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Summary of the Program of Research to Develop a Canadian Child Support Formula

An Overview of the Research to Develop a Canadian Child Support Formula, by Ross Finnie, Carolina Giliberti and Daniel Stripinis, Department of Justice Canada, 1995.

In 1990 the Federal/Provincial/Territorial Family Law Committee began a study to address widespread dissatisfaction with how child support is determined. On behalf of the committee, the Department of Justice Canada undertook four years of research to develop a formula that could be used to determine child support awards in cases of family breakdown. The three-phase research program is described in detail in the January 1995 report, *An Overview of the Research Program to Develop a Canadian Child Support Formula,* by Ross Finnie, Carolina Giliberti and Daniel Stripinis. A summary account of the research can be found in the companion document, *An Overview of the Research Program to Develop a Canadian Child Support Formula: Highlights.*

Phase 1 of the research entailed compiling Canadian data on current child support award levels. Over three months in 1992, the researchers collected information on child support awards in selected sites across Canada. Using court files, court reporters in 15 court districts completed a questionnaire on all cases involving child support. The final database contained information on the income level of 869 families, the number and ages of children, and the court-ordered amount of child support.

The average monthly child support award in the database was $242 per child, ranging from $195 in New Brunswick to $294 in British Columbia. The average award per family was $368, ranging from $280 in New Brunswick to $451 in British Columbia. The average awards by province tended to rise with average provincial income. The child support award levels in the database were not enough to lift many custodial families out of poverty.

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Analyzing the cases in the database revealed that custodial parents had an average annual income of $19,171, and that of non-custodial parents was $28,694. Notwithstanding the payment and receipt of child support, the living standards of both types of households tended to be lower than that of the pre-separation intact household.

Phase 2 of the research involved selecting the preferred formula for calculating child support levels. Child support formulas are intended to set child support awards that increase the living standards of the custodial household and divide more equally the costs of children. All child support formulas follow certain procedures to estimate the costs of children, and decide how to divide those costs between the custodial and non-custodial parents. After a thorough review of various methods for assessing the costs of children in Canada, and of various mechanisms (or formulas) for sharing child costs between parents, the committee determined that the costs of children could best be calculated using the so-called "40/30" scale, used by Statistics Canada. It was agreed that this method of estimating costs, in conjunction with the *Revised Fixed Percentage Formula*, provided the best overall mechanism for calculating awards.

The third component of the research examined the impact of changing the current tax treatment of child support. Under the current income tax system, child support is included as taxable income for the custodial parent and is deducted from the taxable income of the non-custodial parent. Due to public perceptions of unfairness in the current tax treatment brought to light by the recent *Thibaudeau* case, the child support formulas under consideration were re-examined using a no-deduction/no-inclusion tax treatment of child support. The findings indicated that the preferred formula produced higher average award levels than the other formulas under consideration.

As this report so clearly illustrates, developing a child support formula is an exercise in balancing the interests of all parties and searching for a solution that is not only fair and equitable, but that will also work well in practice. A child support formula cannot resolve all the problems that families encounter with the determination of child support. However, applying a carefully constructed formula can lessen some of the difficulties and help make the process fairer and less adversarial.

Since the release of both the Federal/Provincial/Territorial Family Law Committee's report on child support reforms and the accompanying research report, the Department of Justice has consulted widely with the legal community, judges, custodial and non-custodial parents, and community organizations concerned with the issue of child support. The recommendations contained in the Family Law

Justice Research Notes is produced by the Research, Statistics and Evaluation Directorate of the Department of Justice. Its purpose is to provide, in summary form, results of projects carried out under the Department's program of research into various areas of justice policy, as well as information and articles on other socio-legal matters.

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Committee's report have been modified to incorporate the major concerns that have been raised. On March 8, 1996, the federal government, as part of the federal budget package, detailed its policy regarding child support. This policy includes the implementation of child support guidelines, a number of federal maintenance-enforcement initiatives and re-distribution of tax reserves to working low-income families, and removes the deduction/inclusion provisions for child support payments. Separate budget documents and brochures outlining these policies can be obtained by calling 1-800-343-8282.

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Second-Class Justice? Alternative Dispute Resolution in the Courts

Court Dispute Resolution Processes: The Application of Alternative Dispute Resolution Processes in the Court, by Dr. Lee Axon and Robert G. Hann, Robert Hann & Associates. Department of Justice Canada, Working Document [WD1994-22e], 1994.

Introduction

As part of its ongoing examination of the application of alternative dispute resolution (ADR) in the justice system, the Research and Statistics Section, in cooperation with the Dispute Resolution Project of the Department of Justice Canada, commissioned a study on court-annexed ADR programs. This study explored several issues, including:

- whether ADR improves access to justice, court efficiency, the quality of justice and users' satisfaction with the courts;
- the advantages and disadvantages of court ADR programs;
- the kinds of cases suitable for referral to court ADR programs; and
- whether the integrity of the justice system can be maintained through the use of ADR.

This report examines the application of ADR programs in civil, family, and criminal courts. As well, the report examines the experiences of other jurisdictions and provides recommendations concerning the development of court ADR programs in Canada.

Research Findings

The researchers caution us that "the enthusiasm currently afforded DR in achieving objectives identified by the courts may be misplaced, and that equally significant results could be obtained through other means such as improvements in different types of case management methods, case-flow management and other court administrative procedures" (p. ix).

The research cites many advantages to the application of ADR in the courts, including: it enables people to participate more directly in resolving their disputes; it provides privacy; it is less formal; and it helps to preserve relationships. Perceived disadvantages of court DR processes include: their potential to remove important cases from the public domain and

public accountability; the potential for coercion and abuse of civil and personal rights; their potential to attract cases that would otherwise settle out of court; and the risk that these processes promote a type of second-class justice. Concerns have also been expressed about higher administrative court costs associated with implementation of these processes, duplication of existing court procedures, and the potential to defuse other court initiatives.

Are Court DR Programs Really Effective?

Several measures of effectiveness have been used in assessing court DR processes. For example, although it is often argued that DR programs can decrease case-processing times, and thereby court costs as well, the research suggests that court costs are actually higher — because of the higher costs associated with implementing programs and the possibility that speedier settlements are not actually linked to court costs.

