Manitoba
Aboriginal Justice
Implementation Commission

BACKGROUND PAPER ON OPTIONS FOR A SUCCESSOR BODY

April 2001

I. EXECUTIVE SUMMARY

The Aboriginal Justice Implementation Commission (AJIC) was appointed in November 1999 with a 16 month mandate which highlighted the government's request for a priority agenda for action in the short and mid term. The Commission was asked to develop practical, cost-effective and attainable strategies to implement the recommendations of the Aboriginal Justice Inquiry (AJI), keeping in mind as well the more recent recommendations of the Royal Commission on Aboriginal Peoples (RCAP).

The Commission's mandate has been to focus on priority areas of action and implementation strategies for recommendations of AJI. One of the AJI's core recommendations was for a statutory institution – a permanent Aboriginal Justice Commission – as the primary vehicle to facilitate initial and on-going negotiations between both levels of government and with First Nations and the Métis Nation of Manitoba. A permanent Commission was also proposed in order to monitor implementation and to report regularly to the government, and the legislature, on progress.

This background paper reviews major options for the establishment of a successor to the AJIC, keeping in mind the original purposes for such a body as proposed by the Aboriginal Justice Inquiry, as well as the Royal Commission's subsequent recommendations for facilitative, investigative, monitoring and implementation support institutions. The latter may be of particular relevance, as to date the federal government has declined to take steps to establish such bodies, and accordingly a Manitoba specific institution might usefully incorporate some of the functions recommended by RCAP for national structures.

In assessing the options for a successor institution, this paper examines a wide range of precedents – from the Canadian and international experience – exploring in particular the mandate, make-up, structure and successes, and failures, for those bodies established to facilitate relations between governments and indigenous peoples.

A primary consideration in this paper is whether and to what degree the establishment of a successor body to the existing AJIC represents a prudent expenditure of financial and political resources in the cause of achieving the goals set out by the government of Manitoba in the mandate provided to the AJIC in November, 1999.

In brief, we conclude that a successor body, established largely along the lines initially recommended, would appear to be a very central component in any successful agenda for action that hopes to gain broad public support, achieve bi-

partisan respect and which sets practical and attainable goals that all Manitobans can share with enthusiasm.

II. CONTEXT

AJI RECOMMENDATIONS

The AJI recommended that an independent, statutory commission be established in order to accomplish three basic goals[1]:

a) "to ensure that Aboriginal-government negotiations occur in as fair and productive a manner as possible...;

b) to monitor the degree to which governments are proceeding toward the implementation of the recommendations in this report, and to report publicly on its progress from time to time; and

c) to facilitate any negotiations which need to occur between governments and Aboriginal people, and assist in resolving points of disagreement. That could be done in whatever way the parties agree, but we believe that utilizing mediation or other dispute resolution techniques, including arbitration, should be considered."

The AJI also recommended that a permanent commission take on additional roles, including those relating to the recommendation of legislation, the establishment of an Aboriginal Justice College and Aboriginal justice systems, and to carry out a quasi-Ombudsman role in the hearing of grievances and referring recommendations for action to appropriate government agencies.

By way of structure, the AJI recommended that the Commission be comprised of a board of directors with equal numbers of Aboriginal and government (federal and provincial) representatives, and that these Commissioners select a neutral Chief Commissioner.[2] In the view of the AJI, the Aboriginal Justice Commission was key to the implementation of its recommendations.

RCAP RECOMMENDATIONS

Any assessment of the core recommendations of RCAP leads to a consideration of why it determined that four broad types of national or regional, permanent or time-limited, and mostly statutory bodies were required to meet the diverse requirements that the RCAP saw as essential:

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[1] The full recommendation of the AJI in respect of a successor Commission is set out at Annex 1.

[2] The AJI specifically noted that "Aboriginal representatives should include status Indians, Métis, non-status Indians, and representatives of Aboriginal women and urban Aboriginal people." This would appear to require a Commission a minimum of 5-7 members, taking into account the need to reflect demographic and regional representation amongst First Nations and Métis communities.

a) facilitative;
b) investigative;
c) arbitrative, and;
d) determinative.

The overall framework of the Commission's approach to reconciliation was designed to respond to three contesting needs: the enforceability of Aboriginal rights, the effective retention by federal and provincial governments of their respective jurisdictions, and the selection of negotiation as the surest means to successful implementation. The challenge faced by the Commission was to come up with alternatives to deliberate stalling by either side through such devices as political avoidance or litigation, without, however, turning inherent or constitutionally protected rights into contingent demands upon governmental discretion.

The Commission's approach was to provide for alternative dispute resolution, accompanied by facilitation and capacity building as discussed above. The following specific measures were recommended:

- Political Oversight
  Based on the precedent of the constitutional conferences up to 1992 and section 35.1 of the *Constitution Act, 1982*, the Commission called for a lead role to be played by national Aboriginal representatives, both in the initiation and on-going oversight of transition processes. This is expressed most concretely in relation to the creation of a national framework agreement on core jurisdictions and fiscal relations and in constant arbitration, through representative negotiations, of "macro-level" disputes over representation, compliance with negotiation commitments and the need identified by the Commission for certain amendments to the Constitution.[3]

- Formal Commissions, Tribunals and Dispute Resolution Mechanisms
  In addition to a transition centre to provide advisory services to Aboriginal and partner governments, the Commission recommended three arms-length bodies of specific relevance to the implementation of the RCAP's recommendations in relation the reconciliation of Aboriginal rights with Crown jurisdictions:

  - *Regional Treaty Commissions* as permanent, neutral bodies to fund and facilitate treaty negotiations (of relevance in particular to issues respecting existing treaties);

[3] Attention might be usefully paid in this regard to the involvement of Manitoba in the development of policy objectives for the resumption of inter-governmental dialogue through the "Federal-Provincial-Territorial-Aboriginal" (or FPTA) process.

- An *Aboriginal Lands and Treaties Tribunal* (ALTT) as an independent administrative tribunal respecting the settlement of specific claims, treaty-making (self-government as well as land-related) and treaty implementation process, including the power to make final and binding orders and settlements within both the federal and provincial spheres of jurisdiction. This Tribunal would also be charged with arbitrating compensation issues relating to the return of expropriated or unsold surrendered reserve lands; and
- One or more *Aboriginal Recognition Panels* (under the auspices of the ALTT) to carry out the task of assessing the preparedness for and recognition of inherent self-governing bodies (styled by RCAP as Aboriginal Nations).

The reliance on these arm's-length institutions for facilitation and dispute resolution reflected the Commission's appreciation that fundamental issues cannot be simply left to political negotiations between dominant, well resourced governments representing majoritarian interests, on the one hand, and, on the other hand, groups that have yet to be established with independent capacities, representing relatively small minorities. Added to this consideration was the Commission's view of the Federal and Provincial Crown's fiduciary obligations to Aboriginal peoples and the difficulty inherent in reconciling such obligations with the pressure on individual Ministers or agencies of government to express a fully collective view of government policy. Nevertheless, and in keeping with the Commission's view of the primary federal jurisdiction under section 91(24), these institutions would be constituted under federal legislation. Accordingly, all such institutions would be of a "national" character and mandate, though they might, as with Treaty Commissions, be organized on a regional basis. In the main, the RCAP proposed national institutions – avoiding regionally based bodies.

Federal Reorganization

Rounding out the main recommendations of the Commission in respect of achieving reconciliation were its proposals for new machinery of federal (and by implication, provincial) government. In this the Commission focused specific attention on the Department of Indian Affairs and Northern Development (DIAND) and the need to depart from existing structures closely linked to the administration of the *Indian Act* and allied legislation. RCAP called for the following new federal structures:

- <u>A New Department of Aboriginal Relations</u>
  RCAP proposed that an organizational restructuring occur, early on in the government's response to its recommendations, by organizing a new senior Ministry with three main branches (policy, finance and transition) with the following basic functions:
  - development of fiscal framework for Aboriginal government finance;
  - negotiation of treaties, claims and self-government through a legislatively established Crown Treaty Office;

- transition from the *Indian Act*;
- initiation and direction of sectoral policy reviews, and;
- funding for arm's-length facilitation agencies.

➢ A Remnant Department of Indian and Inuit Services
This Department, under a junior Minister, would discharge obligations to First Nation communities remaining under the *Indian Act*, and provide service and support to status Indian and Inuit communities for established programs and services. RCAP recommended that this Department *not* have any policy role in the transition to self-government.

➢ New Central Agency Role regarding Transition Legislation
< initiation of and appointments for Treaty Commissions and Aboriginal Lands and Treaties Tribunal, as well as Recognition and Government Panels, and;
< provide a secretariat to a new Cabinet Committee.

➢ A Permanent Cabinet Committee on Aboriginal Relations
< chaired by new Minister of Aboriginal Relations, and;
< develop trans-government policies on health, housing, etc.

It is crucial to appreciate that the Commission called for these structural initiatives, mostly federal but some involving provincial initiative, to be taken *first*, before the development of policy or the negotiation of legislation regarding recognition, new treaty policies and so fourth.

