

DRAFT OUTLINE OF ISSUES FOR RESEARCH  
WITH RESPECT TO ADMINISTRATION  
OF JUSTICE NORTH OF THE 55th  
PARALLEL IN QUEBEC

MAKIVIK CORPORATION  
February 24, 1984

«It seems to me, however, that to obtain equal treatment, to give equal justice, if a Judge or Magistrate can be said to meet out or give justice, requires some form of special treatment, an adjustment as it were, if inequality or injustice is to be avoided.»

W.G. Morrow  
Yellowknife, N.W.T. (1974)

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## INTRODUCTION

Justice, or the administration of justice, has not attracted the same priority by governments and native leaders as those more «stimulating» issues, such as aboriginal rights and the Canadian Constitution, aboriginal land claims and northern economic development. Of course, all these issues are significant and will have long-term implications for native people and the quality of their lives. However, the disproportionate numbers of native people involved in the criminal justice system and the serious relationship between alcohol and drug abuse and crime in the north, strongly suggest that constitutional rights, aboriginal rights and economic development rights which are being structurally put in place now for future generations of native people may have little meaning for native societies made up of individuals who have lost their self-respect, their sense of history and their goals and aspirations.

Substantial research has been done over the last ten years in almost all areas of administration of justice with respect to native peoples. Reports have been written, recommendations have been made. But still, governments fail to generate the necessary interest and funding to implement these important recommendations; implementation which necessitates involvement of native peoples at all levels and at all stages of such implementation.

Clearly, from an examination of the various problems in each of the basic components of the justice system described in section IV of this outline, it is easier to take remedial action with respect to certain of the problems than others. For example, it may be easier to increase funds to the legal aid system so as to facilitate Inuit access to legal aid in the north than it may be to deal with alcohol and drug abuse at the community level.

Irrespective of changes to the present system of administration of justice which can be recommended and perhaps ultimately made, native peoples have historically been deprived of their own traditional laws, concepts of justice and legal procedures. Native people, therefore, have the right to expect that the system of justice, at a minimum, reflects the elements of their own cultural heritage. Consequently, the final section of this outline deals with the subject of Inuit self-government and the necessary element thereof, namely, an Inuit justice system. Various options for a new justice system will be examined in that last section.

### I. Background to the Administration of Justice

A number of topics require research and analysis as part of the background to administration of justice in northern Québec:

- 1.1 description of traditional forms of social control amongst Inuit

- history of erosion of these traditional forms
- 1.2 brief description of the nature of the historical interaction between Inuit and southern-style legal systems:
  - accusatorial approach v. atonement
  - adversarial approach v. discussion and consensus
- 1.3 the nature of the concept of justice in Inuit and non-Inuit societies;
- 1.4 the nature and relationship of the demographic, socio-economic and cultural elements of Inuit society and their relationship to crime in the north;
- 1.5 the nature and relationship of community, educational, recreational and social facilities as well as economic opportunities at the community level to crime;
- 1.6 description of the Inuit offender profile in northern Québec.

## II. Current Legal Basis for Adequate and Fair System of Administration of Justice for North of the 55th Parallel in Québec

A number of legal bases exist justifying an adequate and fair system of the administration of justice in the region:

### 2.1 Québec Charter of Human Rights and Freedoms

- Section 10 of the Québec Charter provides:

«Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, sexual orientation, civil status, religion, political convictions, language, ethnic or national origin, social condition or the fact that he is a handicapped person or that he uses any means to palliate his handicap. Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.»

- Chapter 3 of this Charter contains a statement of «judicial rights». (Sections 23-38 of Chapter 3 of the Charter are reproduced in Annex I to this outline.)

- This statute also provides for the establishment of a commission known as the «Commission des droits de la personne». The functions of the Commission are relevant to the implementation and enforcement of the above «judicial rights». (These particular functions are set forth in sections 66 and 67 of the Charter and are reproduced in Annex II of this outline.) Clearly the Québec Charter of Human Rights and Freedoms provides an important basis for demanding that a fair and equitable system of administration of justice be established and applied in northern Québec.

## 2.2 Canadian Charter of Rights and Freedoms

Contained in the Canadian Charter of Rights and Freedoms found in Part I of The Constitution Act 1982, are a number of provisions relevant to the quality of administration of justice in northern Québec. These rights are found under the heading «Legal Rights» (sections 7 - 14 of the Charter) and under the heading «Equality Rights» (section 15 of the Charter). Relevant, of course, as well, but not covered by the Canadian Charter of Rights and Freedoms are section 25, section 28, section 35 (Rights of the Aboriginal Peoples of Canada), section 36 (Equalization of Regional Disparities) and section 37 (Constitutional Conference). Both the Charter's «legal rights» and «equality rights» provisions as well as the other above mentioned provisions outside the Charter are reproduced in Annex III of this outline.

An example of how the «legal rights» of the Charter might apply to the quality of administration of justice in northern Québec could be the fact that given the vast distances and lack of adequate judicial facilities in the north, an accused might have his or her right under section 10(b) of the Charter of Rights and Freedoms infringed. Section 10(b) provides that everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right. Yet another example might lie in the fact that an accused incarcerated in a large federal penitentiary in the south might have his rights under section 12 of the Canadian Charter of Rights and Freedoms infringed. Section 12 provides that everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

With respect to provisions in the Canadian Constitution outside the Charter of Rights and Freedoms, in addition to sections 35 and 37, section 36 is also relevant (see Annex III). It

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<sup>1</sup> Note that the Commission has provided a forum for debate of Native justice issues on a number of occasions. See generally P. Lepage, Role et défi de la Commission des Droits de la Personne du Québec face aux droits des Peuples autochtones (1983), 13, No. 3, Recherches Amérindiennes au Québec 201.

represents a commitment to promote equal opportunities for all Canadians and this is highly relevant when one begins to discuss the quality of administration of justice in northern Québec. In many cases it is the lack of those essential public services in the northern communities which contributes to a break-down in the social fabric and a rise in crime.