Research suggests that some DR programs, such as those concerning settlement weeks and small claims mediation, reduce judicial workload. However, evidence also suggests that other programs, such as judicial conferences, have actually proven to add to the workload. Furthermore, there is also research which indicates that although some programs, such as mediation in family matters, often reduce judicial workload initially, the rate of re-litigation in these matters tends to eliminate any potential gain.

Litigant costs also have been applied in assessing the effectiveness of DR programs. The research findings confirm that litigant costs are frequently reduced because of speedy settlement.

Another common measure of the effectiveness of DR programs is the quality of justice. Data on DR programs suggests that these programs improve access to justice. However, despite favourable results, there still remains some scepticism about the fairness of these settlements.

The Design and Implementation of Court DR Programs

Do court DR programs need to exist at all? While some believe that disputes should be referred to external services, thereby keeping the courts out of the settlement process, others argue that there is a risk of second-class justice in referring these cases outside the courts.

To determine what DR program, if any, to implement, the authors advise that the program should be selected to meet the intended objective, which should be grounded in a needs assessment identifying the causes of court problems. Once the program has been determined, the next step is to select cases that will be referred to the court DR program. While the courts have used a variety of approaches for screening and referring cases to DR programs, little evaluation has been done of these approaches. Therefore, apart from the need to consider public access and accountability, the research suggests there is little reason to exclude any category of case from most DR processes.

A major concern in implementing court DR programs has been whether to make these programs mandatory or voluntary. The research suggests that this depends on several considerations including: the effect on the participation rate; constitutional concerns; objectives of the

program; how well the program is accepted; and how it will affect peoples' good-faith participation. Some jurisdictions have made their programs mandatory, with liberal opt-out conditions, while others permit otherwise excluded cases to be included if parties wish.

The authors suggest that, before embarking on the development of a court DR program, it is important to explore the relationship between DR programs and other available case management techniques. They believe it is possible that the features of successful DR programs could be transferred to other case-management procedures without the additional costs associated with implementing full-fledged court DR programs.

Since many jurisdictions are designing DR programs on limited budgets, many have had to rely on new ways to fund these programs, including user fees, compensation of DR professionals, and *pro bono* work in return for training, certification and prestige.

The authors make several recommendations concerning planning, designing, implementing and evaluating court DR programs in Canada, including:

- the need to consider whether DR programs should be court-annexed or left to private community agencies;
- the need for civil courts to consider using DR processes that serve as both trial preparation and methods to promote settlement;
- the need for courts to consider the costs that can be saved by applying DR features to other case management/case-flow management processes; and
- the need to implement additional court programs on a trial basis and evaluate them.

Conclusion

Given that there are many questions about the effectiveness of court DR programs, there is good reason to assess the need for such programs. Furthermore, it may be that specific features of DR programs may also be available in other management procedures thereby negating the need for a DR program. Hence, it is critical that courts properly assess the problem to determine what is actually needed.

Summary prepared by Shirley Riopelle-Ouellet
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Dispute Resolution in Canada

Dispute Resolution in Canada: A Survey of Activities and Services, by The Network: Interaction for Conflict Resolution. Department of Justice Canada, Technical Report [TR1995-1e], 1995.

Although the practice of alternative dispute resolution (ADR) has existed in Canada for some time, and although it continues to flourish, our knowledge of the nature and extent of this practice in Canada is very limited. In view of this gap in knowledge about ADR, the Department of Justice Canada undertook a study to explore the type and extent of current dispute resolution services and activities in Canada.

Profile of Canadian Dispute Resolution Services and Activities

The survey findings reveal that dispute resolution services and activities across the country fall into a broad range.

For example, the survey found that dispute resolution services are provided primarily in English, although services in French are provided in specific provinces. Interestingly, the survey also found that dispute resolution services are provided in a variety of other languages as well, including Cree, German, Italian and Spanish.

The findings also reveal that dispute resolution professionals provide services from a variety of locations, including offices, schools or education settings, law firms, government institutions and courts.

The need to raise public awareness about dispute resolution is a significant factor in ensuring the continued use of dispute resolution services. Many survey respondents indicated that they distribute information about dispute resolution to the public mostly by brochures, articles, speaking engagements, videos, books, manuals, newsletters and reports.

The survey results demonstrated that dispute resolution professionals are involved in a range of disputes — including family, community, corporate, government, labour and school-based disputes — and the trend seems to be towards a more general practice of dispute resolution. Family-related dispute resolution, however, was found to be the most common specialization.

A review of the data on training programs indicated that many training programs are offered as part of a degree program such as masters in social work. Specific users of these training programs include teachers, justice system personnel, social workers and counsellors, volunteers, business people and students. A significant number of trainers offer their courses to people seeking dispute resolution skills outside the field of practice.

The survey findings reveal that dispute resolution services and programs are financially supported by user fees and government funding. Almost one-fifth of dispute resolution professionals don't charge for their services. These include volunteers with free community services that are supported by donations, government-sponsored self-help groups, and programs at self-funding institutions.

Stakeholder Negotiations

Increasingly, stakeholder groups are being formed to assist government in setting public policy, determining rights, establishing corporate or government direction, and employing consensus decision-making for many programs. The survey revealed that for those respondents who had been involved in stakeholder negotiations, these negotiations covered a wide range of topics including health, financial matters, cross-cultural disputes, Aboriginal land claims, curriculum and classroom organization, construction disputes, and HIV disputes.

Dispute Resolution in Schools

Because of growing interest in introducing dispute resolution programs and services into schools as a way to address increasing violence, the survey sought to collect information on the nature and extent of school-based dispute resolution programs. The data revealed that most school-based dispute resolution programs include training for students, teachers, trustees, staff, parents and administrators. Not surprisingly, students and teachers are the parties most commonly involved in this dispute resolution

training. One in seven schools offering dispute resolution training also reported having dispute resolution programs. Peer mediation programs were the most frequently cited type of school-based dispute resolution program.

Obstacles in the Development of Dispute Resolution Services and Activities

When asked to comment on what they perceived to be obstacles to the use of dispute resolution services in Canada, dispute resolution professionals cited: the perceived lack of awareness of its value by significant segments of society such as the media, government and the legal system; perceived lack of government leadership; lack of time and resources to build a practice; resistance on the part of other professionals to refer cases to dispute resolution professionals; and dispute resolution professionals themselves. Despite these obstacles, dispute resolution professionals identified some very positive aspects of their work, including satisfaction from helping people, achieving win-win situations, watching people grow, and feeling pride in being a catalyst for repairing relationships or preventing damage to parties.

