CANADIAN LAW REFORM COMMISSION

CONSULTATION ON THE MINISTER'S REFERENCE

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Written comments to supplement the discussion

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1. There is an apparent inconsistency in dealing with the matter of self-determination or self-government. Apparently the various portions have been written by different authors, with this resulting inconsistency. For example Part 2, page 9, no. 12 (the notion of voluntary acceptance of the criminal law) appears to be at odds with the statement extracted from a consultant in Part 16, page 12. Cf. also page 7 in Part 16 (first paragraph). The recommendation is to clearly articulate the relation between (interim and ad hoc) reform of the law of Canada and the significance of the right of self-determination in its application to the Aboriginal peoples in Canada. This phrase 'Aboriginal peoples in Canada' implies the existence of another difficulty. First, as a matter of style, it is my contention that the term 'Aboriginal' in its specific connotation referring to the collectivity that comprises the various peoples in Canada, requires a conventional upper case 'A'. I know that the 1985 Secretary of State Writing Guide takes a different view but I believe it is clearly wrong on the point. Note that no one thought of not capitalizing 'Indian' when it was used in its generic sense, which the term 'Aboriginal' has now replaced. If the Report is to show 'respect' as indicated in its title it must lead by example and adhere to the English writing convention of capitalization which serves to indicate respect. I know that it is particularly irksome to Aboriginal scholars to see upper case letters used for streets, roads and rivers but not for the term referring to their human group. Again the different writers have adopted different styles. The Report should adopt a consistent catalogue of terms. There are a number of naming problems. For example, what are 'Aboriginal First Nations'? (page 2 of Part 7) There is a

wandering between 'Indian', 'Aboriginal' and 'First Nations' which must be corrected. 'Aboriginal' is the generic term. It includes Métis and Inuit people. 'First Nations' is the preference of groups administered by the Indian Act. 'Indian' is a generic misnomer, a term accepted by some of the people so designated, as well as a specific term referring to Indian Act persons. It must be used with close attention to the intended meaning. I have jotted down references to the various terms throughout the Report. As a second point regarding the expression 'Aboriginal peoples in Canada', I submit it is useful to indicate that the 'peoples' reside 'in' Canada as a geographic fact but are not 'of' Canada in the sense that the legitimacy of the Canadian state has yet to be established in respect to Aboriginal peoples. You will know, I suspect, that the federal government has taken the position in the international forum that 'peoples' in the Constitution Act 1982 in its reference to 'Aboriginal peoples' does not have the international law meaning. Is it not appropriate to use terminology which does not prejudice the international status of the Aboriginal peoples in Canada?

2. Re: The recommendation that identifiable ... Aboriginal communities ... have control of the ... system. I am concerned about the absence of identification criteria. I believe that attempts to implement this recommendation without dealing with this issue has much potential for political mischief among Aboriginal communities. Any attempt by the federal government to accept the legitimate 'representation function' of particular individuals or groups in respect to a particular 'community' has the potential of undermining the political legitimacy of others who purport to represent

the same 'community'. Consider, for example, the case of Métis people in the cities. There are provincial political organizations made up of Métis representatives elected in general elections who purport to represent the Métis communities everywhere. There are urban segments to these provincial bodies. Experience shows, however, that various federal agencies and departments have 'consulted' with Métis persons who serve on boards of service agencies in the guise of dealing with Métis representatives. Without some sort of determination of the basic question of 'What is a Métis or other Aboriginal community?' and of the related question, 'Who speaks for this particular [identified according to rational criteria] Métis or other Aboriginal community?', then the prospect for happy implementation of a scheme for "willing and capable" communities appear rather dim. There will always be individuals who will be more than happy to assert (rather than demonstrate) the capacity of the community they purport to represent and to assert the willingness of the community through their own enthusiasm for acceptance of a federal proposal. This puts great power in the hands of the government to divide and control Aboriginal communities. In Canada there is now a rising nationalism among the Aboriginal peoples. Efforts are being made by four national organizations to assert the rights of the Aboriginal peoples, to have them recognized by Canada, and to determine, in appropriate political negotiations, the place of the Aboriginal peoples in Canada's constitution and political institutions. If this is so, then matters deriving from the assertion and acceptance of the right of self-government must originate in political communications between the government of Canada and the Aboriginal peoples' representatives. This applies to statutory reform. Legitimate 'self-government' initiatives can only

take place with legitimate political representatives. The legitimacy of these representatives of the Aboriginal communities must be determined politically by the Aboriginal people. Note that some skirmishing for the right of representation occurred in 1983 when the Métis National Council was formed.

In the process of asserting their political status as distinct peoples, the Aboriginal people will determine and define their community. By a process of self-identification, it will become possible to identify particular Aboriginal communities. In the meantime, all we have in Canada are distinct 'Indian reserve' or 'Métis settlement' communities that are characterized by their occupation of particular lands set aside by governments and by definitions of "community" imposed unilaterally by government's past statutory fiat. In practice it would be relatively easy to implement legislative reform of the sort dealt with in this Report in such communities. Any attempts to implement similar reforms in 'communities' whose identity has not been legitimized in political action are liable to interfere (or at least give rise to accusations of interference) with the political process of community identification which is a part of the larger process of self-determination. In the case of relatively isolated and certainly distinct Métis or other Aboriginal communities (those <u>not</u> identified by government legislation or land occupation) it would also be relatively easy to implement statutory reform of the sort proposed. It is even to be expected that <u>at the community level</u> the process of sorting out the legitimate representation issue discussed above would itself be relatively easy (although I am not convinced this would necessarily be so). The danger for outsiders is the prospect, again, of

interfering with the broader self-determination activities of the people to which the particular community belongs. If an eastern European country is in political turmoil and no clear political leader has emerged, is it right for other nations to go in and deal with the leaders of small villages under the guise of dealing with those who represent the political interests of the people of that particular country?

