has also been our experience that unnecessary delays occur when witnesses fail to attend scheduled trials. This presents two problems for the Native accused, first it incurs lengthy delays that can be both financial and time consuming. In the event that there have been previous delays, the judge may rule to proceed with the trial preventing an adequate defence for the accused.*[141]

However, the major reason for court adjournments is the non-appearance of accused persons. Other reasons are the lack or change of counsel. Yet another reason is the time needed for preparation for plea and trial. Lengthy adjournments in youth and adult court are unwarranted but seem to occur frequently. They are currently the subject of public debate in relation to court backlogs.

Only one Brief addressed the specific problems experienced at trial by Aboriginal accused persons. The argument was made that the "defence of Indian people before the courts is a specialized area, both as to the client and as to the system the client is confronted with."[142]

The Brief states further that:

> *At trial, Indian accused are less likely to be represented by counsel, or if represented, less likely to be represented by senior and experienced counsel, or to be able to negotiate 'plea bargains'. At trial, Indian people are also more likely to be convicted.*[143]

The solution offered is a culturally sensitive public defender system. We have examined the public defender system in the Legal Aid chapter of this Report.

Jury trials pose a problem for Aboriginal accused persons because they are held only in the major centres. It is difficult for persons from remote communities to attend these trials. In northern Alberta,

where there are extensive Indian and Metis populations, jury trials are only held in Peace River and Fort McMurray (see Appendix B, Court Sittings Segment). The Task Force was also told that Aboriginal persons are not summonsed for jury duty. Thus, they are deprived of the right to be tried by their peers.

Two additional issues were discussed in the context of trials. The first was the physical layout of courtrooms in general, and their sterile and insensitive decor specifically. Many Aboriginal people find these rooms frightening and intimidating, with an atmosphere made worse by the Judge looking down on them from a raised platform. They would like to see some articles representative of their culture displayed in the courtrooms they are required to attend, and have the rooms arranged in a more culturally sensitive manner.

The second issue concerned the requirement of most courts that accused persons and witnesses take or affirm oaths on a Bible. Some Aboriginal people required to testify in court would prefer to swear an oath on a pipe or be cleansed with sweet grass. These aspects of Aboriginal culture should be explored further and the necessary changes should be adopted in Alberta courts of law without delay.

In certain cases, appeals are heard by the Court of Queen's Bench. Most appeals are heard by the Court of Appeal of Alberta. We did not observe any appeals in the course of our work, nor did we hear from the Court of Appeal itself.

The Court of Appeal sits only in Edmonton and Calgary. Yet, it has been described as the most portable court in the province. If the Court of Appeal were to sit at locations in the province outside of Calgary and Edmonton, such sittings would benefit and educate the people, and serve as educational tools for the Court itself. The Court must be seen by Aboriginal people to be understood. We have been told that most criminal appeals are initiated by persons in custody and that appellants rarely attend the Court of Appeal in person.

There is some difficulty for Aboriginal people in being represented by counsel in the Court of Appeal because Legal Aid is difficult to obtain. Legal Aid is not as generous in the case of appeals as it is in the case of trials. We understand that Legal Aid usually obtains two legal opinions on the likelihood of success before counsel is assigned for an appeal. This is particularly onerous for Aboriginal clients who must rely on Legal Aid to a greater degree than average persons in the dominant society.

## The Task Force Recommends:

**4.39 That Aboriginal people be summonsed regularly for jury duty throughout Alberta.**

**4.40 That courtrooms serving Aboriginal communities be sensitized physically to Aboriginal culture, and be arranged in a less intimidating manner.**

**4.41 That Aboriginal persons giving evidence in court be permitted to swear an oath in a traditional way, for example, by swearing an oath on a pipe or being cleansed with sweet grass.**

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