The report concludes with several recommendations on the development and use of dispute resolution in Canada including:

- a major shift in thinking about how to resolve disputes is needed to encourage the universal acceptance of dispute resolution;
- government needs to show leadership by making it common practice to write dispute resolution clauses into contracts and business agreements, and by demonstrating a preference for dispute resolution when government is a party to a dispute;
- dispute resolution practitioners should set the stage through cooperation and collaboration with others to create the resources for communicating dispute resolution activities to the public and other stakeholders;
- accreditation requirements should be established, along with some minimum standards and guidelines for delivering dispute resolution services;
- public and professional groups should be educated to help demystify dispute resolution and make it accessible;
- dispute resolution should be part of school curricula across Canada;
- pilot studies and model projects should be funded to investigate new approaches, and promote cultural adoption; and
- legal professionals should be given incentives to undertake training in dispute resolution, and be encouraged to explore other methods of resolving disputes.

Although this report does not provide a comprehensive picture of dispute resolution services and activities across Canada, it does establish a useful base from which the dispute resolution field can be monitored.

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Reaching Canadians: Public Legal Education and Information

Inventory of Public Legal Education and Information Materials and Programs Related to Crime Prevention and Victims, by Richard M. Gill and Gina A. Alderson, Alderson-Gill & Associates Consulting, Inc. Department of Justice Canada, Technical Report [TR1994-10e], 1994.

The Department of Justice Canada is exploring various ways to deliver public legal education and information (PLEI) about crime prevention and victims. As a starting point, the Department funded a study to identify what PLEI materials, programs and projects about crime prevention and victims are currently available in Canada. The study results are contained in the report.

The inventory was developed in consultation with PLEI experts knowledgeable about crime prevention and victim services. These consultations helped determine the scope of the inventory and the criteria for including items. Then, about 80 individuals and organizations were contacted, including provincial and territorial PLEI organizations, provincial and territorial government departments, and non-governmental organizations active in criminal justice. From those organizations, researchers obtained 108 PLEI materials and programs for the inventory.

The inventory is organized into five categories. Four of them relate to crime prevention: deterrence, avoidance, education, and general crime prevention. The fifth category is PLEI for victims.

Items in the inventory meet two criteria:

1. Their purpose is to inform or educate the public about the law or the justice system.
2. They provide information that will help people to better equip themselves to avoid being victimized in the future, to better pursue or defend their interests as victims, or to better understand the consequences of committing a crime and their responsibilities under the law.

Each item includes full bibliographic information, as appropriate, including the number of pages. Short descriptions of the item and its primary target group are also included.

The concluding chapter analyses the inventory to determine who is producing PLEI about crime prevention and victims, the purpose of those PLEI activities, types of PLEI information that are missing and possible roles for governments.

The chapter notes that five types of PLEI on crime prevention and victims are missing:

1. PLEI designed to deter people from committing violent crime, particularly spousal abuse, sexual assault, and elder and child abuse;
2. PLEI that promotes a community-based, social development approach to crime prevention;
3. a more systematic and comprehensive approach to school-based PLEI;
4. PLEI for victims of a wider range of crimes; and
5. PLEI adapted and disseminated to members of society who are hard to reach (e.g., new immigrants).

This report may provide individuals or organizations involved in PLEI and/or crime prevention with an indication of where further devel-

opment in this area is required. According to the authors, the analysis suggests that governments would do better to distribute PLEI program materials rather than produce them, and instead should support the organizations that are already well equipped to produce this material. Given some governments' stated interest in the broader, social development approach to crime prevention, governments could also get involved in encouraging PLEI that promotes this approach and in other longer-term PLEI strategies such as education programs.

Summary prepared by Shelley Trevethan
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Seen But Not Heard: Recent Findings on Native People in the Inner City

Seen But Not Heard: Native People in the Inner City, by Carol La Prairie. Ottawa: Department of Justice Canada, 1995.

This article summarizes a recent study for the Aboriginal Justice Directorate of the Department of Justice Canada, conducted in Edmonton, Regina, Toronto and Montreal.

The study had three goals: to examine the over-representation of Aboriginal people as offenders in Canadian correctional institutions; to improve our understanding of that over-representation by comparing Aboriginal people in eastern and western cities, in large and small urban centres, from varying backgrounds, and with a wide range of experiences in cities, home communities and the criminal justice system; and to give Aboriginal inner-city people a voice in the Department of Justice Canada's Aboriginal Justice Initiative.

The literature suggests that specific groups of disadvantaged people are over-represented in the criminal justice system. The theoretical framework of this research uses both structural and cultural factors to characterize the life of Native people in each of the four cities. The study does not compare the circumstances of Aboriginal and non-Aboriginal groups; it compares Native people in Edmonton and Regina with Native people in Toronto and Montreal. The study also explores the effect of city size on the life of Aboriginal inner-city residents — Toronto and Montreal are larger than Edmonton and Regina. The data were not gathered from a representative sample of Aboriginal residents of these cities; rather, the study focused on the Aboriginal groups most likely to commit crimes, most vulnerable to being victimized and most frequently processed by the criminal justice system — i.e., the poorest of inner-city people.

This study is based on 621 interviews in three categories: people selected at street level who live in the inner city (Inner 1), people selected through social and justice agencies who gave inner-city addresses (Inner 2), and people selected through the inner-city sampling process who live in the outer city (Outer).

In the Inner 1 group, which comprised more males than females, males were the most disadvantaged and marginalized. The lives of all Inner 1 people were characterized by despondency and hopelessness, and many were hard-core alcoholics. They were the least educated,

employed and employable, and most victimized as children. All the members of this group, but especially the males, were the most- and earliest-involved in the criminal justice system. They had been in custody more often and for longer periods of time than those in the other groups. Violence was normal in their lives. Members of this group felt marginalized in both Aboriginal and non-Aboriginal societies.

