

**Release Date: September 12<sup>th</sup>, 2005**



**IN THE PROVINCIAL COURT OF MANITOBA**

**IN THE MATTER OF: “The Fatality Inquiries Act”**

**AND IN THE MATTER OF: GLENN FIDDLER, Deceased**

**APPEARANCES:**

**Counsel to the Inquest: Mr. Michael Makar**

**For the Wasagamack First Nation: Mr. Victor Bargaen**

**For the Federal Government: Mr. Joel Katz**

*The Fatality Inquiries Act*

**Report by Provincial Judge on Inquest**

**Respecting the death of: GLENN FIDDLER**

An inquest respecting the said death having been held by me on August 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 2003 at Wasagamack First Nation, Manitoba, and on November 25<sup>th</sup>, 2003, September 9<sup>th</sup>, 28<sup>h</sup>, 30<sup>th</sup>, October 1<sup>st</sup>, 2004, January 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, February 21<sup>st</sup>, 2005 in Winnipeg, Manitoba, and on March 10<sup>th</sup>, 2005 at Wasagamack First Nation, Manitoba, I hereby report as follows.

The name of the deceased is **Glenn Fiddler**.

At the time of his death, Glenn Fiddler was 18 years old and living at Wasagamack First Nation.

On the night of March 28, 1999, having consumed a large amount of alcohol and being intoxicated, Mr. Fiddler decided that he would walk from Wasagamack First Nation to the nearby community of St. Theresa Point. Band Constables intercepted Mr. Fiddler on the winter road and took him into custody pursuant to the Band Alcohol and Curfew By-laws. Mr. Fiddler was then transported to a building being used by the Band Constables as a police station and detention facility. While he was in custody, a fire started in his cell. The fire consumed the cell, and before he could be reached, it caused the death of Glenn Fiddler.

Attached hereto and forming part of my report is a schedule of all exhibits required to be filed by me.

DATED at the City of Winnipeg, in Manitoba, this 7<sup>th</sup> day of September, 2005.

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**Sidney B. Lerner, Provincial Judge**

Copies to: Chief Medical Examiner (2)  
Director, Public Prosecutions  
Deputy Attorney General  
Chief Judge, Manitoba Provincial Court

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### **Holding of Inquest**

[1] The deceased, Glenn Fiddler, died in the course of a fire in the early morning hours of March 29, 1999, while in custody at the Band Constable police station at Wasagamack First Nation. The immediate cause of death was smoke inhalation that occurred as a result of the fire.

[2] On December 27, 2000, an inquest was called by the Chief Medical Examiner of the Province of Manitoba to address the following:

1. An Inquest is mandatory as Mr. Fiddler died while in police custody;
2. To determine the circumstances surrounding the death;
3. To determine what, if anything, can be done to prevent similar deaths from occurring in the future.

[3] The Fatality Inquiry regarding the March 29, 1999 death of Glenn Fiddler was held for 16 days being August 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, November 25<sup>th</sup>, 2003, September 9<sup>th</sup>, 28<sup>h</sup>, 30<sup>th</sup>, October 1<sup>st</sup>, 2004, January 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, February 21<sup>st</sup>, and March 10<sup>th</sup>, 2005.

[4] A total of 22 witnesses were called.

### **Introduction**

[5] The deceased, Glenn Fiddler, died in the course of a fire in the early morning hours of March 29, 1999, while in custody at the Band Constable police station at Wasagamack First Nation. The immediate cause of death is not in issue: as determined by the medical examiner, (Exhibit 1) it was the result of smoke inhalation that occurred as a result of a fire in the Band Constable police Station. But how Mr. Fiddler came to be taken into custody by Band Constables, how he came to be detained in the place that he was, how the fire started and could not be extinguished before taking the life of Mr. Fiddler, is a much longer and more complicated matter.

### **Summary of Facts**

[6] At the time of his death, Glenn Fiddler was 18 years old and living in Wasagamack First Nation. The Wasagamack First Nation is an isolated community located on the west shore of Island Lake, approximately 472 km. northeast of Winnipeg.

[7] On March 28, 1999, Mr. Fiddler had been consuming alcohol from the time he got up. That evening, having consumed a large amount of alcohol and being

intoxicated, he decided that he would walk from Wasagamack First Nation to the nearby community of St. Theresa Point to visit his girlfriend. At that time of year, a winter road built on the frozen lake connected the two communities. Because she was concerned about him, Mr. Fiddler's mother contacted the local Band Constables to ask them to keep an eye out for her son. The Band Constables intercepted Mr. Fiddler on the winter road and took him into custody pursuant to the Band Alcohol By-law, which prohibited the consumption and possession of alcohol, as well as the Band Curfew By-law, which required residents to be in their homes by 11:00 p.m. except in the case of emergency. Mr. Fiddler was then transported to a building being used by the Band Constables as a police station and detention facility. While he was in a cell in the police station, Mr. Fiddler was left under the supervision of a civilian guard. While under that supervision, a fire started in his cell. The fire consumed the cell, and before he could be reached, it caused the death of Mr. Fiddler.

[8] I will expand upon the summary of facts in the course of dealing with the various issues that arose in the course of the Inquiry.

### **The State of Sobriety of the Accused**

[9] Mr. Fiddler's cousin and friend, Toby Wood, initially observed him in the afternoon of March 28, 1999. Mr. Wood told the inquest that Mr. Fiddler had consumed alcohol from the time that he got up that day, and that by that afternoon, Mr. Fiddler was "drunk, but not that drunk".

[10] Another friend of Mr. Fiddler's, Jamie Day, saw him that night at Mr. Fiddler's mother's house, where Glen Fiddler lived. He testified that he and Mr. Fiddler split what he referred to as a "mickie" (375 millilitres) of rye. Although he described Mr. Fiddler as a "3" out of "10" on a scale of intoxication, he also described Mr. Fiddler as "feeling really good". When last he saw Mr. Fiddler, as the deceased left his mother's residence, Mr. Day believed that Mr. Fiddler intended to walk to St. Theresa Point, a walk that was variously described in evidence as between 45 minutes - 2 hours, depending on walking speed and conditions, in order to visit his girlfriend. Mr. Day testified that Mr. Fiddler had a mickie of rye when he left the residence, and Mr. Day assumed he had more alcohol on his person. The time was between midnight and 1:00 a.m. on March 29<sup>th</sup>. Toby Wood, who had come to pick up Mr. Fiddler at his house, was outside the residence at this point. Mr. Wood testified that Mr. Fiddler was more intoxicated than he had been in the afternoon, and "drunk, but not totally". When they parted company that evening, Mr. Wood also believed, based on what Mr. Fiddler told him, that Mr. Fiddler was going to walk to St. Theresa Point. Mr. Fiddler told Toby Wood that he had two mickies of rye, and Mr. Wood saw Mr.