RECEPTION GIVEN THE AJIC

The appointment of the AJIC shortly after the Manitoba government's election in 1999, and the provision of a "fast-track" mandate to prioritize an action plan, sent a fairly strong signal that the government held considerable regard for the importance of the AJI's report, which in turn featured a permanent forum and agency to monitor, facilitate and report on the implementation of its recommendations. Of equal significance was the government's inclusion in the AJIC's mandate of the requirement to take into account the Royal Commission's recommendations, which, as indicated above, emphasized structural change even more emphatically than had the AJI.

Consequently the AJIC has been accompanied by heightened expectations about three broad outcomes:

- the adoption of a clearly stated priority agenda for short and mid-term action, drawing upon the AJI and RCAP reports;
- the provision of a balanced and integrated approach to Aboriginal-provincial relations that does not merely or solely focus on the administration of justice, in accordance with the AJI's recommendations, and;

- the establishment of a successor body to carry out defined tasks in relation to the implementation and functioning of Manitoba's new agenda for action.

Based on their public statements and on the informal dialogues held by Commissioners over the past 15 months, First Nation and Metis representatives appear to regard each of these three components as comprising an integral element of the government's response to both AJI and RCAP.

First Nations and Manitoba Metis will assess the government's response to the AJIC's recommendations in relation to a successor body in the context of recent experience. In the case of First Nations, this includes some disappointment with the federal response to the Royal Commission's report (set out in Canada's *Gathering Strength* initiatives) and the down-grading of expectations for the unique Manitoba Framework Agreement Initiative. In neither case was a neutral or third-party facilitative body or commission provided for, and in partial consequence both are regarded at the community level as somewhat too "political" and discretionary. For the Metis, the federal tripartite self-government approach, and the more recent but largely disjointed and un-funded "urban Aboriginal strategy", have reinforced the call for a much more defined process, aided by a more tangible commitment to resources and powered by a body with autonomous capacities to facilitate coordination and agreement on implementation by all parties.

Experience with past efforts by the province to articulate a Manitoba Aboriginal policy is also of relevance in framing Aboriginal expectations, and concerns. Particularly in the last decade, provincial governments have been seen to adopt a three-phased crisis response strategy in relation to Aboriginal issues. The first phase is autonomous, legislative or governmental examination of the main issues or problems. The more politically sensitive or divisive the issue, the more an autonomous examination is warranted. The AJI, as a Commission of Inquiry, was such a case.

A second period – often extending over several mandates – entails the government entering an internal and often fairly opaque deliberation. In the case of the government's response to the AJI, this took a very long time indeed, and in fact is still in effect on-going.

The third phase in the perceived standard government response is either a set of program and policy initiatives specifically launched as a response, or simply an absence of any clear decisions at all. In the case of the AJI's recommendations, Aboriginal leaders in Manitoba are of the view, with reason, that (at least until the appointment of the AJIC) the government's response has been to not make any decisions at all, but at the same time claim to have responded on several selective fronts as interim measures.[4] In the latter case, Aboriginal expectations remain that a formal and integrated response remains to be completed. In the former case, public

[4] Examples of interim steps or responses of this nature would include the fairly early introduction of operational changes in the administration of justice as it relates to Aboriginal people, and the more recent increase in Aboriginal representative "core" funding from the provincial government.

and Aboriginal cynicism tends to be fuelled by the impression of "yet another shelved" report, hampering the future use of Royal Commissions and similar bodies as a means to generate bipartisan legitimacy in dealing with sensitive or potentially divisive matters.

The longer the delay between the first and the third phase of response, the greater the lack of felt concordance between the crisis and the response. The Aboriginal community is also fairly cynical about the translation of recommendations from the first phase into tangible delivery in the third phase in the absence of some capacity to prompt implementation and monitor progress that is both transparent and involves the direct participation of Aboriginal leaders. This cynicism is fuelled by the perception, if not the reality, that in other settings of government policy or crisis response – such as on the environment, on agriculture or in connection with municipal reorganization, "round tables" and such other types of engagement are almost always used to map out priorities, and equally often a new or re-furbished body with independent facilitative and reporting mandates is set up to aid in the implementation of recommended change. In brief, the establishment of implementation bodies, commissions or special collaborative institutions is part of Manitoba's political culture. In contrast, First Nations and Metis leaders may regard the reluctance to extend these models and precedents to Aboriginal issues as indicative of more than mere political over-cautiousness or jurisdictional uncertainty.

Even where a government is perceived as fully committed to a change or reform agenda, commitment holds less credibility than where a facilitative body – such as a commission – is clearly charged with monitoring and reporting on progress. There is also a strong sense amongst Aboriginal groups that such a body, particularly where it is staffed by prominent individuals with an autonomous capacity to engage in public dialogue and communications, greatly enhances the popular receptivity of specific initiatives amongst Manitobans generally.

Over the past several months, there has also been some defined concern that the current AJIC may lapse without any clear time-table for a governmental response, and with no continuity in the task of implementation monitoring, facilitation, refining of proposed approaches to fulfilling AJI recommendations, and reporting. In this regard, both First Nation and Metis interlocutors with whom the Commission has liaised are anticipating a clear government response to the AJIC recommendations within a matter of a few months, and certainly no later than the second anniversary of the Commission's appointment.

Federal Receptivity

The federal government initially responded to the Royal Commission on Aboriginal Peoples with action on non-structural initiatives, and appeared to show little interest in the establishment of independent or bilateral, tripartite or multi-partite bodies to aid in the process of implementation. This response seemed, initially, to be fuelled by financial considerations common to the deficit-fighting era of the early and mid-1990s, as well as by a sense that "structure" and "process" might overwhelm or

subordinate delivery on "pragmatic outcomes". However, even while the federal government initially down-played the RCAP's recommendations calling for new machinery of government and independent commissions, Ministers of Indian Affairs had just agreed to establish an on-going Treaty Commission in Saskatchewan and were in the process of the full implementation of the British Columbia Treaty Commission.

Federal directions remain flexible on this front. In 1999 Parliament legislated into being the Mackenzie Valley Resources Management Authority, which is representative of claims-signatory organizations in the N.W.T. and holds broad regulatory powers over natural resource management. In 2000 the Minister of Indian Affairs, with support from the Chiefs of Ontario, proceeded to dis-establish the Indian Commission of Ontario (ICO), the first regionally specific tripartite claims-facilitative body set up in Canada since the 1930s. From 1997 to 1999 extensive discussions were held to transform the existing Federal Indian Specific Claims Commission (see below) into a statutory claims adjudication body, discussions which have recently been revived, and in 2000 legislation was introduced to establish a Manitoba Treaty Land Entitlement Commission.

Most recently, a succession of judicial decisions respecting the existence of Aboriginal rights at the appellate and Supreme Court levels (e.g., *Van der Peet*, *Côté* and *Adams*, *Delgamuuk'w*, *Marshall*, *Powley*) have led federal Ministers to begin to muse about the need for bilateral or tripartite structures to facilitate on-going negotiations on Aboriginal and treaty rights elsewhere in Canada, such as in Atlantic Canada. In this, the federal government appears to favour regionalized bodies rather than broadly empowered national institutions.

In short, the trend appears to be that there are no hard and fast objections to the establishment of permanent bodies to facilitate government-Aboriginal dialogue and/or rights implementation or dispute settlement. To the contrary, specific crises and rights disputes, along with judicial directions calling for non-litigation approaches, appear to be as influential as any carefully thought-out policy considerations at the federal level. The only strongly apparent trend is towards a regional approach to policy and crisis management, at least outside of the context of broader reforms to federal statutes or policies, such as the *Indian Act* and the federal specific claims process.[5]

[5] According to recent reports, the Minister of Indian Affairs intends to introduce legislation this year to establish up to four permanent, national First Nations institutions with statutory mandates, including a national First Nations Tax Commission, a financing authority, a financial management board and a statistical institute. The Minister is also on record as wanting to introduce broad new legislation to renew governance capacities of First Nations, which may well involve either national or regional institutions in relation to elections, accountability, redress, etc.

III. Major Considerations

Any move to establish a successor to the AJIC, whether of a permanent or time-limited nature, will invite comparisons with similar bodies, particularly those in Canada. The latter experience, discussed in greater detail below, has been mixed, with the greatest degree of impact appearing to be related to those bodies that have a statutory basis and a defined mandate in relation to the facilitation of negotiated outcomes on an on-going basis. Also of relevance are the positions of key parties to any Manitoba-based initiative, to which we turn first.

A. POSITIONS OF KEY PARTIES

Critical to the success of any successor body to the current Commission will be the degree to which it accurately reflects, and is seen to reflect, the interests and views of those most directly affected by its activities.

Beyond the government itself, the interests most directly affected include the federal government (should it be approached to co-sponsor or adhere itself to the body's activities) and, of course, the First Nation and Métis peoples of the province.