Inner 2 people were in transition — either spiralling down until they had acquired all the characteristics of Inner 1 people, or rising into the Outer group. They also had suffered childhood disadvantage, deprivation and violence, but their upbringing tended to be more stable than that of Inner 1 respondents. Inner 2 males had had particularly extensive contact with the criminal justice and correctional systems, but less than Inner 1 males. Inner 2 people were less resigned than Inner 1 people, and less controlled by alcohol. Younger and better educated, they were also angrier and more aware of their rights and, therefore, less passive in their contact with authority. Inner 2 people were not strongly tied to reserves but, more than Inner 1 people, looked to Native culture and reserve communities for solutions to their problems.

The Outer group comprised more females than males. Outer people had had comparatively stable childhoods and adult lives, and were the most connected to families and reserves. The best-educated and most-employed respondents in the sample, more Outer people had custody of children and ambitions for better lives. But although they were more advantaged — as measured by their socio-economic and educational indicators and their involvement in systems of social control — this group was also excessively involved in the criminal justice system.

Most respondents in the sample reported childhood abuse. Females were more likely to report sexual abuse, and males were more likely to report other forms of assault, such as beatings. For most, abuse and violence were facts of childhood and adult life.

Overall, the findings of this study paint a bleak picture of the lives of inner-city Native people, especially males. The inner-city people in the sample were poorer, less skilled and less educated than other Canadians, Aboriginal or non-Aboriginal. They had been victimized more frequently and more seriously than other Canadians. The study also found that on reserves, people do either very well or very poorly, probably as a result of their connection to local power. On reserves, the challenge is to distribute opportunities more evenly through communities and to better integrate marginalized people.

The criminal justice system, especially police and courts, may treat inner-city Native people more harshly in some cities than in others. However, marginalization and alienation resulting from childhood instability and violent experiences, combined with alcohol and a lack of education, opportunities and options, make people more likely to commit crimes and end up in the criminal justice system. To reverse this trend, we must address the physical, spatial, emotional and spiritual needs of inner-city Native children and adults.

Research suggests attacking recidivism with a combination of strategies, such as surveillance and treatment. Most correctional programs for Native offenders are culturally focused, and it is essential to explore their effectiveness against recidivism, alone and in combination with other rehabilitative measures such as diversion and sentencing alternatives. Unfortunately, there is

no such thing as a model program for all offenders and offences. Approaches and combinations of approaches must be tested to find out what works best for various types of offenders, offences, and circumstances. Mainstream diversion and rehabilitation approaches should be offered to Native offenders, and non-Native offenders should have a chance to try Native approaches.

The respondents' knowledge and reliance on Native culture varied. Most respondents thought Native people should be responsible for improving their own lives. However, they lack a political voice. This was evidenced in the failure or refusal of most respondents to identify an Aboriginal political organization that represented their interests.

Most respondents wanted to live better lives but few had the necessary resources. Many were controlled by their environment — loneliness drove them to alcohol and drugs, and addiction keeps them there. They are tortured by inescapable memories; trapped in social controls, especially the criminal justice system; and dependent on social services, such as welfare, soup kitchens, drop-ins and hostels. They lack education and skills, and they seek the company of others in the same circumstances. Rehabilitation tends to focus on only one aspect of their lives.

The study recommends developing the inner-city community, beginning with safe, secure housing that reflects people's relationship to the city and to one another. The primary objective of new approaches to housing, however, is to stabilize inner-city populations so that other types of community development, such as economic revitalization and social organization, can take root. Transient residents of shabby, unstable, inappropriate housing are unlikely to improve their communities.

The research concluded that although the criminal justice system fails both Native and non-Native people, it fails a disproportionately large group of Natives simply because they are more likely to be involved in it. This indicates that policy and programs do not target the greatest need. The nature and extent of problems must be researched before policies are designed and implemented and, once implemented, policies and programs must be evaluated. For inner-city people, Native and non-Native alike, controlling the criminal justice system is less important than eliminating the conditions that create conflict with the law in the first place.

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[1] Although the term Aboriginal is most commonly used, respondents in the Inner City study preferred the term Native.

Keep It Plain and Simple: *Consumer Fireworks Regulations* Redrafted in Pilot Project

Consumer Fireworks Regulations: Final Report, by Shelley Trevethan, Wendy Gordon and Marie-Andrée Roy. Department of Justice Canada, Working Document [WD1995-4e], 1995.

Plain language has been introduced to the *Consumer Fireworks Regulations* as the result of a pilot project carried out by three federal departments. The Explosives Branch of the Department of Natural Resources, the Department of Justice Canada and the Regulatory Affairs Division of Treasury Board Secretariat developed a partnership to redraft the *Consumer Fireworks Regulations* in plain language and then tested and evaluated the process.

Plain language legislation is an important way to achieve compliance with the law. According to modern compliance theory, most people will comply with regulations they understand. This project presented an ideal opportunity to combine plain language drafting of regulations, public legal education and information, and the principles of modern compliance theory.

The project was conducted by a Department of Justice Canada team, comprising one researcher and two drafters (one for each language). The team first consulted with individuals in the fireworks industry to identify problems or misinterpretations with the old *Regulations*. Then, drafts of the new *Regulations* were distributed both internally and externally (to plain language experts) for comments. Finally, in British Columbia, Ontario and Quebec, the *Regulations* were tested on those who must follow the *Regulations* (e.g., consumers, retailers, and distributors) and those who must enforce them (e.g., police officers, and firefighters).

Findings

This pilot project demonstrates that involving drafters in consultations with users provides important information to the drafters on how the regulations are used and understood. The plain language of the revisions makes the regulations easier to use and more realistic. Finally, testing the usability of the regulations with various stakeholders who use the legislation examines whether the revisions have made the regulations clearer and easier to understand.

It is expected that adopting the general approach piloted in the Consumer Fireworks project will result in the following benefits:

- other documents will not be required to explain the regulations;
- fewer revisions will be required since the product will be of better quality;
- less time will be spent answering questions about the regulations;
- the drafters will be more informed in drafting the regulations since the consultations help them better understand the context of the regulations;
- the users will be more committed to the legislation since they are involved in developing the product; and

▲ the usability testing will ensure that individuals understand the regulations and that there are no gaps.

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Responses to Spouse Abuse

Manitoba Spouse Abuse Tracking Project, Final Report, Prairie Research Associates, Working Document [WD 1994-18e], 1994.