Fiddler consume one of them. Although he didn't see the second bottle, he believed that Mr. Fiddler had it hidden somewhere on his person. As noted elsewhere in this report (see "The Search") when the Band Constables intercepted and searched Mr. Fiddler, they in fact found what appears to have been the second bottle on Mr. Fiddler's person. A third half-consumed bottle of alcohol was later found on Mr. Fiddler's person when he was moved between cells at the Band Constable's office. It was the assessment of Band Constable Harper that Mr. Fiddler had likely continued to consume alcohol while in police custody, which caused his state of sobriety to deteriorate even further.

[11] The assessments of the Band Constables who came into contact with Mr. Fiddler on the evening of the 29th was that he was drunk; Band Constable Harper described the deceased as a seven or eight on a ten point scale of intoxication.

[12] Exhibit 2 is a forensic laboratory report by Randy Prokopanko from the Royal Canadian Mounted Police setting out the alcohol content of the deceased's urine (due to the condition of the deceased's blood as a result of the fire, a blood alcohol analysis was not performed) . The percentage of alcohol in Mr. Fiddler's urine was 310 milligrams of ethyl alcohol in 100 millilitres of urine.

[13] In light of all the evidence, it is clear that by the time he came under the control of the Band Constables, Mr. Fiddler was significantly intoxicated.

### **The Detention of Glenn Fiddler**

[14] One of the two Band Constables who arrested Glenn Fiddler, Mervin Harper, testified that he initially received a telephone call from a fellow Band Constable, Bernard Wood, advising him that an individual named Glenn (later learned to be the deceased) was intoxicated and attempting to walk from Wasagamack to St. Theresa Point. Band Constable Wood had in turn received that information by way of a telephone call from his aunt, Eva Fiddler, mother of Glenn Fiddler, telling him to look out for Mr. Fiddler as he was in possession of alcohol and/or drunk. Although nothing turns on it, it was the evidence of Bernard Wood that although he had received information from Eva Fiddler about the condition of her son, he had not yet provided that information to the other Band Constables when they radioed him about finding Mr. Fiddler on the winter road.

[15] Mr. Harper and a fellow Band Constable, Joseph Knott, found Mr. Fiddler walking on the winter ice road to St. Theresa Point. According to the evidence of Band Constable Harper, Mr. Fiddler was staggering in the snow. He was "drunk". For the reasons previously set out, this assessment of Mr. Fiddler's sobriety is consistent with other evidence heard at the Inquest on this issue. Mr. Fiddler was searched and found to have a full mickey of alcohol on his person. According to

Band Cst. Harper, Mr. Fiddler was wearing only a light jacket. As well, the ice road had begun to thaw, and it was wet and slushy, with water about a foot high. Mr. Fiddler was wearing only runners on his feet.

[16] Despite his state of intoxication, Mr. Fiddler is described as having been initially cooperative when stopped by Band Constables.

[17] According to Band Constable Harper, the reason Mr. Fiddler was stopped was by way of enforcement of the Band Alcohol By-law, which prohibited both the possession and consumption of alcohol at Wasagamack First Nation, as well as public intoxication. He testified that Mr. Fiddler was stopped as well for his own personal safety; as noted, it was very late at night, and Mr. Fiddler was drunk and attempting to walk a very long distance on an ice road between two remote communities while inadequately dressed for the conditions. The following exchange between Inquest Counsel and Band Constable Harper reflects that reasoning:

Q Okay. And you were concerned, you said, because it was cold outside, that he may not have been dressed very well, and he was walking down this ice road that something might happen to him like he might freeze to death, I guess; is that what your concern was?

A Like, when you're walking on -- it's just like walking on water. It's all the way from here to St. Therese. Just like -- I don't know how -- the water was like a feet -- one foot most parts yeah you have to walk across on the water.

[18] As to why Mr. Fiddler was detained and not simply returned to his mother, the rationale of the Band Constables appears to have been the safety of Mr. Fiddler's mother and that of the community. The following exchange between Band Constable Harper and Inquest counsel reflects this rationale:

Q Okay. And was there any, was there any reason why you just didn't take him back home as opposed to stopping him and detaining him?

A Well, like if we had taken him, probably we would have got another call from the parent why we took him, took him home. 'Cause probably would start something else over there.

Q Okay.

A I mean, that's -- the way he, the way he was, he was real drunk.

[19] And further:

Mostly we -- when we take somebody in custody we, we don't really just take them home because we know that will get the parents -- they'll call us back and ask us to -- why we brought them home.

Q Yes.

A Because, like, it happens all the time here. We, we take the -- that person home, and we get a call from the parents, Why did you -- why don't you guys watch the person and told us that's your job to take care of the people that are intoxicated. I mean, start causing trouble at home right away, they phone us. That is why, why we took him to the police station.

[20] Mr. Harper also testified that Band Constables would not invariably detain an individual for breach of the By-law unless they were “really really intoxicated”, again suggesting that it was the personal and public safety component of the situation that resulted in the detention. It should be noted in this regard that Mr. Fiddler became increasingly belligerent after he was arrested.

[21] For his part, the other officer who arrested Mr. Fiddler-former Band Constable Knott- confirmed that the concern with Mr. Fiddler had to do with the fact that he was drunk and in breach of the Band alcohol By-law, the fact that he was out after the 11:00 curfew (and therefore in breach of the Band curfew By-law), and the fact that he was in an unsafe situation. Specifically, Mr. Knott agreed that Band Constable Bernard Wood, who ultimately came out to the ice road to take custody of Mr. Fiddler, was told to take Mr. Fiddler back to the Band police station “because he had been drinking and [Band Constables] did not want him wandering around on the ice road.”

[22] When Wood attended to their location on the ice road, he too noted that Glenn Fiddler was drunk (and therefore in breach of the Band By-law), and that conditions on the ice road were dangerous. He testified that he did not consider returning Mr. Fiddler to his mother as “he was too intoxicated and they wouldn't be able to handle him.”