1. Federal

The federal reception to a defined proposal is likely to be framed by the nature of the Manitoba government's request for participation, firstly, and then by the tenor of the Aboriginal response. As noted above, federal Ministers have a preference for regionally specific initiatives, which places importance on the liaison concerning any provincial proposal amongst three federal Ministries: the regional Cabinet Minister (Hon. Ronald Duhamel), the Indian Affairs Minister (Hon. Robert Nault) and the federal Interlocutor for Metis and non-status Indians (Hon. Ralph Goodale). Of significance, all three current Ministers are western in their orientation and two of the three give particularly close attention to Aboriginal policy and related political issues in Manitoba generally and Winnipeg specifically.

At the same time, none of these Ministers will, on their own, be able to commit to a new and regionally significant initiative without assembling support amongst other Ministries. Accordingly, it is recommended that the implications of a successor body to the AJIC be assessed in light of the varied interests and needs of all three federal Ministers, each of whom is perceived as supportive in respect of Aboriginal initiatives generally and in relation to Manitoba initiatives in particular.

2. First Nation & Métis

A defined provincial proposal, based on our recommendation, is expected to find considerable support amongst both First Nation and Métis leaders in Manitoba, though there are some caveats to this general expectation. First, there will be some expectation amongst both First Nation and Métis leaders that any successor body to the current AJIC will provide for some degree of discrete management of the issues,

concerns and interests of their respective constituencies. There may even be a stated preference for separate First Nation and Métis bodies. However, the latter response is not foreseen as a critical issue, so long as the unique interests of the two main Aboriginal groups are respected in the structuring and representation on any successor body.

B. PRECEDENT

The past three decades have witnessed a plethora of Commissions and similar bodies focussed on Aboriginal peoples having been put in place in Canada and in other countries experiencing similar needs. However, the variability in the success of these bodies suggests the value of an assessment. A review of the major precedents offers the government with a sampling of functions, mandates and structures, as well as experience, to draw upon in crafting a body suitable to the Manitoba context.

1. Canadian Experience

Indian Commission of Ontario

The Chiefs of Ontario, the federal government and the Government of Ontario established the Indian Commission of Ontario (ICO) on September 28, 1978 in the aftermath of the disappearance of the *Canadian Indian Rights Commission*. The sole commissioner of that latter body (Mr. Justice Patrick Hartt) accepted an appointment as the Commissioner of the ICO by complementary Orders-in-Council of the federal and provincial governments and resolutions in support from the four regional First Nation associations within the province. The Commissioner reported to the Tripartite Council consisting of the Minister of Indian and Northern Affairs, the Ontario Minister responsible for Aboriginal Affairs, and the Regional Chief of Ontario along with the Grand Chiefs of the four associations and representatives of unaffiliated First Nations.

A Tripartite Steering Committee of senior officials of the parties were scheduled to meet 4 times a year to set agendas for the semi-annual Tripartite Council meetings as well as to address issues arising. The Commissioner was also mandated by the respective OICs and Chiefs' resolutions to assist in the resolution of issues of mutual importance. Over the years the various commissioners and their staff would chair meetings of the respective parties dealing with a broad range of issues as authorized by the Tripartite Council, including: individual land claims, reforms to the land claims process, First Nations policing negotiations, lands and resource issues, harvesting rights, and many others. The ICO would record the minutes, serve as a neutral chair, and would seek to facilitate the discussions in search of common ground.

Indian Commission of Ontario (ICO)

Status/Mandate	***Structure***	***Assessment***
ϖ Complementary Orders-in-Council (Ontario and Canada) and resolutions from the Chiefs of Ontario. ϖ To facilitate discussions of the parties, act as neutral chair, record decisions and assume other functions as requested in relation to land claims, policing, harvesting issues, etc.	ϖ A single Commissioner, backed up by a staff of 4 and a budget, in its last fiscal year (1999/2000) of $384,000.	*Effective in its early years in relation to specific claim and policing issues.* *Limited autonomy and budget hampered its capacity to respond to demands; resulting in it becoming more a procedural aid and less a facilitator or mediator.* *The Commission and third parties saw its major failings as being a lack of clear mandate and independence, and associated with that, a lack of resources.*

The federal Minister and the Chiefs of Ontario dissolved the ICO, along with the Tripartite Council, in early 2000 as a result of dissatisfaction with the level of progress achieved in recent years. While the ICO had a number of successes, it was also subject to criticism for being too passive in the face of disagreements and breaches of undertakings made by the parties. The ICO itself complained of a lack of clarity in its mandate, insufficient funding provided by the two governments and the absence of a statutory foundation that included the ability to arbitrate disputes. The renewal of its mandate from time to time, annual budget cycles, and lack of public profile in its latter years coupled with a lack of political will by at least one of its main parties throughout most of its duration hampered its chances for success considerably.

British Columbia Treaty Commission

The B.C. Treaty Commission (BCTC) is the only legislatively based comprehensive claims and self-government negotiation commission in Canada, and was created through an agreement in September 1992 between the Government of Canada, the Government of British Columbia and the First Nations Summit (the Principals), whose members represent the majority of First Nations[6] in British Columbia. The Commission received complementary statutory recognition through the *Treaty Commission Act* passed by the Legislature of British Columbia in April 1993 and through *the B.C. Treaty Commission Act* passed by the federal government in December 1995. Both Acts were proclaimed in force in March 1996, though the Commission began its work in 1993.

[6] The agreement was not adhered to by a number of B.C. First Nations, including some in the interior and in the north, such as the Nisga'a, who were already well advanced in their treaty negotiations. Of importance, the definition of "First Nations" in the Federal and B.C. legislation is inclusive: "an Aboriginal organization representing Aboriginal peoples within their traditional territories…"

B.C. Treaty Commission

Status/Mandate	***Structure***	***Assessment***
ϖ The role of the BCTC is to facilitate the negotiation of modern treaties and, where the Parties agree, other related agreements in British Columbia. ϖ First Nations have a choice of whether or not to have their claims processed via the Commission, and a majority now do so, with the exception of some First Nations in the interior of the province, the Nisga'a and the Gitksan and We'tsuwe'ten. ϖ The Treaty Commission funds claims accepted for negotiation through six phases, from a preparatory phase through final agreement and implementation negotiations.	ϖ Comprised of five Commissioners and thirteen full-time staff. Two Commissioners appointed by the First Nations Summit, one by the federal government and one by the BC provincial government. ϖ The Chief Commissioner is appointed by agreement of all three parties for a three-year term. Former Haida Chief Miles Richardson began his appointment as Chief Commissioner on November 19, 1998. ϖ The federal and provincial government cost-share the expenses of the B.C.T.C., with a core-operating budget in 2000/2001 of $4 million.[7]	*Only one of the 48 B.C.T.C. claims in process has moved to the final agreement negotiation level (the Sechelt First Nation claim), and thus the Commission has been attacked by some First Nations as bottle-necking the implementation of rights and by public critics for failing to enhance certainty.* *The B.C.T.C. has generally been credited with a significant reduction in land and resource use disputes (e.g., blockades) of the sort common in B.C. after 1985, through its facilitation of "interim measures" agreements.* *The opposition in the B.C. Legislature has not directly attacked the B.C.T.C. process: instead, the policy governing B.C.'s negotiators has been attacked as lacking popular support.*

The Indian Specific Claims Commission[8]

Specific claims involve lawful obligations to Indian bands established or recognized under the *Indian Act* by Canada. As such they involve claims related to the breaking of promises under treaty or other agreements, or breaching statutory duties to properly manage and protect Indian lands, money and related assets. They also include inadequate compensation for taking or damaging reserve land and clear instances of personal fraud by federal employees and agents in reserve land transactions. Only federally recognized Bands under the *Indian Act* are permitted to file such claims or access the ISCC process.

The ISCC was established in 1991 after consultations on its structure and mandate with national Aboriginal organizations (particularly the AFN), and prompted by the then-government's "Agenda for Action", which stemmed from the controversies surrounding the management of specific claims generally and more immediately,

[7] Federal and provincial negotiation costs are not included in these figures. Also excluded are the $8.14 million in grants and $32.56 million in loans to First Nations anticipated in FY 2000-01.

[8] Cf.: www.indianclaims.ca

from the events of the summer of 1990 (the Oka crisis), on which a Parliamentary Committee filed a report including a recommendation for the establishment of such a body.

The establishment of an independent, legislatively sanctioned claims body with the power to make binding decisions has been the topic of dialogue and study since the 1950s, and almost continuously since 1986. When the ISCC was formed in 1991, the Assembly of First Nations (AFN) announced that the government of Canada had agreed that this was an interim measure, to be followed, after no more than 5 years, by the establishment of a jointly sanctioned, independent body. An AFN task force on the matter was established in the mid-1990s and led, up to 1999, to revived talks with DIAND in an effort to negotiate a successor body. The AFN and Canada failed to agree on a mandate – particularly in relation to the body's capacity to make financial awards, and those talks lapsed, while at the same time arriving at recommendations that were taken to the federal Cabinet. Based on the latter instructions, the Minister of Indian Affairs is pursuing possible draft legislation for introduction into Parliament in the Fall of 2001.