One of the most comprehensive reviews of the processing of spouse abuse cases ever undertaken in Canada has been carried out by the Department of Justice Canada, the Ministry of the Solicitor General of Canada and the Manitoba Department of Justice. Completed as a joint effort under the federal Family Violence Initiative, the study tracked cases of spouse abuse through the criminal justice system in Manitoba, a province with a mandatory charging policy for such incidents. The research also assessed how the criminal justice system and the social service system work together in responding to spouse abuse.

The researchers, Prairie Research Associates Inc., undertook four major research projects: (i) a study that tracked cases from initial contact with police through to settlement and into the correctional system; (ii) interviews with victims; (iii) interviews with police, prosecutors, defence counsel, judges, probation officers and other personnel involved in services and treatment; and (iv) court monitoring in Winnipeg, Brandon, Thompson and some surrounding First Nation communities. The monitoring of the Winnipeg Family Violence Court complements the report of a more comprehensive evaluation of that court — the *Manitoba Spouse Abuse Tracking Project, which* has been published by the Department of Justice Canada and is available to the public.

One major issue that the study addressed was the effectiveness of mandatory charging in domestic violence cases. This policy is currently being debated across Canada by criminal justice system personnel, advocacy groups, victims and offenders. The questions raised by this policy are important yet difficult: Is mandatory charging the best way to keep victims safe? Is it effective in preventing abuse? Is it an effective use of police and court resources, given fiscal restraint and an already-overburdened system?

The researchers found that the mandatory charging policy in Manitoba generally has had positive results, primarily because the victim no longer has to decide whether to lay charges. On the other hand, they also found that rigorously applying the policy in Manitoba (where it is known as the "zero tolerance " policy) was somewhat counterproductive because it sometimes resulted in charges being laid in relatively minor incidents that would not otherwise go before the courts. In Winnipeg, for example, several women were charged for actions that really involved resisting assault but that fell under the zero tolerance guidelines. The researchers concluded that these cases and other minor incidents involving first offenders could be dealt with through a formal diversion process that would still respect the zero tolerance policy, but allow the courts to deal more quickly with more serious cases.

The researchers made many recommendations, which can be grouped under charging, court proceedings, and support. The recommendations were made in a rapidly changing environment — even during the study, police, criminal justice and correctional agencies were implementing new policies and procedures for responding to spouse abuse. Therefore, some recommendations had already been acted on before the report was published. But the concerns raised may still apply in other jurisdictions.

Although the results of the Manitoba Spouse Abuse Tracking Project apply directly only to Manitoba, the research reveals information that should be considered by all provinces and territories and by the federal government. As Canadians become increasingly aware of the long-term effects family violence has on individuals, communities and society, current policies and procedures must be assessed and new strategies developed. Further, the innovative solutions already implemented in Manitoba demonstrate that, to successfully end family violence, communities and governments must work together.

Summary prepared by Scott Clark
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The Departmental Law Reform Fund

Introduction

Since the former Law Reform Commission of Canada (LRCC) was disbanded in 1993, the Department of Justice Law Reform Fund has provided support for an ongoing program of law reform research.

In 1993-94, 15 projects addressing challenging legal issues were funded. The results of several of these research projects and consultations are described in this edition of *Justice Research Notes*. The views expressed herein are solely those of the authors and do not necessarily represent the views of the Department of Justice Canada.

For information on how to obtain the technical reports below, please contact Department of Justice Canada, Law Reform Division, at (613) 941-4150.

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Bioethics and Legal Advisors

The report by Edward Keyserlingk has two components: a theoretical examination of the relevance of ethical analysis to the provision of legal and legal/policy advice; and a survey of current opinion in the federal Government about the present and possible role for lawyers in ethical analysis of biotechnology files.

Professor Edward Keyserlingk argues that ethical and legal analyses are different, but related. He observes that lawyers are not generally asked by their clients to provide comprehensive advice on the ethical implications of policy options, nor are they exclusively equipped for this task. He suggests, however, that lawyers can contribute unique skills and experiences as part of multidisciplinary teams. Since the mandate of government lawyers involves advancing the public interest in policy development, he argues that Department of Justice Canada lawyers have a unique role to collaborate with their clients on both the legal and ethical dimensions of policies. Therefore, as members of multidisciplinary policy teams, Justice lawyers can bring to the table legal training and any other training in ethical reasoning.

Ellen Margolese surveyed lawyers and client officials in major biotechnology departments about the present and possible roles of Justice counsel in ethical analysis. According to her findings, the extent to which Justice lawyers currently participate in ethical analysis depends largely on their role in policy development. Margolese found that every department, and even every Legal Services counsel, had a different view about what is an appropriate role for them in policy development. Nevertheless, the study found that many client departments are interested in Justice lawyers taking a more proactive role in ethical debates concerning biotechnology.

Margolese emphasized that study participants did not advocate that ethics should be left exclusively to the lawyers. Instead, they felt that lawyers should contribute their particular skills and viewpoints to a process involving several professions. Her study concludes that most persons involved with biotechnology can identify ethical issues, although they may not use a common terminology. She also concludes that most departments, including Justice, do not

need to create a cadre of ethicists to advise on ethical matters. However, she recommends that legal advisors be given basic training in ethical analysis to assist in their participation in policy development when requested.

The Relevance of Bioethics in the Provision of Legal & Legal Policy Advice, by Edward Keyserlingk of McGill University's Centre for Medicine, Ethics and Law, March 30, 1995.

Ethics and Biotechnology: An Examination of the Role of Legal Advisors, by Ellen Margolese, Department of Justice, March 30, 1995.

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Protecting Privacy in the Federal Private Sector

Protecting personal privacy has become a very real concern in this technological age. The report *La Protection de la vie privée dans le secteur privé sous jurisdiction fédérale* examines privacy measures in federally regulated companies involved in banking, communications and interprovincial transportation. The report details the various privacy measures set out in legislation, regulations, administrative documents, collective agreements and decisions, as well as in voluntary codes adopted by some private sector companies and associations. The report finds that in the federally regulated private sector, privacy is governed by a broad patchwork of rules that are largely ineffective in providing complete and integrated protection of privacy.