[23] As noted, there were therefore many practical reasons to stop Mr. Fiddler on the ice road. But did the police have the legal authority to arrest and detain Glenn Fiddler? The representative of the Aboriginal Policing Directorate who testified at the Inquest confirmed that Band Constables Harper and Wood had been sworn in as Special Constables/peace officers. Although Band Constable Knott testified that he too was sworn in as a peace officer, his evidence was that he had been sworn in by the Chief and Council. Notwithstanding this evidence, representatives of Wasagamack Band have no authority to appoint a Special Constable or swear in a peace officer. As well, Band Constable Knott had received no police training prior to being hired as a Band Constable, and evidence at the Inquest was that this was a pre-requisite to appointment as a Special Constable. Finally, the records of the Aboriginal Policing Directorate (the Federal department responsible for administering the Band Constable program) confirm that Mr. Knott hadn't received an appointment as a Special Constable.

[24] As noted, Mr. Fiddler was in breach of Band By-laws. Section 85.1 of *the Indian Act* specifically allows for the creation of alcohol prohibition By-laws: punishment is upon summary conviction. Other than in exceptional circumstances, which do not apply here, section 494 of the Criminal Code does not permit civilians to arrest persons for non-Indictable offences.

[25] As well, in 1971, the Department of Indian Affairs published circular 55, a set of provisions governing Band Constable policing services for First Nations (exhibit 23).

[26] Paragraph 1 of that circular provides:

... a Band Constable has no more jurisdiction in law enforcement than any ordinary Band member and he must not attempt to act as such before obtaining the necessary certificate.

[27] The certificate referred to is effectively that pertaining to appointment as a Special Constable.

[28] And so it would appear that Band Constable Knott, who actively participated in the arrest of Glenn Fiddler, had no authority to do so in the circumstances of this case.

[29] However, Mr. Fiddler's arrest was also effected by Band Constable Harper. As noted, Mr. Harper was a Special Constable, and had the authority to arrest Mr. Fiddler on the facts of this case. Mr. Fiddler was also turned over to the custody of Band Constable Wood, who was himself a Special Constable.

[30] As a result, given the participation of individuals with the necessary authority to arrest in the circumstances of this case, the arrest of Mr. Fiddler appears to have been lawful.

[31] Although there was authority to arrest Glenn Fiddler, the question that follows is whether Band Constables also had the authority to detain Mr. Fiddler at Wasagamack (as they ultimately did) once he was arrested.

[32] As noted, Mr. Fiddler was intoxicated. *The Intoxicated Persons Detention Act* permits a peace officer to take into custody a person found intoxicated in a place to which the public has access. The Act also provides that if there is a detoxication centre in the community, the peace officer may take the person to the detoxication centre and deliver him into the custody of the person in charge of the detoxication centre. However, a "detoxication centre" is defined as premises designated by the minister as a detoxication centre for the purposes of this Act; clearly not the case with respect to the Band Constable police station at Wasagamack.

[33] As well, evidence at the Inquest was that circular 55 does not contemplate the detention of prisoners by Band Constables. Paragraph 7 of that policy states:

In cases where detention is required, the case should be referred to the responsible Senior Police Force.

[34] It was the evidence of the regional manager of Aboriginal Policing Services for the Public Safety and Emergency Preparedness Canada (formerly the Solicitor General's Department) that her department was unaware of any detention facilities at Wasagamack First Nation. It was her evidence that her department's assumption would have been that any person detained in that area would be detained at the RCMP detachment, the responsible senior police force with respect to Wasagamack First Nation.

[35] The Inquest was not referred to any authority for detention by Band Constables at Wasagamack First Nation. The Band Alcohol By-law (tab A, Exhibit 62) and Section 85 of *The Indian Act* are silent on the issue of detention. Counsel to the Inquest, as well as counsel for Wasagamack First Nation and counsel for the Federal Government, have submitted to the Inquest that Band Constables lacked the authority to detain Mr. Fiddler in the circumstances of this case.

[36] In all the circumstances of this case, it appears that Band Constables did lack the authority to detain Glenn Fiddler at Wasagamack First Nation.

[37] But the equally appropriate question is "what choice did the Band Constables have"? Mr. Fiddler was too drunk and ill-dressed to be permitted to continue on his journey to St. Theresa Point. If he had been permitted to continue on his walk, it was not unreasonable for the Band Constables to have concluded that his life was at risk. As well, for the reasons explained by Band Constables Harper and Knott, Mr. Fiddler was too drunk, and ultimately too belligerent, to be released back into the community or to his mother.

[38] But if the Band Constables had no authority to detain Glenn Fiddler, the question becomes: why did they not refer the matter to the responsible senior police force- the RCMP- as they were obliged to do pursuant to Circular 55?

[39] The answer in part (as noted elsewhere in this report, under the heading "Why Wasagamack First Nation Requires a Detention Facility") is that travel conditions and other factors often affect the determination as to whether to transport prisoners to the RCMP detachment in Garden Hill, some 15 miles away. The RCMP was not always available to attend Wasagamack, as per the evidence of Band Constable Harper:

A Like, if there's a serious offence like assault and all those we, we let the RCMP know what -- for them to deal it -- to deal with that person. Like --

Q So what would you do? Would you call them?

A I would call the RCMP and that would be -- like, in the wintertime it's easy to get across.

Q Um-hmm.

A Like, we could just transfer that, that person to, to the detachment in RCMP.

Q Um-hmm.

A But when it's like late at night, in the summertime like we can't -- we just have to ask that person ourselves. Like, stay up all night and watch the person not to do anything to himself.

[40] As to the situation in this case, the following exchange with Band Constable Harper is also instructive:

Q Well, that -- what would have been the procedure during March or during that time of year? Would the procedure have been to contact the RCMP at St. Therese Point or some other place?

A Well, it was hard to travel at that time.

Q Right.

A I don't know if -- like, if we would have taken Mr. Fiddler to Garden Hill when we picked him up there probably we would have stalled the vehicle --

Q Um-hmm.

A -- because of the -- couldn't hardly drive on the winter road that time.

[41] And so travel conditions the night of this incident made transportation of Mr. Fiddler to the RCMP detachment a very difficult proposition, and militated in favour of detaining Mr. Fiddler in the community.

[42] Band Constable Harper also testified that an additional reason that the Band Constables did not contact the RCMP was that they felt that they had the situation under control, and that they didn't feel they required the assistance of the RCMP to deal with the matter. It was the evidence of Bernard Wood that if Band Constables had someone under detention in their cells, they would only notify the RCMP of same if they were unable to control that person themselves- in which case the RCMP would pick up the prisoner, or the Band Constables would transport to the RCMP detachment.