Indian Specific Claims Commission

Status/Mandate	***Structure***	***Assessment***
ϖ Created by order in council under the federal *Inquiries Act* in 1991 as an interim measure to deal with specific claims until an independent claims resolution mechanism could be jointly developed with First Nations. ϖ The ISCC mandate is to inquire into and advise the Governor in Council on claims that have been rejected by Canada, or on claims that Canada has accepted but where the parties cannot agree on compensation. ϖ The ISCC mandate also includes mediating between the parties at their request where compensation negotiations may have reached an impasse as well as providing advice to the joint Government/First Nations Working Group on claims.	ϖ The ISCC is currently comprised of five Commissioners appointed by Order in Council. ϖ Staff of 40 people, with a budget of $5 million in 2000/01. ϖ At current staffing and budgeting, the ISCC is managing to process upwards of 100 claims reviews per year (including all types of assessments).	*Potentially of considerable influence given its mandate and status.* *In practice has been both ineffectual and invisible. DIAND's Minister has tended to reject or ignore its findings.* *Greatest weakness is its lack of independence in both reporting and in financing its work as well as its lack of arbitral power* *The ISCC has also been criticized as having no mandate to deal with claims of Aboriginal groups other than Indian Act Bands, or with claims other than those defined by DIAND as meeting its definition of "specific claims".*

<u>Office of the Treaty Commissioner</u> (Saskatchewan)

In 1989, the Federation of Saskatchewan Indian Nations (FSIN) and the Government of Canada created the Office of the Treaty Commissioner (OTC) with an initial five-

year mandate to provide recommendations in the areas of Treaty land entitlement and education. In the former area, the OTC's objective was to assist in the establishment of a settlement agreement covering all Saskatchewan First Nations with outstanding entitlements, which was largely accomplished with the passage in 1993 of the *Saskatchewan Treaty Land Entitlement Act*. A second mandate area was subject to dispute, with the FSIN interpreting education broadly as a treaty right, while Canada viewed it as likely falling outside of legal obligations associated with treaty entitlement or specific claims processes.

After its initial mandate expired, Canada, Saskatchewan and the FSIN agreed to re-establish the OTC with a new mandate, and Judge David M. Arnot was appointed Treaty Commissioner for a five-year period by federal Order in Council effective January 1, 1997. The OTC's primary role remains that of facilitation of the various bilateral and tripartite treaty discussions now underway, and particularly the Exploratory Treaty Table established in 1996. The OTC also mounts a public education program (and a speakers' bureau) and, most recently, has begun work on potential treaty adhesions with Dakota First Nations. It is important to realize that the rebirth of the OTC was part of a bilateral agreement between FSIN and Canada to engage in treaty related discussions along with a tripartite agreement including the provincial government for a Common Table regarding issues of mutual concern including self-government and fiscal matters.

Office of the Treaty Commissioner

Status/Mandate	***Structure***	***Assessment***
ϖ 5-year mandate effective to January 1, 2002. ϖ An independent and objective office to provide a forum to facilitate a common understanding between the FSIN and Canada on Treaty rights and/or jurisdiction in the areas of: • Child Welfare • Education • Shelter • Health • Justice • Treaty Annuities • Hunting, Fishing, Trapping, and Gathering • And other issues the Parties may place before the OTC	ϖ A single commissioner appointed by federal Order in Council on the recommendation of FSIN. ϖ The OTC is independent and reports to both parties (Canada and FSIN). ϖ Saskatchewan participates in most discussions facilitated by the OTC as a party, but sits as an observer in treaty-related discussions. ϖ Staff of three; with a budget under $500,000.	*The OTC is now under joint review for potential renewal and extension of its mandate.* *The OTC is regarded by most of those involved as highly effective given its modest cost.* *OTC is effective as a facilitative body largely because there is momentum on substantive treaty and governance talks, a receptive provincial government and a well-organized First Nations' authority (the FSIN).*

Cree-Naskapi Commission (Quebec)

The Cree-Naskapi Commission (CNC) was established in 1986, pursuant to the *Cree-Naskapi (of Quebec) Act*, R.S.C. 1984. It was the first statutory claims implementation body established in Canada, with a mandate to monitor the implementation of the Cree-Naskapi Act – Canada's first Aboriginal self-government legislation, provided for by the James Bay and Northern Quebec Agreement (1976) and the Northeastern Quebec Agreement (1978).

The Cree-Naskapi Commission prepares biennial reports on the implementation of the Act and investigates any representation submitted to it relating to the implementation of the Act. The Commission is also empowered to receive and investigate specific complaints from affected bands, groups or individuals about the implementation and application of the Act, and to prepare reports and recommendations on the matters investigated, and thus acts in the form of an Ombudsman.

The CNC's three Commissioners are charged with the responsibility of ensuring compliance with the provisions governing the Commission's duties and powers, meeting an average of 10 times per year in Ottawa or elsewhere.

The powers that the Act confers on the CNC are:

- to investigate any representation submitted to it relating to the implementation of the Act, including the exercise or non-exercise, by any party, of a power under the Act and the performance or non-performance of a duty under the Act;
- to refuse to investigate or discontinue an investigation for specified reasons;
- to request any document and the appearance of any person to give evidence; and
- to prepare a report on conclusions, findings and recommendations; the report is sent to the Minister, to the complainant and to anyone against whom a negative finding is made.

Cree-Naskapi Commission

Status/Mandate	***Structure***	***Assessment***
ϖ Permanent, statutory body established in 1986. ϖ First statutory body to be established to oversee implementation of a self-government agreement established as part of a modern treaty. ϖ CNC mandate is to monitor implementation of the *Cree-Naskapi Act* and	ϖ The CNC is currently comprised of 3 Commissioners appointed by federal Order in Council on advice of the Cree Regional Authority and the Naskapi Band. ϖ CNC is a bilateral commission, though Quebec is a party to the relevant treaties.	*The CNC's early years were controversial and marked by charges of bad faith concerning implementation of the Act, as well as over-dependence of the CNC on federal discretion and funding.* *In 1998 the CNC recommended the need for an independent dispute resolution body, and noted that its own function was too limited to meet the needs of*

to investigate referred matters by the parties (Canada and the First Nations).	ϖ Commissioners are supported by 4 staff; with a budget of $566,000 in 2000/2001. ϖ Funding is not by Parliamentary appropriation, but has evolved from a contribution agreement from DIAND to a Flexible Transfer Agreement (since 1999/2000).	*the Parties.* *The CNC is valued by the First Nations involved, but regarded as too "advocacy oriented" by DIAND. The lack of an independent capacity to enforce findings, together with Canada's lack of responsiveness to its recommendations, are cited as failings.*

Nunavik Commission

There has been an absence of clarity, or closure, in relation to "self-government" within the Nunavik region (the predominately Inuit portion of Quebec north of the 55th parallel) since the 1976 James Bay and Northern Quebec Agreement. In part, this flows from a federal and provincial perception (or misperception) that the Inuit of Quebec are happy to have their governance aspirations met through public institutions within the framework of Quebec's provincial jurisdictions. This perception is also, of course, favourable to those who wish to avoid the thorny task of tackling the Quebec government's refusal, since at least 1985, to take steps to implement the provisions of the *Constitution Act,1982* and successive federal policies regarding self-government, and especially the 1995 federal "inherent right" policy.

Former Premier Bouchard and Mr. Zebedee Nungak, then President of Makivik Corporation[9], agreed in the Summer of 1998 to "fast-track" self-government negotiations by establishing a joint commission to develop a proposal for the constitution of a new public government in Nunavik. The concept of a commission was important to Makivik because "self-government" discussions that had begun in the late 1980s had been repeatedly subject to delay and distraction (elections, referenda, etc.). A device was needed to focus political and bureaucratic attention on clear outcomes. A tripartite commission with a defined agenda and a limited time-span (initially 8 months) was the result, though it took a year to finally negotiate its terms of reference before it began its work in December, 1999. The Commission was to conduct consultations with Inuit and other groups on:

- powers, jurisdictions, and responsibilities;
- electoral process for selection of leaders,
- responsibilities of the Executive;
- administrative structure and required personnel;
- a plan of consolidation for existing Nunavik organizations;
- amendments to the James Bay and Northern Québec Agreement;

[9] Makivik Corporation is the claims settlement corporation established by statute to represent Nunavik Inuit beneficiaries in the administration of their entitlements under the James Bay and Northern Quebec Agreement.

- the relationships between governments, e.g. Nunavik and Québec, Canada & Nunavut;
- Financing, such as block funding arrangements with Québec or with Canada, taxation powers, and the ability to incur debt; and
- Measures to promote and enhance the Inuit, including the use of Inuktitut in a Nunavik Government.

Canada was originally somewhat cool to participation, apparently out of concern with complicating an already complex political dynamic over sovereignty. In addition, there was opposition from other Aboriginal groups (particularly the Cree) and from within Quebec government circles. Nevertheless, the three parties eventually agreed to certain broad principles to govern the work of the Commission:

- The Nunavik Government is to be a public government, open to all permanent residents of Nunavik. It will respect the authority of the Québec National Assembly. (In a separate and balancing clause, respect for the "Canadian Parliament" is also cited).
- The Canadian *Charter of Rights and Freedoms* and the Charter of Human Rights and Freedoms (Québec) shall apply to the Nunavik Government.
- The design of a Nunavik Government should be innovative in nature. It shall respect the Arctic character of Nunavik, and the close relationship between the Inuit of Nunavik and Nunavut.
- The rights of the Cree and the Naskapi, as set out in the James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement, as well as the rights and obligations of third parties in Nunavik, will be respected.