### 2.3 Public International Law

There is a strong possibility that the meaning, intent and nature of the rights and freedoms contained in the Canadian Charter of Rights and Freedoms will be interpreted in future by government and the judiciary with reference to public international law in such a manner as to strengthen and expand those rights and freedoms. This development in the art and scope of «interpretation» of the Charter will have important implications for the legal basis in the Charter upon which Inuit may wish to base their arguments and claims for a higher quality system of administration of justice in northern Québec.

A recent article in the Canadian Bar Review entitled «The Canadian Charter of Rights and Freedoms and Public International Law» outlines in detail this future interaction of Canadian public law with the international legal system. It states:

«Traditionally, Canadian courts have been cautious in using the language and modalities of customary international and conventional law to assist in interpreting domestic legislation or public policy. This is often the case where statutes or regulations do not clearly state that the enactment was intended to implement a specific international obligation. Judicial views are likely to be altered materially by the links of language and concept now in effect between the family of international human rights, principles and conventions and the specific duties, internationally, undertaken by Canada and reflected directly or indirectly by the Charter or by related federal and provincial statutes... Canadian courts and Canadian lawyers will henceforth have a marketly broader range of policy options and technical resources (concepts and documents) with which to approach the interpretation of important constitutional or statutory provisions or policy rules, that have their origins or their parallels in general international law or under some conventional instrument.»<sup>1</sup>

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<sup>1</sup> Maxwell Cohen and Anne F. Bayefsky, The Canadian Charter of Rights and Freedoms and Public International Law, (1983), 61, No. 1, Canadian Bar Review 265 at 265.

This important article suggests that all international law relative to human rights, whether the subject matter of customary or conventional international law, the latter whether incorporated or not into domestic law, would have a bearing on the interpretation of the Charter. Indeed, this article suggests that international law will play a role in deterring derogation from the Charter by use of sections 1 and 33 of the Charter, namely, the «Override Provisions».<sup>1</sup>

Aside from the Charter of the United Nations which makes reference to respect for human rights in articles 1, 13, 55, 56, 62, 68 and 76, and the Universal Declaration of Human Rights of 1948, as of January 1982, Canada has ratified twenty-three principal international conventions on human rights. Perhaps most important among these, for our purposes here, are the following, all of which were in force for Canada as of August 19, 1976:

- International Covenant on Economic, Social and Cultural Rights;
- International Covenant on Civil and Political Rights;
- Optional Protocol on Civil and Political Rights.

#### 2.4 James Bay and Northern Québec Agreement

Chapters 20 (Administration of Justice) and 21 (Police) of the James Bay and Northern Québec Agreement provide certain rights in favour of Inuit with respect to the administration of justice in the region north of the 55th parallel. Though the provisions contained in those chapters are an attempt to improve the quality of the justice system in northern Québec, there are two major problems associated with these provisions:

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<sup>1</sup> Ibid. at 274:

«It is quite clear that both the United Nations' covenants of 1966 and the European Convention will be used to support arguments against derogation due to the impact of article 1, which together with article 33 constitute the celebrated double «override» provisions of the charter. Articles 2 on «Fundamental Freedoms», 7 - 14 on «Legal Rights» and 15 on «Equality Rights» also are vulnerable to a possible federal and provincial «override» under article 33. There is little doubt, again, that the United Nations' covenants and other instruments will be used to convince the courts where possible to strictly construe any federal or provincial attempt to use the non-obstante clause in relation to these articles.»



1. They have not been adequately implemented by either Québec or Canada since execution in 1975 of the Agreement. For example, the following provisions have not yet been implemented:

- Section 20.0.20:

«The provisions of the Code of Civil Procedure, the Criminal Code and the Canada Evidence Act shall be modified, if deemed necessary, to suit the particular difficulties of the judicial district of Abitibi and to take into account the circumstances, usages, customs and way of life of the Inuit and to render justice more accessible to them.»

- Section 20.0.21:

«The Criminal Code should be amended to allow that six jurors only be sworn in the territories of Abitibi, Mistassini and Nouveau-Québec in the judicial district of Abitibi.»

- Section 20.0.22:

«Amendments should be adopted to allow Inuit, in cases where the defendant or accused is an Inuk, to be sworn as jurors according to applicable laws and regulations, even though they cannot speak French or English fluently.»

- Section 20.0.24:

«Sentencing and detention practices should be revised to take into account the culture and way of life of the Inuit people, and this, with their cooperation.»

- Section 20.0.25:

«As quickly as possible after the execution of the Agreement and after consultation with the Regional Government, the appropriate detention institutions shall be established within the judicial district of Abitibi so that Inuit should not be, unless circumstances so require, detained, imprisoned or confined in any institution below the 49th parallel.»

- Section 20.0.26:

«All Inuit persons, wherever they are sentenced or confined, shall, if they so desire, have the right to be detained, imprisoned or confined in small institutions located within the territory of the Regional Government if such institutions are adequate for these purposes having due regard to all circumstances.»

2. The substance of the provisions of many of these chapters do not go far enough in addressing the real problems and needs of the justice system in northern Québec.

2.5 James Bay and Northern Québec Agreement Implementation Review

On March 26, 1981, the Crees and Inuit appeared before the House of Commons Standing Committee on Indian Affairs and Northern Development and presented their grievances with respect to implementation of the James Bay and Northern Québec Agreement. As a result of the hearings, the Standing Committee drafted a special Statement to the Ministers of Indian Affairs and National Health and Welfare in which they endorsed the claim of the Crees and Inuit that Canada and Québec had failed to implement major provisions of the Agreement. In response to this Statement and the representations made by the Crees and Inuit to the Standing Committee, the Minister of Indian Affairs and Northern Development, in conjunction with the Minister of Justice and Minister of State for Social Development decided to conduct a joint review of the implementation of the Agreement. The results of this review were published in a report of February 1982, sometimes referred to as the «Tait Report».

With respect to the administration of justice provisions of the Agreement, the Report at page 79 states as follows:

«Although, under the Agreement, Québec is responsible for the administration of justice, the Department of the Solicitor General believes that there are various areas where federal participation is necessary or would be helpful. The Department is undertaking a general examination of existing programs and policies for natives in relation to its responsibilities in the area of criminal jurisdiction.