[43] As noted elsewhere in this report ("The Band Constable Program") the Wasagamack Band had also previously expressed the view to the RCMP that they wished to self-police where possible. It was the evidence of the officer in charge of

the local detachment that other than in cases involving homicide, domestic violence, child abuse, and sexual offences, the RCMP attempted to provide the community with some measure of autonomy in the policing of offences on the Reserve. It was the evidence of that witness that infractions of the Band By-law fell within the category of matters that tended to be investigated by the Band Constables, rather than by the RCMP. Therefore, the desire of the Band to self-police was likely also a factor in the decision to deal with the breach of the By-law matter internally.

[44] Given all of the foregoing, it seems clear that the nature of the offence committed, the hour that the incident took place, the difficulty in travelling between Wasagamack and the RCMP detachment, the belief that the situation was under control, and the desire of the Band to self-police where possible - along with the RCMP's compliance with same - all played a role (with different degrees of importance) in the decision of Band Constables to deal with this matter on their own.

[45] And so, in this as in so many other aspects of their jobs, the Band Constables made a choice as best they could: they decided to detain Glenn Fiddler at the Band police station. It was not a choice that was correct in law, and with the benefit of hindsight, it was clearly a tragic choice; but it was a choice that the Band Constables made in difficult circumstances, with the intention to try to do what they could in those circumstances.

### **The Search**

[46] When Mr. Fiddler was first stopped by Band Constables Mervin Harper and Joseph Knott on the winter road between Wasagamack and St. Theresa Point, he was searched by Band Constable Knott before he was put in the police vehicle. On Mr. Fiddler's person, Band Constables found the mickey of alcohol that both Toby Wood and Jamie Day referred to in their evidence. The search was described by Band Cst. Harper as "a little search", which he agreed was not thorough. Band Constable Knott described the search as involving patting Mr. Fiddler's upper body "a little bit". In particular, when the Band Constables found the bottle of alcohol on Mr. Fiddler's person, the search of Mr. Fiddler's person, such as it was, did not continue. It was Mr. Knott's evidence that when he found the bottle of alcohol on Mr. Fiddler, he did not need to search any further. As noted elsewhere in this report ("The Band Constables"), Mr. Knott had never received formal police training prior to becoming a Band Constable. Mr. Knott had received some informal advice from the RCMP as to search, but either the advice or his understanding of it was inadequate, as per the following series of questions and answers in the course of the Inquest:

Q What were you supposed to do? Tell me what you were supposed to do to search a prisoner, according to what you were shown by the RCMP.

A Leg spread. Arm spread. And then pat, pat-down.

Q Okay. You're showing or saying, leg spread, arm spread and patting them down. You're showing fingers moving down the side of the body.

A Yeah.

Q Any other place that you were shown to search?

A No.

Q Just the side?

A Yeah. And the legs.

Q Legs?

A Yeah.

Q What about the front of the legs, the back of the legs?

A No.

Q No? What about the crotch area, were you told about that?

A No.

Q Were you told to look inside pockets?

A No.

Q No?

A Pat.

Q I'm sorry?

A Just a pat.

Q Just a pat. And on the side of the body?

A Yeah.

Q And that's what you used to do?

A Yeah.

Q But in this case, you only patted on the top part of the --

A Yeah.

Q -- chest --

A Because I saw, saw the mickey already.

Q Because you saw the mickey already.

A I thought -- that -- that was enough.

Q You thought that was enough?

A Yeah.

Q Did the RCMP ever talk to you about officer safety or band constable safety?

A No.

Q So, for example, as to whether or not Mr. Fiddler might have had a weapon on him when you sent him off with Band Constable Wood, you don't know?

A No.

Q Okay. Or whether or not he might have had other things on his person besides a weapon, you don't know?

A I wouldn't have known.

[47] It should be noted that the cursory search conducted on Mr. Fiddler by the Band Constable did not comply with the search procedure upon arrest described by a representative of the RCMP in the course of his evidence at the Inquest.

[48] After arresting Mr. Fiddler, Band Constable Harper turned the prisoner over to Band Constable Bernard Wood, who transported him back to the Band Constable facility. Of particular concern is the fact that Band Constable Wood did not search Mr. Fiddler at all when he took him into custody. When asked for a reason for this failure to search his prisoner, Mr. Wood suggested that he had none, and that he guessed he had simply forgotten to do so.

[49] Band Constable Wood testified that when he transported Mr. Fiddler to the police station, Fiddler began yelling and "ranting" in the police car. According to his evidence, when he brought Glenn Fiddler into the police station, Fiddler started "going towards" an individual by the name of Frank Monias who was at the police station at the time to use the telephone. It was Mr. Wood's evidence that as a result of Mr. Fiddler's conduct, he placed him directly into a cell without having searched him. He testified that when he placed Mr. Fiddler in his cell, Mr. Fiddler began threatening suicide. Although Monias stayed in the police station for a total of only 5-10 minutes, Band Constable Wood did not attempt a search of Fiddler once Monias had left. He also testified that he had no plans to search Fiddler once Band Constables Wood and Knott returned to the police station, and that he did not do so.

[50] The ineffectiveness of the search of Mr. Fiddler on the winter road, and the consequence of the failure to search him both when he was placed in the police car and later when he was put into cells, is highlighted by the fact that a second bottle of alcohol was subsequently discovered on Mr. Fiddler's person. According to the evidence of the Band Constables, after Mr. Fiddler had been in Band police custody for some time, he began damaging his cell by tearing off a large piece of

plywood from the wall. When the Band Constables moved Mr. Fiddler to the second of the two cells in the police station, a second bottle of alcohol was found on his person. According to the evidence of Band Constable Harper, Mr. Fiddler had likely continued to drink from that second bottle even after he was in the custody of the Band Constables - no doubt while he was left alone in his cell which, as noted elsewhere in this report, had allowed little opportunity for observation of the deceased. It appears that the opportunity afforded Mr. Fiddler to continue drinking caused both his state of sobriety and his mood to deteriorate.

[51] It was the evidence of Band Constable Harper that although he believed a second search of the prisoner was attempted by Bernard Wood when Fiddler was being moved between cells, it was not completed because Mr. Fiddler was resisting and could not be controlled. For his part, former Band Constable Wood testified that he did not in fact attempt a second search of the prisoner, and that that the second bottle was found only when it fell out of Fiddler's boot in the course of the struggle to move him between cells.