The Nunavik Commission's initial term of eight months was extended, both for operational reasons and due to the Commission's need to respond to a considerable variety of proposals for drafting its recommendations. The Commission's report was released in late March of 2001, recommending a public regional government with its own legislative powers and additional, Inuit-based structures such as an elders' council. There is no formal requirement or undertaking regarding provincial or federal responses to the report, but there is an assumption on Makivik's part that negotiations would begin to implement the Commission's recommendations in short order.

Nunavik Commission

Status/Mandate	***Structure***	***Assessment***
ϖ A limited (15 month) mandate to map out a proposed constitution for a territorially self-governing body (Nunavik) within Quebec. This mandate is most consistent with that of a constitutional convention or constituent assembly.	ϖ Established by provincial order-in-council, though with effectively equal federal and Nunavik concurrence. ϖ Two Co-Chairpersons, six Commissioners, with the Nunavik parties and Quebec each appointing	*The size of the Commission wasconsidered unwieldy, but essential to accommodate Quebec's demands that existing institutions in Nunavik be represented. Formal equality for each party was offered, but not pressed for by Ottawa.*

ϖ The Commission is to make recommendations on the design, operation, and implementation of a public government in Nunavik that would also satisfy Inuit demands for a self-government agreement under the federal inherent right policy (though the latter objective is muted).	one of the Co-Chairs and two Commissioners; and Canada appointing two Commissioners. ϖ The Commission had an initial budget of $770,000, with all three parties contributing on a 42%-42%-17% basis between Quebec, Canada and the Nunavik Inuit. Staff support provided by the parties via secondment.	*The Commission was only nominally "independent": most substantive issues were negotiated by senior Quebec and Makivik officials (with little input from Canada), particularly on "hard topics" such as Inuktitut as an official language, and whether Bill 101 would need to be amended.*

INTERNATIONAL

A sampling of a variety of international experiences of potential relevance to Manitoba is examined below.

Washington State Fish and Wildlife Commission

The judicial endorsement for specific Treaty-based fishing rights for Washington state Tribes in the 1970s and 1980s led to some degree of "backlash", one symptom of which was public distrust over state decision-making in connection with the management of fisheries. This led, in 1995, to a state-wide referendum (Referendum 45, held during the 1995 state elections) that approved the establishment of a Commission to oversee the state's Department of Fisheries and Wildlife. While initially the Commission was to focus on Fisheries, the merger in 1994 of the former Departments of Fisheries and Wildlife has provided the Commission with comprehensive species authority as well.

Washinton State Fish and Wildlife Commission

Status/Mandate	***Structure***	***Assessment***
ϖ Operating under the authority of a state-wide referendum, with the goal of supervising the state Department of Fish and Wildlife. ϖ Its primary role is to establish policy and direction for fish and wildlife species and their habitats in Washington and to monitor the Department's implementation of the goals, policies and objectives established by the Commission. ϖ The Commission also classifies wildlife and establishes the basic rules and regulations governing the time, place, manner, and methods used to harvest or enjoy fish and	ϖ Nine members serving six year terms, appointed by the state Governor and confirmed by the state Senate. ϖ At present there are no Tribal or Indian Commissioners; most commissioners are active in sport or commercial fisheries. ϖ Members are territorially based, with each from different counties, three east of the Cascade mountains, three west,	*The Commission is essentially a consultative device for public input into fish and wildlife regulations.*

wildlife.	and three from anywhere in the state.	

South Africa Truth and Reconciliation Commission

The Truth and Reconciliation Commission was established by the *Promotion of National Unity and Reconciliation Act, No 34 of 1995*. The Commission presented its report to President Nelson Mandela on 29 October 1998.

Truth and Reconciliation Commission (South Africa)

Status/Mandate	***Structure***	***Assessment***
❖ Statutory, set-period (3-year). ❖ The objective of the Commission was "to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past…" ❖ Its mandate was to enable violators of human rights to apply for amnesty in return for details of their acts. This process was aimed at allowing investigation of such violations; rehabilitation and reparation to victims; as well as documentation and subsequent recommendations.	❖ Seventeen commissioners, headed by Bishop Desmond Tutu, appointed by the President. ❖ Wide ranging hearings were held throughout South Africa in which victims and perpetrators were encouraged to share experiences, document tragedies and enhance the reconciliation process.	*Triggered by a repressive regime of minority "white rule" and by massive civil strife, the goal of the Commission was to advance social, political and economic reconciliation.* *Generally regarded as successful for disclosure of illegal repression and the avoidance of expected reprisals against whites and Afrikaners since the achievement of majority rule in 1994.* *Widely applauded around the world for "inventing" the "truth and reconciliation" approach to healing the rifts in deeply divided societies.*

Australian Aboriginal and Torres Strait Islander Commission ***(ATSIC)***

ATSIC is a decentralized organization, which advocates Aboriginal and Torres Strait Islander (ATSI) issues nationally and internationally, advises the Minister for Aboriginal and Torres Strait Islander Affairs, and delivers programs to Aboriginal and Torres Strait Islander people. As such it combines elements of a federal department, an advocacy commission and a dispute resolution forum.

Aboriginal and Torres Strait Islander Commission *(ATSIC)*

Status/Mandate	***Structure***	***Assessment***
❖ Permanent, statutory Commission. ❖ Established in 1990 as Australia's lead policy-making and service delivery agency, effectively replacing the former federal Department of Aboriginal Affairs and the Aboriginal Development Commission. ❖ The Commission has charge over a significant program and service budget as well as carrying out a national and international advisory and advocacy role.	❖ 18 member Board elected by regional Councillors. ❖ National Chair of the Commission elected by 18 Commissioners from amongst their numbers, and then replaced by a new election for Commissioner. ❖ 35 Regional Councils grouped in 16 zones are elected by Aboriginal popular vote. ❖ The Commission had charge of $1.204 billion AUS in 2000/01.	*Widely seen as a successful endeavour in placing most key federal programs and services (except Heritage and Health services) under elected ATSI control* *Officially, provides independent advice to federal Minister and Cabinet. Unofficially, ATSIC is the lead advocate of Aboriginal and Torres Strait Islander positions.* *Mixed success overall due to conflicted role between being a service deliverer and representing the political goals of ATSIC for economic and legislative reforms.* *The original function of ATSIC as a "watch-dog" of federal policy and programs, and other government departments, is seen as having suffered from ATSIC's increasing focus on reconciling the program and service functions of a government department with its advocacy role.*

Australian Council for Aboriginal Reconciliation

The Council for Aboriginal Reconciliation (CAR) was established by the Australian Commonwealth Parliament in 1991 by the *Aboriginal Reconciliation Act*. Its last term ended on January 1, 2001. The Council was made up of 25 members drawn from the Aboriginal, Torres Strait Islander and wider Australian communities. The Government, the Opposition and the Australian Democrats in the Commonwealth Parliament were represented among the wider community participants. The overall objective of the CAR was to engage Australians generally in a public education process, and a dialogue, to further the goals of reconciliation for past treatment of the Aboriginal and Torres Strait Islander population.

Council for Aboriginal Reconciliation

Status/Mandate	***Structure***	***Assessment***

ϖ Set (10-year) term Council established by statute. ϖ The Council "seeks to fulfil its responsibility to promote a process of reconciliation which will reach the hearts and minds, and touch the lives, of the whole Australian community." ϖ The Council's work started in 1991 with the mandate of promoting "the understanding and appreciation of Aboriginal and Torres Strait Islander cultures and achievements and to foster a community commitment to coexistence and a reconciled nation. ϖ The Council achieve its goal primarily through public awareness campaigns.	ϖ 25 members appointed by the federal government after consultation and drawn from the ATSI and wider Australian communities. ϖ Opposition parties represented. ϖ Budget of is $4.75 million AUS for 1999-2000.	*Symbolically successful in sparking some public engagement and education.* *Thoroughly unsuccessful in bringing about reconciliation, particularly as land rights disputes have been highly adversarial with little progress in populous areas.*

Saami Rights Commission of Sweden

The Swedish federal government in 1983 appointed the Saami Commission following on the Norwegian experience of appointing a similar commission three years earlier. Its mandate was primarily to examine the Saami rights to land and water, however, after an initially conservative set of recommendations, followed by changes to its membership and mandate, it ultimately reported in 1989 on these and other matters, including language rights, reindeer harvesting rights and greater elements of political self-determination. The Commission recommended changes to the Swedish constitution to recognize the Saami as an indigenous minority, establishment of a Saami Parliament and changes to land use and resource laws to protect Sami reindeer harvesting interests. Only the establishment of the Saami Parliament was acted on by the government, in 1993.