The report compares the various types of protection in the federal private sector with those under the *Privacy Act*, and outlines the structured and integrated nature of the Act. It also discusses international instruments, particularly the Organization for Economic Development's *Guidelines,* which Canada adhered to in 1984. Comparing the *Privacy Act* with OECD *Guidelines* suggests that the former should comply with the latter. However, the report reveals that the lack of national legislation for the private sector and the existing voluntary codes (which are not binding) allow for non-compliance with OECD *Guidelines.*

The report also examines Quebec's passage of the *Act Respecting the Protection of Personal Information in the Private Sector.* Although the report applauds some worthwhile innovations in the Quebec statute, it is not confident in the law's ability to effectively curb serious problems such as the creation of data banks on the population; the uncontrolled circulation of information between the public and private sectors, and among provinces and countries; confusion regarding the purposes of use and disclosure; and the widespread marketing of personal data.

The report also examines the possibility of extending the *Privacy Act* to the private sector. This was recommended by the Standing Committee on Justice and Solicitor General in 1987, as offering several advantages. One could be an opportunity to give the Act a more modern structure that would be better suited to solving problems that have arisen since it was passed. Alternatively, a special Act could be passed for the private sector.

The report indicates that banks require legislative intervention most urgently, followed by the telecommunications companies, particularly telephone companies. The third area that should be addressed is not a sector of activity, *per se*, but a type of information — personal information relating to employees of the federally regulated private sector.

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Pension Credits for Unpaid Work

Despite the benefits of Canada's pension system, more than 50 percent of elderly women in this country are poor. That is one key observation of *Pension Credits for Unpaid Work: A Discussion Paper*, which is the result of an extensive literature review by University of Victoria, Faculty of Law professor Jamie Cassels. The study comprises two parts: a discussion paper and an annotated bibliography.

Several pension surveys state that elderly males have consistently enjoyed more financial security than elderly females. A key reason for female under-representation in both private and public pension plans is that unpaid work is ineligible for pension credits. Unpaid work is indirectly recognized by the Canada Pension Plan (CPP) (e.g., derivative benefits, credit splitting, and drop-out provisions for family responsibilities). However, these benefits are based on the individual's relationship to the wage earner rather than on individual contribution or need. One solution under the existing system is 'disaggregation of benefits', which awards pension credits based on individual merit or contribution.

The report details several pension reform options and models, including the dependency model which consists of an approach of basing benefits on relationship to a wage earner. The author also argues that the dependency model, which was the accepted social security model for reform in the 1980s, should be reassessed, given its inability to adequately address the needs of siblings, same-sex couples, and single Canadians. Cassels recommends that future reform proposals adopt clear philosophical presuppositions (e.g., contribution or need basis). He notes that the difficulties inherent in defining such concepts as contribution and merit must also be recognized when developing models of disaggregation.

Cassels also discusses the advantages and drawbacks to voluntary inclusion, which would allow homemakers to voluntarily opt into the CPP by paying the premiums. One option requires that pension premiums for unpaid work be contributed by individual households. According to Cassels, this would not disadvantage other low-income workers even if small public subsidies were provided to certain homemakers. However, he notes that these benefits would likely exclude those who could not afford the premiums.

Cassels reports that in addition to a lack of consensus on such technical issues as what should be included as unpaid work, and how work undertaken by different segments of the population should be valued, the issue of who should be included in the various models is also problematic.

Cassels points out that some hold the view that homemaker pension models will create inequities among individuals in the homemaker category and between homemakers and paid workers. Contributing factors cited include the undermining of the earning-benefit link, discrimination against the working mother in favour of the full-time homemaker, and favourable treatment of homemakers over other groups.

Cassels contends that after more discussion, different models should be developed to promote a better understanding of several issues, namely: comparison of benefit levels between the existing system and various models; identifi-

cation of those who would benefit the most; and the overall impact on women. Finally, to promote effective and efficient reform, Cassels recommends the changes be implemented system-wide.

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Discrimination in the Provision of Services

A recent Supreme Court of Canada decision has interpreted the meaning and scope of a prohibition against discrimination in "services customarily available to the public" in section 3(1) of the British Columbia *Human Rights Act* (S.B.C. 1984, c. 22, amended by S.B.C. 1992, c. 34, s. 2). *Discrimination in the Provision of Services*, by James W. O'Reilly, assesses the impact of the decision in *University of British Columbia v. Berg* ([1993] 2 S.C.R. 353). The question in *Berg* was whether the complainant, a graduate student at the University of British Columbia, was denied by the University a service customarily available to the public. The student had been denied an evaluation and a key to a university building with which other students had been provided. The report also describes what implications the decision will have in interpreting and applying a similar provision in section 5 of the *Canadian Human Rights Act* (CHRA) (R.S.C. 1985, c. H-6). The report then recommends how to respond to the *Berg* decision.

The paper begins with an overview of other legislative provisions dealing with discrimination in the provision of services in the 13 Canadian jurisdictions, the United States, the United Kingdom, and Australia. The paper then analyzes the case law, focussing on *Berg* and putting it in the context of other related cases. The author then relies on the jurisprudence to assess the scope of the protection in section 5 of the CHRA.

In *Berg*, Chief Justice Lamer held that determining whether services are being offered to the public means looking at the relationship between who provides the service and who receives it. The existence of eligibility criteria does not mean that the service is not being offered to the public. The Chief Justice went on to defer to the Human Rights Board of Inquiries' finding that these services were "customarily available" to the public, and stated that the existence of a discretion in the provision of services is not enough to oust the application of human rights legislation.

O'Reilly makes the following observations about how the CHRA applies to government:

- the words "customarily" and "general public" presumably do not limit the scope of the CHRA;
- the CHRA then applies to all "services" provided by government;
- government "services" may include all conduct by government personnel in administering federal laws, which brings them into contact with the public;
- eligibility criteria for services do not mean that the provider of the service does not have a public relationship with those who use the service; and

- in a government context, section 15 of the *Charter* will likely apply to such services as well.

With respect to the private sector, the author says that the approach adopted in *Berg* diminishes, but does not eliminate, the public/private distinction. There continues to be a realm of purely private conduct not affected by human rights legislation.

O'Reilly concludes that the *Berg* decision gives the law very broad application and that, as matter of policy, this is a positive development for three reasons. First, it is consistent with the Supreme Court's approach in giving human rights legislation a large and liberal interpretation. Second, it offers a rational and predictive approach to the interpretation of the law. Third, it is appropriate to ensure that the public policy of ensuring equal access to employment and services is given broad application.