[52] And so it is important to note that even after the second bottle of alcohol was found on Mr. Fiddler's person as he was being moved between cells, which ought to have demonstrated the inadequacy of the first search and the consequences of a failure to search a second time, a second search was not attempted by Band Constables, and Mr. Fiddler was once again placed into a cell without a thorough search of his person having been completed. This failure to search is particularly significant given the evidence of Band Constable Wood that he was aware at the time that prisoners had previously been able to burn names in the walls and cells at Wasagamack, suggesting that he was aware of the serious consequences of inadequate prisoner searches.

[53] The significance of the failure to search the accused before being placed in his cell is underscored when considered in light of the description of proper search technique provided by the RCMP witness:

...upon arrival back at the detachment, prior to lodging that individual in cells, my search procedure would be -- it's difficult for me to verbalize this, and I'm going to do the best I can, however, I would have to say that obviously undo the handcuffs to allow the individual to put their hands on the wall up in the air, much like --

Q Okay. So pointing, for the record, just pointing straightforward. Was there --

A Yes. Basically the palms of my hands, I'm simulating placing them on a wall and I would start at the top, usually start with searching the hair to ensure that there is nothing hidden in the hair, the collar, work my way basically down the trunk of the arms and not so much padding as grabbing, simply because

padding, we'll sometimes miss items that are attached to someone's body whereas if you grab you will at least have a better chance to actually feel what's on their person. Work your way down, checking obviously, paying particular attention to the belt, the belt area and into the groin region, searching there, and then down into the feet where you would want to check the socks. Most of the time in Island Lake I would have people remove their socks, then I could examine the bottom of the soles of their feet and they would be -- certain items of clothing would be taken from them, shoes, because the shoes obviously contained shoelaces in most cases and they're a hazard.

Q And that would be a hazard to the prisoner themselves --

A That's correct.

Q -- as a suicide problem?

A Yes, that is correct... Belts would be removed, again for the same reason that the shoelaces, the shoes would be taken. And that would usually be at -- you'd have to play it by ear as far as the circumstances went.

Q What about pockets, would the pockets be turned out wherever they --

A Yes, absolutely.

Q And I take it with pockets that couldn't be turned out, such as the back patch pockets, you would have your hand in there --

A Yes, that's correct.

Q -- to determine whether or not there was anything in there.

A Yes, that's correct.

Q And that would relate to either (a) drugs or other sort of contraband, possible weapons?

A Um-hum.

Q And I take it one of the concerns as well too would be lighters?

A Yes, absolutely.

[54] It should also be noted that in addition to the failure to properly search Mr. Fiddler, there was no also no search done of either of the cells before Mr. Fiddler was placed in them. Given the evidence of Sgt. Muir (see The Band Constable Facility) as to the presence of debris in Wasagamack cells, this aspect of the general failure to search is also significant.

[55] Bernard Wood testified that after Glenn Fiddler was placed into a cell, he asked Wood for a cigarette. The Inquest heard evidence from other Band Constables that it was contrary to Band Constable policy for a prisoner to be

allowed a cigarette in cells, and in his evidence Wood denied giving Fiddler a cigarette.

[56] Cst. Wood also denied lighting a cigarette for Fiddler, testifying that as he brought Fiddler into the police station that night he had been asked for a lighter by Frank Monias, and that when he discovered that his lighter was not working, he had thrown it away outside. His evidence was that he knew he didn't give Mr. Fiddler a light for his cigarette because his lighter had been thrown away.

[57] Frank Monias also gave evidence at the Inquest. Mr. Monias testified to having been at the police station to use the telephone. He denied having asked Bernard Wood for a light outside the police station, and denied that Glenn Fiddler had lunged at him as Fiddler was being lead into the station. He testified that after Mr. Fiddler had entered the police station he offered Mr. Monias a cigarette from a cigarette pack in his possession, took one for himself, and then asked Mr. Monias for a light. Mr. Monias testified that he did not have a light, and testified that after Mr. Fiddler had been placed in the cell, Fiddler continued to repeatedly ask for a light for his cigarette. He testified that initially Band Constable Wood ignored the requests, and told Mr. Monias to do the same. He testified that Mr. Fiddler persisted with his requests for some time, becoming angry and frustrated. Mr. Monias testified that he then observed Band Constable Wood walking toward the mesh window of Mr. Fiddler's cell, saw him speak for some time to Mr. Fiddler, and then, as he saw him walk away from the cell, observed a cigarette being pulled back through the holes of the mesh window, with an accompanying puff of smoke. He testified that as Band Constable Wood walked by him, he said "That quietened him down". Mr. Monias testified that he did not see whether the tip of the cigarette was lit, but did smell cigarette smoke.

[58] Although none of the other Band Constables testified to having observed Wood give Glenn Fiddler a cigarette, it should be noted that given the timing of when this would have occurred, Band Constables Harper and Knott would not yet have returned to the police station.

[59] As to whether Band Constable Wood did in fact give Glenn Fiddler a cigarette, I note the following: Mr. Monias was in a position to observe what occurred. He did not embellish his evidence: for example, he did not claim to have seen the lighting, or to even have seen a lit cigarette. He had no apparent motive to fabricate. As to Band Constable Wood, I note that Mr. Fiddler was clearly being extremely difficult that night, and it would have been tempting for the Band Constable to give him something to mollify him. Glenn Fiddler was his cousin. As well, Band Constable Wood had apparently not been sufficiently concerned about the prospect of fire to search his prisoner, even though he had evidence that

prisoners had previously been left with incendiary materials that had allowed them to burn their initials into cell walls at the police station. He also wasn't concerned enough about the possibility of fire to ensure that the cells had no debris when prisoners were placed into them. The thrust of Band Constable Wood's evidence is effectively that he drew the line at not lighting a prisoner's cigarette.

On balance, I would tend to accept the evidence of Mr. Monias on the issue of the lighting of Mr. Fiddler's cigarette by Band Constable Wood.

[60] Even accepting that the Band Constable did light the cigarette, however, given the amount of time that passed before Mr. Fiddler was transferred to the cell where the fire occurred, and given the struggle that went on when he was transferred, it is unlikely that the cigarette would still have been burning at the time of the fire. And so it is unlikely that the cigarette played a role in terms of direct fire causation; rather it appears to be simply consistent with the general lax attitude towards proper police procedure and safety demonstrated in the course of this incident.