The Departments of Justice and the Solicitor General are ready to discuss with the native parties and Québec the action required to fully implement sections 18 and 20.»

III. Principles and Objectives of Justice System for North of the 55th Parallel

Inuit must establish a series of principles and objectives for the administration of justice in the region north of the 55th parallel in Québec. These principles and objectives must necessarily go beyond those contained in Chapters 20 and 21 of the James Bay and Northern Québec Agreement. Only when consensus can be reached and such principles and objectives are set forth clearly can the direction and initiatives required to establish an appropriate system of administration of justice for the region be undertaken. Minimally, such principles and objectives should include:

3.1 Affirmative Action Programs: Equal justice in the case of Inuit of northern Québec will mean special treatment. Affirmative action programs will be necessary with respect to training and hiring of Inuit for the justice system and in the treatment of Inuit accuseds, inmates, parolees and releaseds.

3.2 Inuit Participation: Inuit must be closely involved in the planning and delivery of justice-related services in the region.

3.3 Access to Information: Inuit must have easy access on a timely basis to information concerning all aspects of the justice system.

3.4 Native Values and Traditions: The justice system and all those individuals involved therein must be fully sensitized to Inuit values and traditions. Justice in any legal system is directly related to its cultural and social milieu. Sensitivity to Inuit cannot only be ensured through the hiring of Inuit court workers and Inuit police; it also implies that Inuit and their communities must control the institutions and agencies related to the justice system.

3.5 Financial and Technical Resources: Inuit must have easy access to government resources, both technical and financial, for the administration of justice in northern Québec. Instability in the provision of such resources will necessarily imply instability in the justice system. Administration of justice requires substantial program planning and implementation which in turn requires resources.

3.6 Diversion and Preventive Programs: Greater emphasis must be placed on preventive measures and on diversion techniques in the administration of justice in the region.

3.7 Causes rather than Symptoms: Any initiatives in the area of administration of justice in northern Québec must be aimed at the fundamental causal factors of native crime rather than a superficial «bandaid» approach to the system. Treatment of a symptom without treatment of the cause of the disease is both

inefficient, expensive and ultimately self-defeating. Preventive measures in the justice system in northern Québec must be interpreted in their broadest sense to include improved infrastructure in the communities, increased economic opportunities in the communities and improved community and recreational facilities.

3.8 Incorporation of Customary Law into the Canadian and Québec Legal Systems: Not only should efforts be made to apply Inuit customary law in the region, but also ways must be explored to incorporate customary laws and principles into all areas of the Canadian and Québec legal systems so that the values of Inuit law can be reflected in the law as a whole.

3.9 Validity of Customary Law: No federal, territorial, provincial, regional or municipal laws should effect either the formal or essential validity of customary Inuit laws as identified and codified.

3.10 Eligibility: A careful system of eligibility for participation in an Inuit justice system must be determined. For example, should non-native people living north of the 55th parallel have access to for example, an Inuit community court system for minor criminal offenses?

#### IV. Basic Components of the Justice System: Current Problems

##### 4.1 Preventive Measures

- Education programs required at the community level concerning all components of the justice system and at every level of each component. Simple ignorance often leads to offenses.
- Specific education and remedial programs on alcohol and drug abuse required.
- The role of various provincial and federal government departments in prevention (Québec Social Affairs; Federal Justice; Federal Solicitor-General; Québec Justice; Federal Health and Welfare; Federal Secretary of State; etc.).
- Special preventive programs for Inuit youth.
- Ongoing public education programs of non-native population regarding Inuit, especially with non-natives involved in delivery of services with respect to administration of justice for the north.
- Curriculum development for the Kativik School Board to include specific programs with respect to alcohol and drug use and abuse.

- Government funds must be made available to develop community correctional programs designed to help upgrade social, cultural and economic environment of the communities as well as to provide a variety of community services which will open up interesting and stimulating alternatives to young Inuit. Many youth at present get into difficulty with the law because of idleness and an overall lack of meaning in their lives.
- Specific programs aimed at improving community economic and social conditions must be initiated by both governments. Minimally this must include adequate community social and recreational centres with appropriate and adequate funding of programs and activities carried out in those centres.
- Diversion mechanisms must be designed and implemented for every level of the pre-trial period.<sup>1</sup> Such diversion programs could include the following:
  - 1) Community-based diversion: whereby individuals or special interest groups within the community deal with problems in their area privately, outside any intervention by the police and the court system.
  - 2) Police-based diversion: a formal referral by the police of an incident to a community resource rather than following the criminal justice process.
  - 3) -Prosecutorial diversion: instead of proceeding with charges in the criminal court, the Crown Attorney may refer a case to a community resource at the pre-trial level to be dealt with through mediation and conciliation procedures.
  - 4) Court-based diversion at the pre-adjudication stage: during periods of remand for trial, the parties involved may be referred by the judge or others to community resource for conflict resolution.
- Research is required with respect to the social and cultural impact of large-scale economic development on the northern communities. Mr. Justice Thomas Berger has noted as follows:

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<sup>1</sup> Diversion has been defined «alternative processes and programs at the pre-trial level to to the formal procedures of the court for dealing with persons who come into conflict with the law».

«I am persuaded that the incidence of these disorders (accidents, homicides, suicides and juvenile delinquency) is closely bound up with the rapid expansion of the industrial system and with its persistent intrusion into every part of the native peoples' lives. The process affects the complex links between native people and their past, their culturally-preferred economic life, and their individual, familial and political self-respect. We should not be surprised to learn that the economic forces that have broken these vital links, and that are unresponsive to the distress of those who have been hurt, should lead to serious disorders. Crimes of violence can, to some extent, be seen as expressions of frustration, confusion and indignation, but we can go beyond that interpretation to the obvious connection between crimes of violence and the change the south has, in recent years, brought to the native people of the north. With that obvious connection, we can affirm one simple proposition: the more the industrial frontier displaces the homeland in the north, the worse the incidence of crime and violence will be.»<sup>1</sup>

- Coordination is required amongst the schools, churches, private agencies and government agencies providing services, support and assistance related to the administration of justice so as to avoid duplication and conflict.
- An education program aimed at all age levels of Inuit to instruct Inuit in their history, specifically, their past and present achievements as a distinct people. Such education program could assist Inuit, especially the young, in building a positive identity and pride that could lead to less crime (this specific recommendation with made at the National Conference on Native Peoples on the Criminal Justice System held in Edmonton in 1975).