Saami Rights Commmission

Status/Mandate	***Structure***	***Assessment***
ϖ Appointed by Order in Council in 1983 to study land and water rights of Saami. ϖ An original commission of experts concluded that Saami rights were entirely at the discretion of the Crown. One expert dissented and a new Commission was appointed, concluding in 1989 that Saami do have rights of ownership and possession of certain traditional areas and recommending remedial changes to the national constitution and various statutes, as well as the establishment of a Saami Parliament.	ϖ First Commission: Six non-nationals (Norwegians) with legal expertise appointed.	*Had limited effect but its recom-mendations did help lead to the creation of the Saami Assembly as a voice for Saami people and an advisor to the government.* *Seen as a retrogressive step in protection of Sami legal rights, though balanced by*

ϖ It should be noted that the Swedish legislature acted as well on the first Commission's report in affirming that governmental titles to Saami reindeer harvesting areas were paramount to that of the Saami.		*an increased autonomy in voicing policy goals and overseeing programs and services.*

Office of Hawaiian Affairs (U.S.A.)

The Office of Hawaiian Affairs (OHA) was established as a result of amendments to the Hawaiian constitution of 1959 by the state Constitutional Convention of 1978. The Office is a public trust, with the mandate to improve the conditions of both Native Hawaiians and the Hawaiian community in general. It receives funds from the state for the delivery of programs. It also is the owner of certain lands previously held by the US government that were allocated to Hawaii on statehood on condition that they would be managed for the well-being of the Native Hawaiians. The OHA possesses $400 million in assets with annual revenue in 2000 of $22 million and expenditures of $17 million largely in relation to the 138,000 Native Hawaiians who are resident in the state.

The OHA consists of nine trustees elected by Hawaiians state-wide. It participates in task forces and community groups to fulfill its mission of improving conditions of Hawaiians. In addition to running its own programs, OHA provides many programs with major funding and coordinates joint activities with participating organizations. It advocates for Native Hawaiians in the state Legislature, state and federal courts, in the United States Congress and in the local media, as well as by supporting community initiatives. Limiting voters in OHA elections to Native Hawaiians and those with ancestry in the Islands back to 1778 (i.e., the time of the visit by Capt. Cook and a century before American annexation) has been recently declared by the United States Supreme Court to be unconstitutional.[10]

Office Hawaiian Affairs

Status/Mandate	***Structure***	***Assessment***
ϖ Statutory, public trust (1978). ϖ Mandate is to improve social conditions of Native Hawaiians. ϖ Acts as both a service-provider and an advocacy organization for Hawaiian interests, and has participated in litigation to provide greater rights to Native Hawaiians	ϖ Nine trustees elected by Hawaiians statewide for 2 or more 4-year terms. ϖ 1999/2000 budget of US$ 17 million, with approximately 100 staff.	*Criticized by some Hawaiian leaders as competing with more broadly based representative organizations and being subject to co-optation by state interests.*

[8] *Rice v. Cayetano*, 120 S.Ct 1044 (2000).

Waitangi Tribunal

The Waitangi Tribunal was created in 1975 by the Parliament of New Zealand through the passage of the *Treaty of Waitangi Act, 1975*. It is a permanent commission of inquiry consisting of a chair and up to 16 members appointed as part-timers for a three year term by the Governor-General on the recommendation of the Minister of Maori Affairs in consultation with the Minister of Justice. The Tribunal was originally chaired until 2000 by whomever had the post of the Chief Judge of the Maori Land Court. With the elevation to the High Court of former Maori Land Court Chief Judge Eddie Durie, the Act was amended to allow Justice Durie to continue to serve as Chair of the Tribunal with his successor (Maori Land Court Chief Judge Joe Williams) appointed as Deputy Chair of the Tribunal.

The Tribunal members have historically been selected to reflect a racial balance between Maori and *pakeha* (non-Maori) and have consistently been highly regarded New Zealanders from all walks of life such that their reports carry considerable credibility in governmental, Maori and the general public's eyes.

For the first ten years of its existence the Tribunal was solely empowered to deal with claims arising after its creation, and as a result, few claims were submitted and many criticised its mandate as unable to address historic injustices. Amendments to its enabling Act in 1985 expanded the Tribunal's authority to receive claims arising since the date of the Treaty of Waitangi (1840).

The Tribunal imposes few demands upon claimants beyond submitting the claim in writing – often merely in the form of a letter. The Tribunal's research branch is the primary body to conduct research into any of the claims filed. Its reports are shared with all parties as the principal claim document and are then built upon by the oral hearings and legal arguments of all interested parties, which are conducted before three to seven members.

The Tribunal issues a detailed report with its findings and recommendations to government and the Maori claimants. Although its reports are not binding, the high regard with which the Tribunal is held has meant that most of its recommendations have been accepted. The Tribunal is, therefore, widely viewed by Maori and pakeha alike as a resounding success as it has rewritten New Zealand's history while fundamentally reshaping the country's present and future.

Waitangi Tribunal

Status/Mandate	***Structure***	***Assessment***
ϖ Permanent, statutory (1975) tribunal. ϖ Receives and reviews claims brought by Maori (whether as individuals or as groups) relating to the	ϖ Chair and up to 16 Commissioners appointed to 3-year terms by Order in Council on Ministerial advice. ϖ Chair was originally to be	*Its lack of powers to make binding judgements has not undermined its effectiveness, as the government has accepted most of its rulings.* *A strong research capacity and its composition have*

practical application of the Treaty of Waitangi and to determine whether identified matters are in conflict with the principles of the Treaty. ϖ As of September 2000 it had received 869 claims. While most of the claims filed with the Tribunal relate to small blocks of land formerly in Maori hands, it has also dealt with disputes concerning the allocation of radio frequencies, commercial fishing rights, Crown funding for electoral enrolment, ownership of geothermal and other natural resources, environmental pollution cases, and major land claims.	held by the Chief Judge of the Maori Land Court, but the statute was amended to permit the long-serving Chair to continue after appointment to the High Court. The sitting Chief Judge of the Maori Land Court now sits as Deputy-Chair of the Tribunal.	*aided its independence and effectiveness.* *Its greatest weakness is its inability to compel the government to take action on its reports.*

Treaty of Waitangi Fisheries Commission (New Zealand)

Te Ohu Kai Moana is the Treaty of Waitangi Fisheries Commission (TWC). It was set up in 1992 after a decades-long struggle after a number of court cases, in which Maori rights to fisheries were affirmed. The TWC was a response by the government, and Maori, to the need to accommodate established fisheries quota assignments to Maori legal rights, which had until the early 1990s not been reflected in New Zealand statute law. Aided by the rulings and recommendations of the Treaty of Waitangi Tribunal, four Maori organizations went to the New Zealand High Court, and in 1987 the court upheld an application for an injunction of species that were managed under the federal quota system, since the latter failed to accord the Maori with the protections their rights demanded.

After lengthy negotiations, several draft Bills, further court action, and continuing Maori opposition, a *Maori Fisheries Act* was passed in the New Zealand Parliament in 1989. The essential deal offered Maori 10% of all in-shore fishery quotas, plus a $10 NZ million compensation package for use in levering the necessary capital to outfit Maori fishing and processing capacity.

The TWC was set up as the entity through which the Crown would deliver fishing quota or allocations to Maori, initially holding it on behalf of Maori, in preparation for an allocation scheme that would see Maori assume total control. The Crown began the gradual transfer of 10 per cent of quota species to the Commission, and the Commission started work on developing options for a permanent allocation system, in conjunction with the main Maori

groups (called *Iwi*). This process was based on extensive consultation. During this time the TWC moved to acquire 11 per cent of quota species in just two years. This included the acquisition of Moana Pacific Limited.

In late 1992, after months of negotiations, a *Deed of Settlement* was signed in which the Crown agreed to fund Maori into a 50/50 joint venture with Brierley Investments Limited to bid for Sealord Products Ltd – New Zealand's biggest fishing company, holding 27 per cent by volume of the New Zealand quota resource. In return, Maori agreed that all their current and future claims in respect of commercial fishing rights were fully satisfied, and discharged. The $350 million purchase of a half share of Sealord gave Maori control of roughly a third of the New Zealand fishing quota. In addition to acquiring a half-share in Sealord, the Deed of Settlement promised Maori 20% of quota for all species not yet in the quota management system. Outstanding Maori claims to fisheries rights were protected.

The Sealord purchase was enshrined in the *Treaty of Waitangi (Fisheries Claims) Settlement Act* 1992. The Commission was renamed the Treaty of Waitangi Fisheries Commission (in Maori; *Te Ohu Kai Moana*), with wider ranging powers, an increased membership of 13 Commissioners and a requirement that it be clearly accountable to Maori as well as to the Crown.

The 1992 legislation requires the Minister to act in accordance with the principles of the Treaty of Waitangi and consult Maori about and develop policies to help recognise Maori use and management practices of the exercise of non-commercial fishing rights, to recognise and provide for customary food gathering by Maori, and respect the special relationship between Maori clans and those places which are of customary food gathering, to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade.