[61] It is clear from the evidence heard at the Inquest that there were a series of missed opportunities for the prisoner to have been properly searched. According to the evidence of the RCMP witness at the Inquest, he had had to remind Band Constables in the past about the need to properly search prisoners. Given the failure by all the Band Constables involved in this incident to properly search the prisoner, and the evidence as to past history in this regard, the inadequate search of the prisoner in this case appears to have been not an aberration, but rather part of a larger pattern. Given that, as well as the absence of any motive on the part of Frank Monias to fabricate, it also seems unlikely that the failure to search Mr. Fiddler when he was first placed into cells was a result of the deceased lunging at Frank Monias. Rather, it would appear that Mr. Fiddler was not properly searched because a habit of inadequate searches had developed over time, and by the time of the fire was a part of standard operating procedure for the Band Constables.

[62] In the end result, the quality of the search conducted by the Band Constables, and the evidence from Mr Fiddler's friend Toby Wood that Mr. Fiddler was a smoker who usually carried a lighter on his person, lead to the conclusion that notwithstanding several opportunities to search him properly, Mr. Fiddler was likely left in possession of incendiary materials after he came into custody of the Band Constables. Further, it also appears clear that as a result of the inadequate search conducted on Mr. Fiddler, he was allowed to continue drinking even after he came into the custody of the Band Constables, causing the impairment of his judgement to increase and his mood to deteriorate. Finally, the failure to search the cells themselves, coupled with the frequent presence of paper

product debris in those cells, made it likely that there were flammable materials available to Mr. Fiddler. The combination of these and other factors constituted a formula for disaster.

### **The Band Constables**

[63] Three Band Constables were responsible for intercepting Glenn Fiddler and taking him into custody. The history of each of the Band Constables involved in this matter is instructive, and reflective of the weaknesses of the Band Constable Program at Wasagamack First Nation.

[64] One of the two Band Constables was Mervin Harper. Mr. Harper testified that he had received training to become a Band Constable in 1995. He testified that the training took place in an eight month course at a facility for tribal police in Mission B.C.

[65] Mr. Harper testified that he had received some training in this course as to how to deal with emergency situations, including those involving fire, but was unable to recall how much time was spent on this training. Mr. Harper also testified that after he graduated in 1995, he had attended only one refresher course in the eight years that followed, that being a two week course offered at the RCMP detachment in Island Lake eight years after he graduated. He testified that the course involved learning to write reports, self-defence training, as well as “survival, search, and rescue.” There was also no supervising superior officer for the Band Constables. No one, either in house or externally, had ever conducted a professional assessment of the manner in which Mr. Harper or his colleagues were executing their professional responsibilities.

[66] Mr. Harper also testified that after he was first hired as a Band Constable by the Chief and Council three months after his graduation, at which time he was sworn in as a peace officer. His work as a Band Constable was not continuous, but was interrupted by periods of time during which he either did other things, or was not working at all. He testified that he had been suspended by the Chief and Council for periods of time varying from three to twelve months, as a result of taking unauthorized leaves from his job as a Band Constable, which he said were the result of stress. Clearly, he had been unable to sustain a consistent career as a Band Constable, and this fact may have been reflected in the inconsistent and uneven manner in which the police function was executed in the course of this incident. Conversely, given the reason that Mr. Harper’s police career was not consistent, including repeated unauthorized leaves by him from his position as Band Constable, it may be that the limited pool of candidates from which the Band was able to hire (i.e. only Band members) created a limit on the quality of the force

and contributed to the inconsistent and frequently inadequate nature of police performance here.

[67] The second Band Constable who intercepted Mr. Fiddler on the winter road to Wasagamack was Joseph Knott. Although he had two years of experience as a Band Constable at the time of the fire, Mr. Knott testified that at the time he was hired as a Band Constable by Chief and Council at Wasagamack he had received no training whatsoever as a peace officer. He testified that he learned what to do by watching his colleagues.

[68] According to the evidence of Mervin Harper, and that of Joseph Knott himself, Band Constable Knott went into shock when he and Harper returned to the Band Constable Office. Mr. Knott testified that in addition to his lack of training as a peace officer, he had never received any training in dealing with fires in buildings.

[69] The third Band Constable involved in the arrest of Mr. Fiddler was Bernard Wood. Mr. Wood testified that he had been a Band Constable for some three years at the time of the fire. Like Mervin Harper, he too had received police training at Mission, B.C. prior to becoming a Band Constable. He testified that the course in British Columbia was supposed to have been eight months in length, but that he attended for six months. At the end of the six month course he was to have been paired with an experienced Band Constable in Wasagamack for two months of on-the-job-training. It was Mr. Wood's evidence that this training never occurred. He began his duties as a Band Constable on his own, with no supervision or training, only when the existing Band Constable resigned. He testified that he had never received any further training or attended any refresher courses following his graduation from the training school in Mission B.C. It was his evidence that the only training he had received was a course one afternoon from the RCMP on the proper way to stop a motor vehicle.

[70] As noted, the inadequate nature of the search conducted by the Band Constables, the use of grossly unsafe and dangerous detention facilities, and the failure to supervise the prisoner all played a role in the events of March 29th. But notwithstanding the deficiencies in the way in which the Band Constables conducted themselves in this case, there were positive aspects to their conduct, as well as elements of bravery that must also be noted: on their return to the Band Constable facility after being called by the civilian guard, Band Constables Harper did what he could in the circumstances, and given the limited resources available to him, to try to deal with the situation with which he was faced. He turned on the siren at the police station to sound a general alarm. He attempted to find people to assist in extricating Glenn Fiddler from the fire. He and Band Constable Wood

entered the burning building to attempt to save Glenn Fiddler. When they entered, the building was filled with thick black smoke, and they crawled across the floor of the building to get to Mr. Fiddler's cell. When Mr. Fiddler's cell door could not be opened, Band Constable Wood retrieved two large pails of water from outside the building and dumped them into the burning cell through its mesh window, in an unsuccessful attempt to extinguish the blaze. Band Constables Wood, Harper and Knott attended to the outside wall of the cell in an attempt to puncture a hole in the wall to extricate Mr. Fiddler from his cell. The elements of courage and bravery in the conduct of these Band Constables are as much a part of what occurred on the night of March 29<sup>th</sup> as the errors and omissions identified in the course of this Inquest.