#### 4.2 Law Enforcement

- need for a regional police force made up of Inuit for northern Québec with the training program taking place in northern Québec.

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<sup>1</sup> Canada. The Report of the Mackenzie Valley Pipeline Inquiry: Volume 1 at 152. (Berger Report).

- Police have a primary educational responsibility to Inuit.
- need for police to make greater use of their discretionary powers so as to divert rather than to charge.
- need for police to consistently enforce liquor restrictions pertaining to retailers and private individuals selling alcohol as well as to those pertaining to the individual abusing alcohol.
- need for Unseasoned police officers, whether Inuit or non-Inuit, not to be posted to work in the communities.
- need for programs to be developed to improve police/community relations and should be designed to overcome the hesitancy of Inuit to use policing services.
- need for each community to have a citizens' committee to deal with complaints about police treatment of community members;
- need for Inuit to be assured representation on regional, provincial and national police commissions or bodies. Police training must include courses in family counselling and alcohol and drug counselling.

#### 4.3 Legal Representation

- need for Inuit to have better access to legal counsel for both civil and criminal matters, whether in the north or in the south. Factors making such access difficult often involve the following:
  - 1) Language barriers and lack of interpreters often mean legal counsel are of no use even when available;
  - 2) Lack of adequate knowledge concerning the legal system and legal rights of an accused in criminal rights and generally in civil matters.
  - 3) Simple unavailability of legal counsel in the communities or with quick access to the communities.
- Need for greater information and access to legal aid in northern Québec.<sup>1</sup>

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<sup>1</sup> See Jean-Guy Leclerc, L'Aide Juridique et les populations autochtones du nord québécois, (1982), 5, no. 1, Canadian Legal Aid Bulletin, 93.

- need for programs to be developed to<sup>1</sup> facilitate training of Inuit as lawyers and para-legals.
- need for legal counsel functioning in the north to serve an educative as well as legal function and appropriate training and job requirements should provide for such.
- need for more cultural and community-orientation training for legal aid lawyers dealing with Inuit or Inuit community legal problems.
- need for study of range of legal aid services available to Inuit and their communities with a view to extending them and making them more accessible on a timely basis.
- need for Inuit and native people in general, to have adequate representation both in the legal profession and within<sup>2</sup> the positions available in the legal system as a whole.
- need to examine the role of legal counsel vis-à-vis individual Inuit and vis-à-vis Inuit groups and organizations

#### 4.4 The Courts

- The nature<sup>4</sup>, role and effectiveness of native court workers.

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<sup>1</sup> The Saskatchewan Native Law Program is instructive in this regard. To date<sup>7</sup>, there are no Inuit lawyers in northern Québec.

<sup>2</sup> This situation is slowly improving - in 1980 there were 44 native lawyers in Canada compared with only four in 1973. Nevertheless, clearly there is a need for more native lawyers in Canada.

<sup>3</sup> See T. Havemann, the Regina Native Council Project: A Civilian Perspective on the Delivery of Legal Services to People of Indian Ancestry in our City, (1982), 5, No.1, Canadian Legal Aid Bulletin 69; John U. Bayly, Representing Native Groups in Canada: A Shared Experience (1982) 5, No. 1, Canadian Legal Aid Bulletin 97.

<sup>4</sup> Native court workers are recent additions to the criminal justice system. They emerged as a response to the injustices that frequently occur when native people became involved with the legal system. Almost every province and territory in Canada has a native court worker program. The primary function of court workers is to act as a bridge between the legal system and the native offender. This is done mainly by supplying information to both groups.



- need for native court worker programs to be given greater funding since they provide an important service. Such increased funding would allow for more formal training to be provided to native court workers.<sup>1</sup>
- need for more Inuit to be recruited and trained for full-time positions in the criminal and civil court systems, including Inuit para-legals working as Court workers, interpreters, clerks, correctional liaison persons.
- need for courts and Judges to have a greater knowledge of the southern correctional facilities, and social and cultural impacts thereof, to which they sentence Inuit offenders.
- Like the police, Judges have an educational as well as judicial responsibility to fulfill towards Inuit.
- need for more extensive interpreter services to be provided by the Courts for all levels of proceedings during both the pre-trial and trial periods so as to ensure full information and comprehension by the accused as to the nature of the proceedings.
- need for Inuit participation on juries in trials in the region to be facilitated and increased.
- need for greater Inuit participation and input in preparation of reports upon which Judges base their sentencing.
- need for greater support for Inuit offenders at their court appearances both at the pre-trial and trial levels. Such support must involve information and assistance in addition to that provided by legal counsel.
- need for special Inuit cultural education programs and courses are required for judges, prosecutors and defense attorneys dealing with Inuit cases, whether in the north or the south. Judges should be encouraged to exercise their discretionary power so as to divert Inuit offenders, especially juveniles, from being removed from the north due to sentences.
  - interviews with prosecutors, judges and legal aid defense lawyers operating with the itinerant court in northern Québec;

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<sup>1</sup> See E. Gardner, Le Programme de Conseillers Para-Judiciaires au Québec (1982) 5, No. 1, Canadian Legal Aid Bulletin 47.