Waitangi Fisheries Commission

Status/Mandate	***Structure***	***Assessment***
ϖ Permanent, statutory (1992) Corporation. ϖ Represents Maori and Pakeha interests in the management of the settlement agreement and legislation. ϖ Oversees the allocation of fisheries quotas and the operation of voting shares in Sealord Fisheries Inc. as well as other Commission-owned commercial fisheries interests.	ϖ Originally seven Commissioners, with Dr. (now Sir) Tipene O'Regan as the chairperson. A small permanent staff is headed by Chief Executive Robin Hapi. ϖ Now a 13 person Commission with a majority of Maori.	*The Commission has achieved significant success in commercial terms as it has effectively raised Maori ownership of fish quota to over 50%, generated sizeable profits, has fostered a number of community owned fishing companies and encouraged many Maori to enter the fishing business at all levels.*

National Commission for Scheduled Tribes and Scheduled Castes (India)

As a federation modelled along British Parliamentary lines, India, faced with enormous diversity and hundreds of distinct indigenous groups, adopted the model of a national oversight body shortly after its founding in 1947. This basic approach, never effectively implemented, has been reformed in recent years to upgrade what was originally a mere "office" to the stature of a full and permanent, constitutionally mandated Commission, with powers of subpoena. However, the Commission still suffers under a major disability: its lack of autonomy from the executive, though this is nominally capable of being remedied by statute.

National Commission for the Scheduled Castes & Scheduled Tribes

Status/Mandate	***Structure***	***Assessment***
ϖ Constitutional (Article 338, *Indian Constitution*,1990). Permanent body. ϖ To investigate, monitor, evaluate, and inquire into specific complaints, to participate in and advise on socio-economic planning, to make reports and recommendations, and to fulfil any roles assigned by the President, subject to any national law. ϖ Judicial powers to summon witnesses, documents and require testimony under oath. The national and every state government is required to consult with the commission on all major policy matters affecting scheduled castes and scheduled tribes.	ϖ Commission named by and reports to the President. ϖ A Chief Commissioner, a Vice-Commissioner and no fewer than five members. ϖ Dependent upon the Executive for staff and financial support. ϖ Reports to the Executive, which is required in turn to report to Parliament and state Legislatures with a report of actions taken.	*Potentially has influence given its mandate and status.* *In practice has been so politicized as to be both ineffectual and invisible.* *Greatest weakness is its lack of independence in both reporting and in financing its work.*

IV. CORE ELEMENTS FOR A SUCCESSOR BODY

1. Mandate and Functions

Based on a review of the Canadian and international precedents and an assessment of the political culture and Aboriginal context in Manitoba, any successor body to the AJIC should have a clear mandate and powers. There would appear to be three broad options regarding a mandate:

- *To Continue the Role of the AJIC*
  This approach would establish a body (whether styled a Tribunal, Commission or Council) whose functions would be tied to promoting and facilitating the implementation of the various recommendations of the AJI and, potentially, of RCAP. Accordingly, such a body would require a capacity to consult with all stakeholders as to a priority implementation agenda and then facilitate implementation, likely accompanied by a mandate to foster relevant research, monitor progress and report regularly to the parties, through the relevant Legislatures, or both. This approach would reflect a decision that the precise nature of an implementation regime in relation to the AJI and RCAP recommendations is still very much uncertain, and requires further, and considered, facilitation by a third party agency.

  A potential précis in the mandating of a successor body might be the convening of a round table of First Nation, Metis and government representatives in order to affirm the primary mandate of an on-going Commission.

- *An Integral Component in a Government-wide Action Plan*
  This approach assumes the province adopts a priority action plan along the lines recommended by our Commission, and establishes a successor body as part of that response. Such a body could carry out facilitative and monitoring functions and, possibly, be tasked with the arbitration and/or resolution of disputes in regard to such matters as harvesting rights, as well as to assist in the implementation/negotiation of rights-based agreements. Examples of this approach include the B.C. Treaty Commission (though in a modern treaty-making context) and the Council for Aboriginal Reconciliation in Australia.

  This approach presumes the adoption by Manitoba of a basic and integrated plan of action in response to the AJI and RCAP recommendations. It would see a commission or tribunal, of the sort advanced by both AJI and RCAP, adopted to facilitate the implementation

of a clear set of policy outcomes for First Nation and Metis people in the province.

- *A Highly Focussed Role*
  This option would see the emergence of a successor body with a very precise focus in relation to one or more of the core elements in the government's action plan. Such a body could be tasked, for example, to facilitate dialogue between the government(s) and First Nation and Métis parties, in the development of an appropriate statement of recognition and reconciliation (akin to the Nunavik Commission). Alternatively, a commission or tribunal could be tasked to address certain particular types of disputes; for example, harvesting access issues (akin to the Indian Commission of Ontario, the Indian Specific Claims Commission and the Waitangi Tribunal), whether as a facilitative body or as a tribunal provided with the authority to recommend or arbitrate disputes. This approach presumes that any action plan adopted by the government is quite detailed in its operational implications, such as to invite a delimited role for one or more independent bodies.

In assessing these broad approaches, it merits noting that the AJI itself strongly recommended the second course: i.e., a Commission tasked with assisting in the implementation of the overall recommendations that are, in consultation with First Nations and Manitoba Métis, selected as priorities for implementation. This approach also appears most consistent with our assessment of the expectations and recommendations of First Nations and Manitoba Métis.

A balance should be achieved between the mandate of any successor body and its powers. Our review of the precedents concerning specific powers suggests the following range of mandate possibilities:

1. Implementation assistance (i.e., good offices facilitation)
2. Mediation and conciliation
3. Arbitration of disputes
4. Public education
5. Research related to policies and practices
6. Monitoring and Reporting
7. Public inquiry(ies) into particular grievances or claims
8. Development/drafting of legislation or specific implementation plans
9. Review of legislation and related implementation orders for consistency with the principles affirmed in any governing accord or agreement.

A successor body that is consistent with the second approach, would include functions 1-6 and 9. Function 7 would apply were the federal government to join in an effort to directly address outstanding grievances (e.g., in relation to Métis land entitlements), but could also apply in a solely provincial-Aboriginal body in relation to First Nation and/or Métis access to harvesting entitlements on provincial Crown

lands. Function 8 might also be considered in relation to the development of a consensus statement of recognition or reconciliation, as discussed further in our policy papers concerning both First Nations and the Métis.

The potential request for distinctive First Nations and/or Métis bodies is another major consideration affecting the mandate and functions of any successor body. Given the distinctive cultural and Aboriginal rights contexts of each constituency, such a proposal is not unlikely. However, and consistent with both the RCAP and the AJI recommendations, proposals for entirely distinct and separate successor bodies should be resisted. The variability amongst and between Metis and First Nation communities in Manitoba is so great – with some Metis and First Nation communities sharing more than either shares with other groups of the same status elsewhere -- as to admit no ready organizing principles to distinguish mechanisms for the resolution of discrete Metis and First Nation problems. Neither the social conditions nor the traditional lifestyles and interests in the land of Métis and First Nations people are so markedly different as to warrant such an approach, which would also introduce redundancy and cost into the implementation efforts of government. At the same time, the unique treaty interests of First Nations (though not currently shared by all Manitoba First Nations), like the equally distinctive land question of the Métis, could be accommodated within a common successor body by the establishment of appropriate sub-commissions, tribunals, and the like.

2. Autonomy

A second major consideration is the status or autonomy of a successor body. A number of techniques have been employed to this end in other contexts, including the appointment of widely respected individuals, judges etc.. However, the trend in Canada and internationally is to use a statutory instrument to signal the importance, autonomy and stature of permanent or longer-term bodies with on-going mandates in relation to the facilitation or arbitration of Aboriginal interests. In the case of India (as well as in both Mexico and Brazil) facilitative bodies hold constitutional standing, though with uneven results. In some cases, the adoption of constitutional solutions may signal an overly symbolic objective, just as the choice of a non-statutory route may telegraph the inconstancy of a government's commitment.

The use of legislation to found the work of commissions of the sort proposed by the AJI (as well as RCAP) finds reflection in the non-Aboriginal context, where on-going facilitative or investigative bodies are almost uniformly provided with a statutory basis (e.g., the Canadian Human Rights and Official Language Commissions, Manitoba's Human Rights Commission, etc.). Where commissions or tribunals have quite limited functions and time-sensitive mandates, it is more likely that they are appointed under Orders-in-Council, and usually provided the powers of inquiries under either federal or provincial inquiries legislation, akin to the classic functions of Royal or judicial inquiries.

Perhaps the most important consideration in judging the appropriateness of a successor body's status is the requirement for it to be independent, and to be perceived as such. This is of particular relevance in a context of contested legitimacy – which largely defines the relations that consumed the attentions of both the AJI and the RCAP. As indicated in our review of precedent, an almost uniform criticism of non-statutory bodies, at least those that are asked to review grievances and recommend remedial action – has been their lack of independence, both in relation to the matters referred to them for review and in connection with their budgetary autonomy. Non-statutory bodies are also more readily dissolved after a change government administrations. Nevertheless, even statutory bodies (such as the earliest of Canada's legislated commissions in this context: the Cree-Naskapi Commission) can find themselves without sufficient independence. While this failing may be attributed to the unique political context involved, it is, nevertheless, important to avoid any such debilitating lack of clarity in the drafting of a successor body's mandate and powers.