### **The Band Constable Program**

[71] As noted previously, Circular 55 is a set of provisions governing Band Constable policing services for First Nations Band Constables, published in 1971 by the Department of Indian Affairs (exhibit 23). The document sets out the role of Band Constables in First Nations policing, which was contemplated to primarily involve enforcement of First Nations Band By-laws.

[72] Evidence at the Inquest was that the Band Constables at Wasagamack have a larger role to play in policing than originally contemplated by Circular 55. The Inquest heard evidence on this point from Sgt. Ron Muir, a 17 yr. veteran of the RCMP, who had been in charge of the Garden Hill RCMP detachment from July 1996 - July 1999. Sgt. Muir testified that on his arrival at Garden Hill, the then Chief of Wasagamack First Nation had advised him that the Band wished to have the opportunity to deal with police-related matters themselves (i.e. through their Band Constables), and that they would call the RCMP if they needed them. This position was subsequently incorporated in a letter (Exhibit 7) sent to the RCMP by the Band. It was Sgt. Muir's understanding that the protocol for dealing with investigations in Wasagamack was that in the case of calls for service from residents of Wasagamack to the RCMP detachment in Island Lake, the RCMP were to notify the Band Constables prior to their attendance, and the Band Constables would in turn notify the chief and council prior of the attendance of RCMP.

[73] As noted elsewhere in this report ("The Detention of Glenn Fiddler") it was also the evidence of Sgt. Muir that other than cases involving homicide, domestic violence, child abuse, and sexual offences, the RCMP attempted to provide the community with some measure of autonomy in the policing of offences on the Reserve.

[74] It was the assessment of Sgt. Muir that the position taken by the Band had a negative impact on the ability of the RCMP to provide such things as training and refresher courses to Band Constables, as well as to exercise influence with respect to safety and structure of holding cells used by the Band. It may also have been one of the factors in the decision of the Band to construct a police station and detention facility in their community, contrary to circular 55 (“The Detention of Glenn Fiddler”).

[75] Winona Embuldeniya testified at the Inquest. Ms Embuldeniya is the regional manager for the Aboriginal Policing Directorate for Manitoba, an arm of Public Safety and Emergency Preparedness Canada, formerly the Solicitor General's Department. The Aboriginal Policing Directorate provides funding to 49 First Nations in Manitoba. One of the functions of the Aboriginal Policing Directorate is the management of Band Constable funding under the “Indian policing program”.

[76] It was Ms. Embuldeniya’s evidence that the base funding for each Band Constable in Manitoba is approximately \$33,000. The annual budget for Band Constables at Wasagamack First Nation is \$43,000: this amount is intended to cover non-capital costs relating to the operation of a Band Constable program, including salary and operations and maintenance. Ms. Embuldeniya testified that funding for the Band Constable program has been frozen since 1992. Implicit in Ms. Embuldeniya’s evidence is the position of the Federal government that no additional funds will be provided to First Nations policing services at Wasagamack unless under the umbrella of the First Nations Policing Policy (see below, para. 102 and following). As a result, the various requests for additional funding by Wasagamack for its police services in the years preceding the fire, and since, have been unsuccessful (see Exhibits 33, 34, 37-40).

[77] Saulus Harper, a community justice worker for MKO who works in Wasagamack, testified that one of the justice service providers he works with in the community is the local Band Constables. He described his function with respect to the Band Constables as attempting to find additional funding for that program. Mr. Harper testified that the funding received by Wasagamack for the Band Constable program was for one Band Constable, and his responsibility was to attempt to find funding to provide what he described as “a decent salary” for his community’s Band Constables, as well as to pay for the police vehicle and gas for it. He described a number of strategies that were employed in this regard, including using funds from a welfare work opportunity program, EI dollars, and from other government programs. Even with all of that, the salary for Band Constables involved in this incident was only \$300-\$400 per week.

[78] It was the evidence of a former Chief of Wasagamack First Nation that Band Constables are on call 24 hours a day, 7 days per week, and that Band Constables are often required to work from early evening until the following morning. As noted earlier in this report, although three Band Constables were working on the night of the fire, all three were required at a domestic violence call, creating the need for a civilian guard to watch their prisoner, which in turn caused a lack of supervision of Glenn Fiddler.

[79] Joe Guy Wood, of MKO, the Organization of Manitoba Northern Chiefs, offered the following observation with respect to the level of funding for the Band Constable program in Wasagamack:

Well, the way I look at it is that is totally inadequate. If the objectives are to be met, you know, to keep order in a community and provide services to people in need, there's just not enough in there. You know with the population of Wasagamack, I think you would need at least two or three constables to provide that work, they have to rotate sometimes because you just can't work eight hours a day, sometimes you need more time. So to pay eight officers out of that 43 is just inadequate and on top of that, they should have equipment to do that, proper equipment. And then they should have vehicles and whoever they pick up, they have to have proper detention places where it meets the health standards and safety standards. So, you know, to do that with \$43,000 is just impossible.

[80] Ms. Embuldeniya conceded that the funding freeze for the Band Constable Program may have made an already difficult job as a Band Constable more difficult.

### **Band Constable Training**

[81] The Aboriginal Policing Directorate currently makes yearly training programs available to Band Constables (prior to 1999, training programs were offered twice yearly). The Federal government funds the cost of the course, as well as meals and accommodations; participants are required to pay only for transportation. The training is currently provided by the RCMP, under contract to the Aboriginal Policing Directorate. The programs are of three weeks duration, and involve training on the basics of law enforcement, including proper police techniques. The programs are open to all Band Constables, whether or not they have previously received training. Band Constables who have been in employment by their Band for two or three years are encouraged to return and take the course again, to receive additional training.

[82] As noted, the training course for Band Constables is of relatively short duration, in particular given the subject matter and its importance. Based on the evidence heard at the Inquest, it also appears that attendance at the training courses is essentially voluntary. Although the provincial government requires that a Band

Constable be trained before they can be appointed a special constable/peace officer, there is no requirement that individuals receive that appointment as a condition of their employment as Band Constables. As noted, at Wasagamack First Nation one of the three Band Constables involved in the incident that is the subject matter of this Inquest had received no training prior to his employment, and was not a peace officer.

[83] The Inquest also heard evidence from Ms. Embuldeniya that her department has encountered difficulties in having Band Constables attend for training. She offered the example of the difficulty her department had in attracting participants to a training program offered in January of this year:

....we sent out registration forms in November, we didn't -- we received eight responses to potentially 39 openings, and we had to call each First Nation individually. We had to call the councillor -- portfolio councillor for justice, as well as the Band Constables, the ones that we could find, and we even contacted the RCMP detachments closest to those communities to then talk to the Band Constables themselves to say, "here's this opportunity, you know, don't lose out."