#### 4.5 Correctional Institutions and Services

- Need to develop a greater scope in the development and implementation of community-based alternatives to sentencing.
- Need to study and develop Inuit traditional measures of control of offenders for application throughout the justice system.
- Need for correctional programs and services for Inuit to reflect their lifestyle, aspirations and cultural background.
- need to explore half-way houses as an alternative or supplement to formal incarceration in correctional institutions. Half-way homes must also be provided for female offenders.
- need to locate any detention centres required for Inuit offenders of northern Québec in the region north of the 55th parallel. (Note that this was recommended in 1972 in the Choquette report<sup>1</sup> and is suggested as a possible option under subsection 20.0.26 of the James Bay and Northern Québec Agreement.<sup>2</sup>)
- Need for more Inuit to be involved in providing correctional services to Inuit offenders.
- Need for more information to be available to Inuit inmates concerning their rights, prison procedures and parole procedures.
- Need for Inuit inmates to have greater access to support and counselling services as well as interpreters and Inuit liaison persons while incarcerated, whether in the north or in the south.

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<sup>1</sup> Québec. Department of Justice. The Administration of Justice beyond the 55th Parallel (Choquette Report) (1972) at 56 and 57.

<sup>2</sup> Subsection 20.0.26 of the James Bay and Northern Québec Agreement provides as follows:

«All Inuit persons, wherever they are sentenced or confined, shall, if they so desire, have the right to be detained, imprisoned or confined in small institutions located within the territory of the Regional Government if such institutions are adequate for these purposes having due regard to all circumstances.»

- Need to give consideration to the inappropriateness of certain prison rules and procedures when applied to Inuit inmates. This is especially true of incarceration of Inuit in southern prison facilities. For example, restrictions with respect to type of foods may not be applicable to certain Inuit whose diet cannot accomodate the prison food.
- Need in institutions for greater quantity and quality of educational and vocational programs for Inuit so as to make sentence time more productive.
- need for Inuit inmates, whether incarcerated in the north or south, to have greater access to outside resources through provision of interpreters, liaison persons, transportation subsidies for families of inmates, greater access to telephone and other forms of communication.
- need for more information of an accurate nature to be provided to the public, both Inuit and the general public at large, so that it can better appreciate Inuit inmate problems whether in the north or the south.
- need for development of community support programs for native organizations attempting to assist Inuit inmates both within institutions and in the post-institutional phase to assist native offenders to return to society in a productive manner.
- need for liaison persons with Inuit inmates to include both male and female liaison persons. (One conclusion of the 1975 National Conference on Native Peoples and the Criminal Justice System was that female liaison persons seem often to have a better rapport with native inmates than male liaison persons.)<sup>1</sup>
- Need to study the Baffin Correctional Centre<sup>2</sup> and the Yellowknife Correctional Centre experiences to determine their successes and failures as northern-based correctional institutions. The stated objectives for the former of these centres when established in 1974 are

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<sup>1</sup> Canada. Solicitor-General. Native Peoples and Justice: Reports on the National Conference and the Federal-Provincial Conference on Native Peoples and the Criminal Justice System held in Edmonton February 3-5, 1975 (1975) at 27.

<sup>2</sup> See H.W. Finkler, Corrections in the Northwest Territories 1967-1981 with a Focus on the Incarceration of Inuit Offenders, (1982), 5, No. 1, Canadian Legal Aid Bulletin 27.

instructive when considering northern detention centres.<sup>1</sup>

- need, where it is necessary for Inuit offenders to be in either provincial or federal institutions in the south, for special institutional programs to be developed for them since they have cultural, social and economic values different from those of other inmates. Present institutions in the south have their programs geared to the needs of southern offenders.
- need for an analysis of actual cost of sending an Inuit offender to prison and those costs associated with a community-based alternative program to prison.

#### 4.6 Probation, Parole and Post-Incarceration Services

- need for examination of the effectiveness of the parole system with respect to Inuit inmates and the issue of recidivism.
- need for native organization sponsorship of Inuit inmates for parole.
- need for regional control over parole and possibility of the need for a regional parole board to service the region north of the 55th parallel.
- need for greater availability of half-way houses for Inuit men and women offenders and improvement in the quality of such services.

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<sup>1</sup> These objectives are the following:

1. To foster in the Inuit offender an improved self-esteem relative to his cultural background.
2. To teach the offender skills and mechanisms necessary to successful community life in the eastern arctic.
3. To provide a public awareness of the problems of criminal justice and corrections and to secure maximum feasible citizen participation in those processes.
4. To activate the public and concerned agencies and to cooperate with them in the provision of appropriate preventive and after-care services to the community.
5. To promote responsible innovation in corrections by initiating and conducting pilot programs and assessing their efficacy.

- need for examination of the quality and availability of parole and probation supervision of Inuit offenders whether living in the north or the south.
- need for community involvement in probation and parole supervision.
- need for native liaison persons, interpreters and legal counsel participation at parole board hearings at the request of the Inuit applicant.
- Need for greater degree of Inuit involvement in provision of probation, parole and other correctional and post-incarceration services to Inuit adult offenders and Inuit juvenile offenders.
- Need for greater degree of cultural and community orientation training for probation officers, parole officers, correctional classification officers and parole board members and staff generally throughout the correctional system providing services and programs to Inuit.
- Need for more facilities for probation, parole and post-incarceration after-care in the community and the region.
  - i. lack of such facilities and services at the community level generates a form of discrimination by precluding to Inuit many of the opportunities for probation available to southern offenders.
  - ii. such facilities, if available at the community level would also serve to involve the community in the rehabilitation process.
- need for adequate consideration to be given to studying the possibility of probation as an alternative to incarceration in the treatment of Inuit offenders.
- Need for proper and timely information to be made available to Inuit inmates concerning parole services.
  - i. need for assistance to Inuit inmates in preparation and presentation of parole application arguments
  - ii. need for information and assistance from outside the correctional institution to Inuit inmates making application for parole.
- Need for greater representation of Inuit and native people in general on parole boards.

- need for assessment criteria for parole applications as well as those criteria for classification within the correctional system must be more appropriately adapted to take into account the cultural, social and economic perspectives of Inuit inmates. Specifically, there is a need for more appropriate classification and aptitude tests for Inuit offenders.