The report identifies three possible options for responding to the *Berg* decision:

1. Codifying the decision.
2. Considering areas where problems could arise and addressing them through specific exemptions.
3. Allowing the case law to unfold and see ing whether the *Berg* approach raises any difficulties.

O'Reilly recommends the third option, based on the policy considerations above, and, in the absence of identifiable difficulties, allowing time for the effect of the *Berg* decision to be gauged.

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Trade Regulation in Canada

With the exponential growth in international trade in recent years, the importance of international trade regulation has also grown. The report *Administrative Law Implications of Dispute Settlement Mechanisms in International Trade* was done in recognition of the importance of international trade regulation in Canada. The report involved five research papers by leading scholars and practitioners in international law and administrative law. These papers were presented and debated at a symposium attended by academics, federal public servants, and members of the legal profession. The comments collected at the symposium are currently being incorporated into the research papers which will be published in book format by the Centre for Trade Policy and Law. The papers presented at the symposium are summarized as follows:

1. Standing of the Decision-Maker in Proceedings for Judicial Review

Professor Hudson N. Janisch examined the role of decision-makers in judicial review proceedings and questioned whether the role of a decision-maker before the Federal Court of Appeal is the same as in proceedings before binational panels. Janisch concluded that a decision-maker has greater scope to participate in binational panel proceedings than in the Federal Court of Appeal.

2. Review of the Administrative Record in Proceedings for Judicial Review

Professor Yves-Marie Morissette examined the kind of information included in the record for review of the Federal Court of Appeal and a NAFTA binational panel and considered whether such information is characterized, disclosed, or treated differently in the two forums. He concluded that the binational panel's administrative record for review contains certain categories of information that are not the same in Canadian domestic law.

3. The Power of Administrative Agencies to Review Their Decisions

In providing guidance on whether a review is warranted, Professor Denis Lemieux considered the relevance of administrative law principles such as *res judicata*, acquired rights, estoppel, procedural fairness and the duty to act reasonably and in a non-arbitrary manner. Lemieux also analyzed the international legal principles regulating Canadian International Trade Tribunal reviews. He concluded that although the public interest is served when administrative agencies have the flexibility to respond quickly to changing circumstances, it is equally important that these agencies do not create uncertainty for those directly affected by their decisions.

4. Staff in the Decision-Making Process

Anne S. de Villars, Q.C., examined the role of specialized staff in the decision-making processes, particularly those of quasi-judicial administrative agencies such as the Canadian International Trade Tribunal and the Canadian Labour Relations Board. De Villars stressed the importance of an open process and outlined measures to ensure the decision-maker remains independent.

5. The Relationship Between Domestic Law and International Law in the Resolution of Disputes.

Ivan R. Feltham, Q.C., considered the relationship in Canada between international and domestic dispute-settlement processes. Feltham concluded that, in the interpretation of a statute based on an international agreement, the agreement and decisions of bodies constituted under the agreement are not binding on Canadian courts. Nevertheless, Canadian courts do attempt to interpret Canadian statutes consistent with Canada's international obligations. He stated that to go further would involve political integration and transfer of sovereignty similar to that of the European Union.

Each of these papers is available separately.

Amending the General Part of the *Criminal Code*: An Academic Reponse

After the release of the Government's White Paper on proposals for a new General Part of the *Criminal Code of Canada*, the Department of Justice Canada commissioned leading criminal law academics to review the White Paper and assess its soundness in legal principle. These academics prepared 13 papers on different aspects of the White Paper, and discussed them at a two-day meeting with departmental officials in March 1994.

Fault Element Proposals in the White Paper
by Anne Stalker
Stalker reviews and critiques the fault provisions contained in proposed section 12.1 through section 12.7 of the White Paper.

White Paper Proposals on Subjective and Objective Standards of Fault and Defences, Mistake of Fact and Transferred Intent
by Don Stuart
Stuart reviews the constitutional standards of fault declared by the Supreme Court in interpreting "principles of fundamental justice" under section 7 of the *Canadian Charter of Rights and Freedoms*. He also discusses what he considers to be deficiencies of the current law on fault. In a section entitled Defences, Stuart briefly reviews 'mistake of fact', 'transferred intent', and 'justifications and excuses'.

Parties to an Offence
by Gerry Ferguson
Ferguson reviews the policy underlying the party provisions and then compares the White Paper proposals with existing *Code* sections. Further, he reviews other proposed changes to the party provisions, including the Law Reform Commission of Canada proposals.

Proposals to Amend the Criminal Code - Clause 9, section 24.2, Conspiracy
by Alan Mewett
Mewett first examines the proposed definition of conspiracy and then reviews the issues concerning spouses, abandonment, merger, liability and conviction of involved parties, and punishment.

Comments on the White Paper Proposals Concerning the Liability of Corporations
by Anne-Marie Boisvert
According to Boisvert, the proposed provisions recognize that a corporation may commit an offence through the collective work of one or more individuals. She also offers suggestions to resolve some difficulties she sees in the proposals.

Reconciling the Defences: A Response to the White Paper
by Anne McGillivray
McGillivray examines the potential structure and organization, and underlying policy of the defences under a new General Part. She comments on defences of incapacity, defences of ignorance or mistake, and contextual defences.

Intoxication in the Codification of Canadian Criminal Law
by Patrick Healy
Healy discusses three options, in order of preference, for codifying either a "limited" or an "open" defence for intoxication. He also examines proposals to punish intoxicated conduct.

Actus Reus, Voluntariness and Automatism: A Commentary on Federal Government Proposals to Amend the Canadian Criminal Code
by Bruce Archibald
In analyzing the voluntariness requirement for criminal offences, Archibald touches on the issues of physical compulsion (and/or physical impossibility) and involuntary intoxication. He then discusses automatism as a "mental disturbance" excuse.

Codification of the Defences of Ignorance of the Law and Mistake of Law
by Hélène Dumont
Dumont criticizes the White Paper's proposal for failing to enlarge the range of exceptions to the maxim that 'ignorance of the law is no excuse.'

Duress and Necessity in the White Paper
by Kent Roach
Roach first reviews the structure of the White Paper proposal to codify defences of duress of circumstances and duress by threats, and discusses exclusion of murder and of those who knowingly expose themselves to the risk of threats. Roach also discusses the subjective and objective perception of imminent harm.