A permanent, statutory body would appear to be most appropriate to the context of Manitoba First Nations and the Metis and the objectives set out in the core recommendations of both the AJI and the RCAP. At the same time, the notion of "permanence" should be understood to allow for, and even encourage, adaptation to the evolving character of relations between the province, the federal government (if they are to be a participant) and Aboriginal peoples. One of the failings noted in our review of precedent is the use of overly constrained or rigid terms of reference and mandates for commissions or tribunals. The fluid nature of relations between the parties, the emergent reality of self-government and the always unpredictable direction of judicial decisions, point to the need for any statutory instrument to be flexible and to permit the body concerned to have powers and functions added, or amended, in the course of its life. A statutory approach, and certainly one that permits the Executive and the other parties to the process, to adjust the terms of reference of a Commission or Tribunal through the issuance of new instructions, would balance the need for adaptation with the real and perceived independence of any successor body to the AJIC.

3. Federal Participation

There are a number of potential scenarios regarding the participation in a successor body of the federal government, and each would clearly have a considerable influence on the mandate and functions assigned such a body. The preferred option of the AJI, and of the RCAP, would be full federal participation in all dimensions of the implementation of a reconciliation agenda. We note in this regard that the federal government, despite a general shying away of responding to either the AJI or the RCAP recommendations in this regard, has participated fully in joint Commissions in B.C., Quebec and Ontario, and took a lead in establishing the Treaty Commission in Saskatchewan. Moreover, the federal government and many First Nations appear to have a preference for regionally focussed bodies of the kind recommended by the AJI.

Alternatively, nothing would preclude the federal government being invited to participate in the operations and activities of a provincial or provincial/Aboriginal successor body, whether later on in the life of that body or more narrowly on issues requiring federal participation. This has a certain "reverse precedent" in the provincial engagement in the federal-First Nation creation of the Saskatchewan Office of the Treaty Commissioner. However, it is important to note that First Nations in particular, as well as Metis, generally regard the participation of the federal government as crucial to meeting their objectives in reconciliation. In any case, the mandate of a successor body should make explicit provision for the adhesion of the federal government where they are not an active participant in the founding of that body.

A third broad option is to presume the non-participation of Canada in the operations of a successor body – which of course would narrow the likely functions and mandate of such a body in relation to matters falling within federal jurisdictions. However, even in this case such a body could play a valuable role, particularly in light of the obligation of the provincial Crown to avoid infringements of Aboriginal and treaty rights and to mitigate any infringements that are justified. A neutral and independent body to assist in deliberating on such infringements would greatly assist in the avoidance of costly litigation and the inevitable uncertainties regarding development plans that such litigation entails.

In the case of initial federal reluctance to participate, it is likely to be even more important to establish a successor body on as independent a basis as possible, such as through legislation. If properly crafted, a statute could anticipate a subsequent federal role in such matters as the appointment of officers, mandate adjustments and funding. The alternative approach – involving a non-statutory body – would not likely generate the equivalent expectation for eventual, and essential, federal engagement.

Based on our assessment, the federal government is likely to embrace an overture from Manitoba, and from First Nations and Manitoba Metis, for their participation in a jointly mandated and empowered successor body. In our view, the federal government would be quite likely to welcome an institutional opportunity at engagement, and reconciliation.

4. Life-Span

The life-span of commissions generally tracks the mandates and functions provided. For a successor body with a mandate of the sort recommended by the AJI and ourselves, the preferred course is quite plain: a permanent body.

More constrained mandates have precedents: such as in connection with very clear outcomes and narrowly defined mandates. However, where the objective is to assist in the formulation of a province-wide reconciliation of provincial, federal and Aboriginal goals, a constrained or narrow timeframe would seem singularly inappropriate. An on-going function would seem both reasonable and expected.

There is, of course, little permanence assured for any governmental structure. Permanence speaks not to the actual, expected time-span of an establishment's existence so much as its perceived acceptance as part of a new *status quo*. No commission or tribunal can expect to survive its original mandate un-touched by review or revision beyond a decade or more. However, any body that lives at pleasure, and must negotiate its continuance on a year to year basis, can have little confidence, whether in the pubic eye or that of Manitoba's Aboriginal peoples.

5. Aboriginal Participation

A final consideration addresses the participation required in the establishment, staffing and operations of any successor body. A wide variety of options are available, though in reviewing the Canadian precedents only a few are represented. In general, the most successful bodies are established on the basis of equal Aboriginal representation, with joint selection of Chairpersons. Where the Aboriginal party has been under-represented, the entity concerned has rarely been successful in achieving its mandate.

The participation of stakeholders also speaks to the direct role to be played by Aboriginal organizations in the structuring and on-going operation of any successor body to the AJIC. In our view, any successor body must reflect true independence, not only from the Crown (whether provincial or federal) but also from Aboriginal organizations. Accordingly, it is our recommendation that a balance should be struck that distances any successor body's personnel and leadership from the current representations of either governments or Aboriginal organizations. To be independent, and to be perceived as such, any successor body must find a broadly based confidence in the public's eye – a public that includes both mainstream and Aboriginal versions and dynamics.

We recommend that a successor body to the AJIC be representative of the following Aboriginal interests:

- First Nations, and in particular the northern (M.K.O.) Chiefs, the Southern Chiefs, the Interlake district and the Dakota-Ojibway;
- Regarding the Métis Nation, representation should include both northern and southern regions;
- Women's interests, both amongst First Nations and Métis, be well represented;
- Urban representation be provided for, particularly but not solely from Winnipeg.

As noted in our other reports and recommendations, we also hold concerns regarding non-status Indians and other Aboriginal peoples, such as the Inuit, who may not be well appreciated for their presence in or contribution to Manitoban society. We urge in particular that where the Manitoba government enters into arrangements in aid of or in partnership with First Nations, the cause of non-status, as well as status Indians

without membership in First Nations, should be addressed. We also note that Manitoba First Nation organizations and the Manitoba Métis Federation should be engaged in this dialogue, particularly considering the implications for their respective membership.

Annex 1

Aboriginal Justice Inquiry
Extract from Recommendations[11]

Aboriginal Justice Commission
We believe that an Aboriginal Justice Commission of Manitoba should be established by federal and provincial legislation and by appropriate processes of the Aboriginal people of Manitoba. We suggest that the commission have a board of directors made up of equal numbers of Aboriginal and governmental representatives, with an independent person, acceptable to all parties, as chairperson. Aboriginal representatives should include status Indians, Métis, non-status Indians, and representatives of Aboriginal women and urban Aboriginal people.

The board of directors of the commission should appoint an Aboriginal Justice Commissioner acceptable to Aboriginal people, with authority to take action in the name of the commission as its chief executive officer, and appoint sufficient permanent staff to deal with its various responsibilities. In our view, the Aboriginal Justice Commission is key to the implementation process.

It is apparent to us that there will be considerable work involving both levels of government and Aboriginal people in the implementation of the recommendations which we make. We believe that the implementation of those recommendations and any consequent negotiations should be overseen by the Office of the Aboriginal Justice Commissioner, whose primary role would be to ensure that Aboriginal-government negotiations occur in as fair and productive a manner as possible and that any assistance necessary to overcome areas or points of disagreement is provided.

In addition, while we believe that the Aboriginal Justice Commission should have the support of both levels of government and of Aboriginal people, it should have a degree of independence. The commissioner should be responsible to, and take direction from, the commission and report to it on his or her activities.

The commission's primary responsibility, we believe, would be to monitor the degree to which governments are proceeding toward the implementation of the recommendations in this report, and to report publicly on its progress from time to time.

As well, the office of the commissioner could facilitate any negotiations which need to occur between governments and Aboriginal people, and assist in resolving points of disagreement. That could be done in whatever way the parties agree, but we believe that utilizing mediation or other dispute resolution techniques, including arbitration, should be considered.

The tasks of the commission should be to:

- Enter into discussions with Aboriginal people to determine their wishes with respect to the various recommendations.
- Recommend the form and method of the implementation of recommendations.
- Monitor the implementation of the changes we suggest.
- Report to governments, Aboriginal people and the general public on the progress of implementation.
- Assist in the establishment of Aboriginal justice systems.
- Take steps to establish an Aboriginal Justice College.
- Monitor the progress of affirmative action programs.

[11] Volume 1: Chapter 17, "A Strategy for Action", *Report of the Aboriginal Justice Inquiry*.

- Initiate discussions between Aboriginal people and governments to establish mechanisms to deal with Aboriginal self-government and the settlement of outstanding claims.
- Receive concerns and complaints of any nature from Aboriginal people and forward them to the appropriate department or agency for attention, and monitor the results.
- Mediate Aboriginal concerns or complaints with governments or agencies.
- Become involved in any issue involving Aboriginal people.
- Advise government on Aboriginal concerns and recommend appropriate action.
- Propose legislation or legislative change.