#### 4.7 Substantive Law and its Application to Inuit

This section would deal with the degree to which the substantive law, whether federal, provincial, regional or municipal applies or should apply to Inuit of northern Québec given Inuit traditions, customs and rights. That is, a complete review of laws and regulations at all the following levels would be required to determine to what extent they should apply to Inuit and where current conflicts exist between these laws and Inuit rights and needs. For example, to what degree should Inuit be bound by certain taxation provisions in light of the Jay Treaty and traditional and customary trade between Inuit of the circumpolar region?

Furthermore, the degree to which Inuit customary law has been entertained and applied by the judicial system both within and outside of Canada is also relevant here. However, Inuit tradition and customary law and its application will be more fully discussed under section 6 of this Outline.

##### 4.7.1 All Federal Laws, including:

- Migratory Birds Convention Act
- Gun Control legislation
- Federal Income Tax
- Customs Act
- Parole Act
- Excise Act
- Criminal Code
- Immigration Act
- Various international conventions relating to wildlife and environment of the northern region
- Other

4.7.2 All Provincial Laws, including:

- Family law legislation
- Land-Use Planning Act
- Charter of the French Language
- Provincial Income Taxation Act
- Municipal Taxation Act
- Other

4.7.3 All Regional Ordinances

4.7.4 All Municipal Laws

4.7.5 Judicial Response to Inuit Customary Law

- in Canada
- in the United States
- in Greenland
- in Australia
- other

V. Special Problem Areas in All Components of the Justice System

The following are problem areas requiring special attention since they are found in all components of the justice system. These special problem areas include the following:

5.1 Education: There is a need for the justice system to be educative for both the community and the offender. Proper education as to the administration of justice can play a major role in preventing crime and in modifying various community attitudes towards the justice system and towards offenders.

5.2 Language: Language and local dialects create major problems for both offenders and for the justice system. Lack of comprehension by an offender of his or her rights can effectively deny justice. Knowledge of the system is power. Lack of the ability to understand or community prevents the offender from having such knowledge and consequently renders the offender powerless in the face of the justice system.

5.3 Legal Representation: Lack of adequate legal representation for Inuit offenders leads to lack of knowledge and understanding of the system and of their rights and consequently has the effect of

denying many of the Inuit offenders' legal rights under both the Québec and Federal Charter of Rights and Freedoms. Related to this problem area are also the following:

- absence of Inuit lawyers in northern Québec;
- lack of adequate access by Inuit to the Québec Legal Aid system for both criminal and civil matters.

5.4 Training and Job Placement: More Inuit must be involved in providing services in all components of the justice system. Specific programs may be required to encourage and facilitate Inuit training and job placement in the justice system. Potential cultural biases or impediments to greater Inuit involvement in training and jobs in the justice system require research and analysis as well.

5.5 Access to Information: Information of both a general and specific nature concerning the administration of justice is required for individuals and the community in all components of the justice system. Experience dictates that pamphlets and booklets, even if in the Inuktitut language, are not enough to provide sufficient information to the public. Resource persons available for advice and counselling in every component of the justice system appear necessary.

5.6 Adequate Funding: A problem common to all components of the justice system is that of lack of adequate funding from government sources. Lack of such adequate funding prevents meaningful involvement by Inuit in all components of the justice system and serves to separate Inuit and Inuit communities from the information and knowledge of the justice system which they require. In the field of administration of justice, funds translate directly into human resources, and it is these human resources, if properly trained, that provide the necessary liaison or links between the justice system and Inuit.<sup>1</sup>

5.7 Lack of Facilities and Resources at the Community Level for Youth Offenders: At every component of the justice system there appear to be a lack of adequate facilities and resources for dealing with juvenile delinquency and other youth-related behaviour. Young offenders have special needs because they are dependants at varying levels of development and maturity. These special needs must be addressed in every component of the justice system.

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<sup>1</sup> It is significant that the Federal Department of Justice between the years 1975-1981 expended no dollars in the region north of the 50th parallel in northern Québec (both the James Bay Cree region and the Inuit region north of the 55th parallel). Moreover, the Federal Department of the Solicitor-General in this same period spent only \$43,303.00. (See Canada. D.I.A.N.D. James Bay and Northern Québec Implementation Review (Tait Report) February 1982 at 106, 107.)



Federally,<sup>2</sup> the Young Offenders Act<sup>1</sup> and provincially the Youth Protection Act<sup>3</sup> require evaluation with respect to Inuit youth offenders.

5.8 Inuit Women and the Justice System: Sexism, discrimination and violence are elements familiar to many women in native societies, including Inuit society. These special problems require special responses in all components of the justice system.

VI. Significant Efforts in the Area of Native Peoples and the Administration of Justice: There have in recent years been certain significant efforts undertaken by governments and native organizations in the area of administration of justice. These efforts should be examined with a view to determining those which have been successful and those which have not. These efforts include the following:

6.1 The Native Courtworkers Program:<sup>4</sup> Efforts in every province to establish native courtworkers programs constitute a major effort to improve communications and information in the criminal justice system vis-à-vis native peoples. These programs must be examined for their successes and failures.

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See generally C.P. Laprairie and C.T. Griffiths, Native Indian Juvenile Delinquency: A Review of Recent Findings (1982) 5, No. 1, Canadian Legal Aid Bulletin 39 at 46:

«Clearly, research and policy must address those issues which relate to the role and function of the Juvenile Court in the handling of native Indian juvenile offenders. As well, research must proceed the policies and programs designed to address the specific needs of Indian youth. The collection of good base-line data will assist policy-makers at the federal and provincial government levels in the initiation and formulation of policies ...»

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See W.T. Badcock, An Evaluation of the Operation of Ontario's Native Court Worker Program, Toronto, Ministry of the Attorney General, 1975; S. Karamessines, Potential Sources of Assistance for Native Peoples in the Area of the Criminal Justice System, Ottawa, Department of Indian Affairs and Northern Development, October, 1976; M. Sinclair, Evaluation of the Court Worker Program in Manitoba, Ottawa, Department of Justice, 1976; E. Gardner, Le Programme de Conseillers Para-Judiciaires au Québec (1982), 5, No. 1, Canadian Legal Aid Bulletin 47.