Proposals to Amend the Criminal Code (General Principles), Defence of the Person—Section 37
by Tim Quigley
Quigley makes recommendations for some modifications to these proposals. He suggests that other parts of the *Criminal Code* be changed to reflect the abandonment of the justification/excuse terminology. The paper also discusses a qualified defence of excessive force in self-defence.

Proposals to Amend the Criminal Code (General Principles), Defence of Property—Section 38
by Tim Quigley
Although Quigley believes the proposals convey the intended policy objectives reasonably well, he suggests some revision to eliminate the two separate requirements of reasonableness and proportionality.

The Minister of Justice Canada's Proposal for the Codification of the "Defence" of Entrapment
by Ève-Stéphanie Sauvé
This paper reviews in detail the proposal to codify the defence of entrapment. It also discusses the possibility of criminal liability for state officials involved in crime detection.

Each of these papers is available separately.

Taking a Hard Look at the Preliminary Inquiry

Traditionally, the preliminary inquiry has had two primary functions: charge-screening and disclosure to the defence. These two functions have arguably become superfluous, with improved charge-screening by police and prosecutors, and constitutional requirements of early Crown disclosure.

A working document by David Pomerant and Glenn Gilmour, entitled *A Survey of the Preliminary Inquiry in Canada*, assesses the inquiry's continuing role in disclosure, in light of these and other developments. It examines reforms in several Commonwealth countries and the United States.

The authors discuss the advantages and disadvantages of seven specific reform options ranging from retention of the inquiry to complete abolition. They are as follows:

1. Retain the preliminary inquiry in its present form.
2. Retain the preliminary inquiry in its present form, but limit the offences for which it is available.
3. Retain the present form of the preliminary inquiry but strengthen the screening aspect.
4. Retain the preliminary inquiry, but require videotaping of testimony under cross-examination at the inquiry, and allow the video tapes to be admissable at trial.
5. Retain the preliminary inquiry solely for charge-screening, eliminating the disclosure and discovery functions.
6. Abolish the preliminary inquiry and make available separate motions to a court to question sufficiency of the evidence or seek further discovery.
7. Abolish the preliminary inquiry and have the sufficiency of the evidence determined by the Crown.

The options are not mutually exclusive so some features of different options could be combined.

A Survey of the Preliminary Inquiry in Canada, by David Pomerant and Glenn Gilmour. Department of Justice Canada, Working Document [WD 1993-10e], 1993.

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The Civil Code of Quebec and Canadian Maritime Law

The report on the Civil Code of Quebec and Canadian maritime law reviews the maritime law judgments of the Federal Court and the Supreme Court of Canada. The judgments of these courts since 1977 have aimed to define the admiralty jurisdiction of the Federal Court of Canada and the nature of the substantive law applicable to maritime law matters. These judgments have substantially broadened the scope of the federal jurisdiction over "Navigation and Shipping" (s. 91(10) of the *Constitution Act*, 1867) to introduce it into legal situations formerly governed by the provincial law related to "Property and Civil Rights" (s. 92(13)).

According to the author of this report, the effect has been to eliminate the supplemental role of provincial law in all maritime law matters. This elimination has been put into practice by both the provincial courts and the Federal Court, which must apply English maritime law uniformly to such matters, and English maritime law includes the principles of the English common law. If the application of English maritime law is disorienting for Canada's common law provinces, it is even more disorienting for the province of Quebec, as its civil law system is foreign to and completely ignored by the common law.

The maritime law shaped by these court judgments had not yet been foreseen when the *Federal Court Act* was passed. It would be possible to restore provincial law to its supplemental role in maritime matters by adopting it by reference in order to have it apply to the unwritten aspects of maritime law that were formerly outside the jurisdiction of the Exchequer Court of Canada. This could be done by amending section 2 ("Canadian maritime law") of the *Federal Court Act*, or section 22 or 42.

Such an amendment would keep the Federal Court's admiralty jurisdiction intact while at the same time ensuring that English law is again applied in its entirety to the Admiralty Court's traditional sphere of jurisdiction. The reintegration of provincial law would eliminate the existing uncertainties as to the law applicable to borderline situations whose relevance to maritime law is debatable.

Le Code civil du Québec et le droit maritime canadien, by Edouard Baudry.

Department of Justice Canada — Research Publications Order Form

The following research reports have been described in this issue of *Justice Research Notes*. Please check off the items you would like to receive, and mail a copy of this form, along with your name and address, to: **Research and Statistics Section, Department of Justice Canada, Ottawa K1A 0H8.**

☐ *An Overview of the Research Program to Develop a Canadian Child Support Formula*, by Ross Finnie, Carolina Giliberti and Daniel Stripinis. Department of Justice Canada, January 1995.

☐ *An Overview of the Research Program to Develop a Canadian Child Support Formula: Highlights*, by Ross Finnie, Carolina Giliberti and Daniel Stripinis. Department of Justice Canada, January 1995.

☐ *Manitoba Spouse Abuse Tracking Project: Final Report*, by Prairie Research Associates. Department of Justice Canada, Working Document [WD1994-18e], 1994.

☐ *Dispute Resolution in Canada: A Survey of Activities and Services*, by The Network: Interaction for Conflict Resolution. Department of Justice Canada, Technical Report [TR1995-1e], 1995.

☐ *Court Dispute Resolution Processes: The Application of Alternative Dispute Resolution Processes in the Courts*, by Dr. Lee Axon and Robert G. Hann, Robert Hann & Associates. Department of Justice Canada, Working Document [WD1994-22e], 1994.

☐ *Inventory of Public Legal Education and Information Materials and Programs Related to Crime Prevention and Victims*, by Richard M. Gill and Gina A. Anderson. Department of Justice Canada, Technical Report [TR1994-10e], 1994.

☐ *Consumer Fireworks Regulations: Final Report*, by Shelley Trevethan, Wendy Gordon and Marie-Andrée Roy. Department of Justice Canada, Working Document [WD1995-4e], 1995.

☐ *Seen But Not Heard: Native People in the Inner City*, by Carol La Prairie. Department of Justice Canada, 1995.

For further information concerning these or other departmental research documents, please contact the Research and Statistics Section at: (613) 941-2266, or by fax at (613) 957-2491.

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