In Canada all sorts of statutory reform must be clearly distinguished from the political process of self-determination until that process has been resolved politically. I apprehend that, as they have always indicated, Aboriginal peoples will want to continue an association with Canada and statutory reform would likely be an important consequence of political agreement.

3. Has the issue of the constitutional validity of legislation that would be aimed at the establishment of a distinct 'justice' system in respect of Métis people been dealt with? The question of federal power to legislate in respect of Métis people is an open one in law at present.

4. The term 'Native people' has a pejorative connotation and should be avoided.

5. A proposal to establish separate justice systems would have benefitted significantly from comparative studies of such systems elsewhere. This flaw is not a result of the Commission's decision but of the terms of the Reference.

6. Part I.12: Is it right to focus on exclusively 'negative' events as significant movers of recent change?

7. I.17: Why mention individuals and not 'peoples' as recognized in the Constitution?

8. I.21: A true 'justice' system essentially must spring from the will of the people. That factor is not mentioned.

9. Part II.3, last paragraph: But 'everyone' in which relevant community?

10. II.4: Avoid the reference to 'race'. The issue concerns 'peoples', not races.

11. II.5, note 4. But see also R. v. Fireman (Ont. C.A.) and other more recent cases which explain the relevance of the cultural background as a factor in sentencing decisions.

12. II.5, 2d last line: The issue is colonization and oppression of 'peoples' rather than 'racism'. Racism excludes persons who want to participate in the dominant community. Colonization prevents peoples from asserting their right to self-determination.

13. Part III, regarding 'fly-in' courts in remote communities: Without having researched the point, it seems to me that the process itself is inherently in conflict with the

common law standard that justice must be seen to be done (in regards to impartiality) when defence and prosecution travel together. Is this not worth examination? (See XI.2)

14. Part V, Police Powers: I do not believe the arguments canvassed earlier regarding the problems associated with identifying relevant Aboriginal communities apply in the case of policing. Any community can, by general vote or other appropriate method, decide to control a local police force to enforce Canadian law if the Canadian state sees fit to permit it to do so.

15. V.1, no. 5: There are so many public service jobs that require so-called cross-cultural training. Why is it not suggested to recommend changes to school curricula to teach everyone? The education system fails badly and consultants make fortunes establishing ad hoc programs everywhere. This is a deplorable situation in Canada. I expect that there would still be some need for additional specialized training but I think the entire population is now deprived of a basic understanding of Aboriginal peoples. See also Part VII, Recommendation no. 7.

16. Part VII, page 9: Avoid 'we' in contrast to Aboriginal people. This normalizes the absence of Aboriginal people in the camp of the writer.

17. Part XI, recommendation 1, pages 5-6: Clarify recommendation on page 6 in light of Marshall quotation on page 5. Provision of language services may be made on

court onus or at request of accused. The latter is less effective if accused persons are not aware of the existence of the service. (See discussion on page 13.ff.) This is appropriately dealt with on page 14.ff.) [Cf. this to XIII, paper on Native Courtworkers. (end of section)]

18. Part XIII.1: Reference to 'panacea' is unclear without a hint of supporting evidence.

19. XIII.2: Note the shift between 'Aboriginal'" and 'aboriginal'.

20. XIII.74, recommendation (2): Too much jargon; it is almost meaningless. Rephrase. What is Aboriginal justice? I know of no philosophy of justice that supports the existing sentencing and prison system. Bury this term. Avoid 'programmes' unless there is a handy glossary. This is a bureaucratic term that is sure to irk the ordinary citizen.

21. XIII.74, no. 4: Rephrase. What is 'front-end research'? An unlikely sounding bit of jargon.

22. XIII.75, no. 6: "Disposing of cases" is a bureaucratic term that to the ordinary citizen is empty of all social purpose or moral content. Bury it.

23. XIII.76.77, no. 12: The distinction between this recommendation and no. 2, if any, should be made clear.

24. XIII.77, no. 13: Rephrase. Ambiguous.

25. XIII.77, no. 14: Rephrase. "Such" programmes is ambiguous.

26. XIII.78, no. 16: Rephrase. "Such" makes for ambiguity. Avoid reference to 'the' C.S.O. State each recommendation as a self-explanatory statement.

27. XIII.78, no. 17: Rephrase: "Every effort" is unclear. What particular sort of efforts are meant?

28. XIII.80, no. 23: Rephrase. "This native"? Totally confusing.

29. XIII.80, no. 24: "This area" . Rephrase.

30. XIII.81, no. 27: Rephrase. Makes no sense.

31. XIII.81, no. 28: It is remarkably offensive to coin the phrase "Aboriginal crime!" Jettison this expression and rephrase the whole thing.

32. XIII.81.82, no. 28: Rephrase. Who is 'he'?? I condemn attempts to establish a racist system of sentencing, as this suggests. It appears that the courts have already dealt with the apparent recommendation in using the cultural background factor.

In doing so they have avoided the racist approach suggested here.

33. For the sake of brevity, my other comments about XIII will be made orally at the consultation discussion.

34. Part XIV.1, Native Court Workers paper:

(a) 'a fixture'. What does this imply? Is this good? bad?

(b) What does it mean, 'appropriately'? This could hide a lot of mischief.

(c) What is the object of a paper that asks for more work without a rationale, and for more pay?

35. XIV.15, no. 1: Avoid jargon. Explain "Aboriginal service providers".

36. XIV.16, no. 6: Explain what "fully involved" means.

37. XV.1, no. 3: Rephrase. 'Determined' means to 'end'.

38. XV.1, no. 4: Test cases in what areas?

39. XV.16: Cf. The great historical evidence re. governments in Canada failing to obey the law.