6.2 National Conference and the Federal-Provincial Conference on Native Peoples and the Criminal Justice System, 1975

The National Conference on Native Peoples and the Criminal Justice System was held in Edmonton from February 3-5, 1975. The third day of this meeting actually constituted a formal federal-provincial conference by government officials to which delegates from the National Conference were admitted as observers. These two 1975 Conferences have been described as «The 'watershed' experience for native participants throughout the country who are concerned about the disproportionate numbers of native people in conflict with the law.».

A number of important issues covering all components of the criminal justice system were covered at these Conferences and significant recommendations were established at that time. One of these recommendations provided that «native people should be closely involved in the planning and delivery of services associated with criminal justice and native people». As a result of this resolution, it was decided to establish a Canadian Advisory Council on Native Peoples and the Criminal Justice System. It was intended that this new body constitute a consultative advisory group to government on these matters. Membership on this Council was comprised of one representative of each of the four federal departments involved in native matters - Justice, Secretary of State, Solicitor-General, and D.I.A.N.D.; one representative from each of the six national native peoples groups - The Native Council of Canada, Inuit Tapirisat (I.T.C.), the Friendship Centres, The National Indian Brotherhood, The National Women's Federation and the Native Law Students Association; and up to four representatives from each of the provinces and territories who would be from government and native groups. It was also agreed that each province and territory would set up their own Advisory Council on native justice with government and native representation.

At this Conference, the following statement of general philosophy was adopted by the Ministers as underlying any approach to the problems of native people with the criminal justice system:

- «1. Native persons should be closely involved in the planning and delivery of services associated with criminal justice and native peoples.
2. Native communities should have greater responsibility for the delivery of criminal justice services to their people.

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<sup>1</sup> See proceedings of Québec Native Justice Council, 1976.

3. All non-native staff in the criminal justice system engaged in providing services to native people should be required to participate in some form of orientation training designed to familiarize them with the special needs and aspirations of native persons.
4. More native persons must be recruited and trained for service functions throughout the criminal justice system.
5. The use of native para-professionals must be encouraged throughout the criminal justice system.
6. In policy planning and program development, emphasis should be placed upon prevention, diversion from the criminal justice system to community resources, the search for further alternatives to imprisonment and the protection of young persons.»

Unfortunately, the Canadian Advisory Council on Native Peoples and the Criminal Justice System and its successor, the Canadian Aboriginal Justice Council, ceased to function in 1978. Moreover, though native justice councils were set up in each province, only those of certain provinces have been active. The Native Justice Council in Québec held a conference in 1976 at which a number of resolutions were adopted, but since that date there has been no significant activity from this Council.

It is clear that a significant effort such as these 1975 Conferences lose their meaning unless carefully followed-up through implementation of recommendations and resolutions adopted by them. This requires a significant commitment in human and financial resources by both native organizations and government departments. Moreover, it requires a mechanism to continue interest in administration of justice problems and issues. It would be instructive to determine why the provincial Native Justice Councils have failed to generate and maintain this type of interest.

### 6.3 Comparative Analysis of Efforts in Other Jurisdictions

VII. Self-Government, Aboriginal Rights and an Inuit Justice System

Under this section it is necessary to explore the basis for an Inuit justice system; Inuit legal concepts, traditions and customs; the legal rules and legal structures which flow from these concepts, traditions and customs; and the various options for an Inuit justice system falling from these legal rules and legal structures.

7.1 Basis for an Inuit Justice System dealing with Criminal and Civil Matters

- Aboriginal rights (broader basis)
- Self-government (narrower basis)<sup>1</sup>
- Other bases

7.2 Inuit Concepts, Traditions and Customs With Respect to Criminal and Civil Matters

- Criminal matters and traditional Inuit forms of social control and punishment

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<sup>1</sup> Note that recommendation no. 21 of the Penner Report recommends justice and law enforcement among the range of subject-matters over which Indian First Nation Governments would exercise powers. This recommendation provides as follows:

«The Committee therefore recommends that Indian First Nation Governments exercise powers over a wide range of subject-matters. The exact scope of the jurisdiction should be decided by negotiation with designated representatives of Indian First Nations. A First Nation Government should have authority to legislate in such areas as social and cultural development, including education and family relations, land and resource use, revenue-raising, economic and commercial development, and justice and law enforcement, among others. First Nation Governments may also wish to make arrangements with the federal and/or provincial governments to continue existing programs or services.»

See Canada. House of Commons. Report of the Special Committee on Indian Self-Government in Canada (Penner Report) 1983 at 64.

<sup>2</sup> See also topics presently under research by University of Laval (Bernard Saladin d'Anglure and Alain Bissonnette).

- Family Law Matters
  - Adoption
  - Child Care and Child Welfare
  - Custody of Children
  - Divorce
  - Marriage
  - Maintenance
- Successions and Estates
- Name-Giving
- Inuit concepts of individual and communal property
- Civil Property Matters
- Commercial Matters
- Other

7.3 Legal Rules and Structures based on Inuit Concepts, Traditions and Customs with respect to Criminal and Civil Matters: There may be a number of options possible here with respect to the establishment of legal rules and legal structures which reflect Inuit concepts, traditions and customs regarding civil and criminal matters. Irrespective of the option chosen by Inuit for an Inuit justice system, such an option must meet the basic criteria of fairness, efficiency, accountability, accessibility and credibility. These options include the following:

7.3.1 An Inuit justice system based upon Inuit legal concepts, traditions and customs with respect to criminal and civil matters and employing structures or institutions also based on these same concepts, traditions and customs.

7.3.2 An Inuit justice system based on a combination of both Inuit traditional rules for certain matters and southern legal rules for certain other matters. Similarly, Inuit structures or institutions for their legal system could involve a combination of the traditional structures and southern legal structures.

7.3.3 An Inuit justice system based on southern legal rules and southern legal structures and institutions but with an appropriate system of guarantees that Inuit customs, traditions and

legal concepts are given appropriate weight in all areas of decision-making and the justice system in certain specific areas such as family law.

Clearly this would necessitate certain changes in the rules of evidence with respect to these matters and the appropriate amendments to existing provincial and federal legislation in order to implement such changes in these specific areas.

7.3.4 An Inuit criminal justice system whereby minor offenses are dealt with at the community level through a system of Inuit community courts and the more serious criminal offenses are dealt with by the southern justice system and their courts. The example of the Court of Elders in the Yukon might be applicable here.

#### 7.4 Comparative Analysis with Other Jurisdictions

Other jurisdictions must be examined to determine how they have dealt with the question of native justice systems. These jurisdictions would include:

- Australia
- Greenland
- United States
  - Tribal Courts<sup>1</sup>
  - Tribal Law
    - distinction between customary law and tribal law
- Canada
  - The Indian Act Justice of the Peace (section 107 of the Indian Act)<sup>2</sup>

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<sup>1</sup> See Canada. D.I.A.N.D. United States Indian Tribal Courts: A Bibliography. Social Science Notes 6. Ottawa. 1967.

<sup>2</sup> See (1982), 5, No. 1, Canadian Legal Aid Bulletin 132.

Annex I

EXCERPTS FROM CHAPTER 3 OF THE QUEBEC  
CHARTER OF HUMAN RIGHTS AND FREEDOMS

- Section 23:

«Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him. The tribunal may decide to sit in camera, however, in the interests of morality or public order. It may also sit in camera in the interests of children, particularly in matters of divorce, separation from bed and board, marriage annulment or declaration or disavowal of paternity.»

- Section 24:

«No one may be deprived of his liberty or of rights except on grounds provided by law and in accordance with prescribed procedure.»

- Section 25:

«Every person arrested or detained must be treated with humanity and with the respect due to the human person.»

- Section 26:

«Every person confined to a house of detention has the right to separate treatment appropriate to his sex, his age and his physical or mental condition.»

- Section 27:

«Every person confined to a house of detention while awaiting the outcome of his trial has the right to be kept apart, until final judgment, from prisoners serving sentence.»

- Section 28:

«Every person arrested or detained has a right to be promptly informed, in a language he understands, of the grounds of his arrest or detention.»

- Section 29:

«Every person arrested or detained has the right to immediately advise his next of kin thereof and to have recourse to the services of an advocate.»

- Section 30:

«Every person arrested or detained must be brought promptly before the competent tribunal.»

- Section 31:

«No person arrested or detained may be deprived without just cause of the right to be released on undertaking, with or without deposit or surety, to appear before the tribunal at the appointed time.»

- Section 32:

«Every person deprived of his liberty has a right of recourse to habeas corpus.»

- Section 33:

«Every accused person is presumed innocent until proven guilty according to law.»

- Section 34:

«Every person has a right to be represented by an advocate or to be assisted by one before any tribunal.»

- Section 35:

«Every accused person has a right to a full and complete defense and has the right to examine and cross-examine witnesses.»

- Section 36:

«Every accused person has a right to be assisted free of charge by an interpreter if he does not understand the language used at the hearing.»



- Section 37:

«No accused person may be held guilty on account of any act or omission which, at the time when it was committed, did not constitute a violation of the law.»

- Section 38:

«No testimony may be used to incriminate the person who gives it if he does so under the protection of the tribunal, except in the case of purgery.»

Annex II

EXCERPTS FROM THE QUEBEC CHARTER OF HUMAN  
RIGHTS AND FREEDOMS

- Section 66:

«The Commission must promote, by every appropriate measure, the principles enunciated in this Charter, and exercise the powers and carry out the duties prescribed in this Charter.»

- Section 67:

«The Commission shall in particular:

- a. receive complaints and make investigations regarding matters within its competence by virtue of section 69;
- b. establish a program of information and education designed to promote an understanding and acceptance of the objects and provisions of this Charter;
- c. direct and encourage research and publications relating to fundamental rights and freedoms;
- d. make an analysis of any Québec Statutes existing prior to this Charter - which may be inconsistent with it and make the appropriate recommendations to the Government;
- e. receive the suggestions, recommendations and requests made to it concerning human rights and freedoms, study them and make the appropriate recommendations to the Government; and
- f. cooperate with any Québec or outside organization dedicated to the promotion of human rights and freedoms.»

Annex III

EXCERPTS FROM THE CANADIAN CHARTER OF  
RIGHTS AND FREEDOMS

Legal Rights

- Section 7:

«Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.»

- Section 8:

«Everyone has the right to be secure against unreasonable search or seizure.»

- Section 9:

«Everyone has the right not to be arbitrarily detained or imprisoned.»

- Section 10:

«Everyone has the right on arrest or detention:

a. to be informed promptly of the reasons therefor;

b) to retain and instruct counsel without delay and to be informed of that right; and

c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.»

- Section 11:

«Any person charged with an offense has the right:

a. to be informed without unreasonable delay of the specific offense;

b. to be tried within a reasonable time;

c. not to be compelled to be a witness in proceedings against that person in respect of the offense;

d. to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

e. not to be denied reasonable bail without just cause;

f. except in the case of an offense under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offense is imprisonment for five years or a more severe punishment;

g. not to be found guilty on account of any act or omission unless, at the time of the act or omission, it is constituted an offense under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

h. if finally acquitted of the offense, not to be tried for it again and, if finally found guilty and punished for the offense, not to be tried or punished for it again; and

i. if found guilty of the offense and if the punishment for the offense has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.»

- Section 12:

«Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.»

- Section 13:

«A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.»

- Section 14:

«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.»

Equality Rights

- Section 15(1):

«Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.»

- Section 25:

«The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights and freedoms that pertain to the aboriginal peoples of Canada, including:

a. any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

b. any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.»

- Section 28:

«Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.»

- Section 36:

«(1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legis-

latures, together with the Government of Canada and the provincial governments are committed to:

- a. promoting equal opportunities for the well-being of Canadians;
- b. furthering economic development to reduce disparity in opportunities; and
- c. providing essential public services of reasonable quality to all Canadians.

(2) Parliament and the Government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.»