[84] Ms. Embuldeniya testified that Band Constables from Wasagamack First Nation had not attended police training courses funded by the Aboriginal Policing Directorate since 1995; as noted above, prior to 1999 training courses were offered to Band Constables on a twice yearly schedule. A former Chief, Band Councillor, and Band Constable at Wasagamack First Nation, Cornelius Wood, testified that he was unaware that the Federal government offered free annual training for Band Constables.

[85] Evidence at this Inquest was that at the time of the fire, the RCMP had no formal role either in the initial or continuing training of Band Constables at Wasagamack. Sgt. Muir, the commanding officer at Garden Hill from 1996-1999, testified that there had been talk of instituting formal training of Band Constables, and although he was generally aware of informal training for Band Constables that had been made available by his detachment in 1998, he was unaware as to whether Band Constables attended that training. It was the evidence of this witness that members of the RCMP are provided with training courses on an ongoing basis.

[86] Stanley Manoakesick gave evidence at the Inquest. Mr. Manoakesick was the justice worker for the Island Lake Tribal Council (ILTC) from about 1994 until 1998, became the assistant to the executive director in 1998, and in 2004 became the director of operations for the Tribal Council.

[87] The ILTC has four member First Nations: Red Sucker Lake, Garden Hill, St. Theresa Point, and Wasagamack. Mr. Manoakesick described the Council as being comprised of two parts. The first is the board of directors, comprised of the

chiefs from the four First Nations, which is essentially a political advocacy group for the region, addressing issues of a regional nature. The second aspect of the Tribal Council's work is that of an advisory role to its member First Nations with respect to various programs including health, safety, education, policing, and economic development; Mr. Manoakeesick testified that much of that work is comprised of research, and often involves funding and preparing proposals.

[88] It was Mr. Manoakeesick's evidence that the ILTC had no mandate to train Band Constables, and that it was "up to each First Nation to get their constables into any training that they can. What we did was to inform them of those training and the RCMP usually sent us information and we'd send it on to the First Nations."

[89] Saulus Harper, the community justice worker for MKO, testified that there was no provision in the Band Constable budget for training (as can be seen from the limited dollars budgeted by the Aboriginal Policing Directorate for that program). He believed that the RCMP provided a one week training course for Band Constables in Garden Hill. Although it was Mr. Harper's evidence was that Band Constables "always took advantage" of that training because it was free of charge, he was unaware as to whether the Band Constables involved in this incident had done so, and was unable to explain the failure of Wasagamack First Nation to send its Band Constables for training.

[90] As noted elsewhere in this report, only one of the Band Constables involved in this incident had received any such training from the RCMP. Another Band Constable testified that he was aware of courses offered in Brandon, but according to him there was no funding for Band Constables to attend.

[91] Of the two Band Constables who were working in Wasagamack in January of 2005, at the time community justice worker Harper gave his evidence, one of the two Band Constables had worked for two years before attending a one week RCMP training course in 2004; the second Band Constable had been working for two years and had never been trained.

### **Band Constable Supervision**

[92] The Inquest heard evidence that there is no effective external monitoring or supervision of a professional nature of the Band Constables at Wasagamack First Nation.

[93] Although Band Constables do periodically receive informal feedback from the RCMP, much of the work that they perform is entirely independent of the RCMP, at times and locations not subject to the scrutiny of the RCMP. Although the RCMP is an informal resource for Band Constables, Band Constables are not

accountable to the RCMP, and are not under the direct control or supervision of the RCMP, or any other policing agency.

[94] Band Constables at Wasagamack are hired by the Chief of Wasagamack First Nation and the Band Council. The Band Constables are accountable to the Chief and Council, who are ultimately responsible for all policing enforcement in the community, and to a councillor with a Justice portfolio, who has a particular responsibility on Band council for policing and law enforcement. The Inquest heard that neither the Chief and Council nor the councillor with the Justice portfolio have any police training.

[95] A Justice worker also reports to the councillor with the Justice portfolio. As noted, the Justice worker at the time of the fire, Saulus Harper, gave evidence at the Inquest. Mr. Harper described his position as that of a community justice worker for Manitoba Keewatinowi Okimakanak (MKO), the organization of Manitoba Northern Chiefs. Mr. Harper testified that he had no police training, although he did have some general background in the justice system. He testified that in his capacity as a community justice worker, one of the justice service providers he works with is the local Band Constables. He described his function with respect to the Band Constables as attempting to find additional funding for that program. According to the evidence of one of the Band Constables working at the time of the fire, the Justice Coordinator's role also involves functions such as public education with respect to the Justice system, assisting people who have to go to court, and assisting families in court proceedings. The Justice worker's role does not involve the supervision of Band Constables in the performance of their jobs.

[96] The Band Constables have available the assistance of civilians in the Island Lake Tribal Council, but are not accountable to them: the evidence of the director of operations for ILTC, Mr. Manoakesick, was that the Band Constables are supervised by the Chief and Council. It was his evidence that Chief and Council in Wasagamack did not bring concerns with respect to the skill or effectiveness level of Wasagamack Band Constables to the attention of ILTC.

[97] There is also no internal supervision or monitoring in the Band Constable program, and no apparent hierarchy: all members are equal to each other and not accountable to their fellow members. There is no policy and procedure manual for Band Constables, setting out standards with respect to performance that would allow Band Constables to be evaluated against those standards.

[98] And so the Band Constables at Wasagamack are often left to their own devices - they have no one to provide regular professional supervision or assessments to identify mistakes or weaknesses.

[99] According to the former head of the Island Lake RCMP detachment, as well as the director of the policing directorate, Band Constables traditionally have a high turn-over rate. Of the Band Constables involved in the incident that is the subject matter of this Inquest, none were still working as Band Constables when they gave their evidence.

[100] Ms. Embuldeniya testified that an informal evaluation of the Band Constable program was attempted by her Department in 2003, with questionnaires sent out to Band Constables, as well as Chief and Band councils; the responses were limited: only 10 out of 49 Manitoba First Nations replied; Wasagamack First Nation was not one of them.

[101] Ms. Embuldeniya also testified that her department is considering a formal evaluation of the Band Constable program in 2005, to examine solutions for the Band Constable program. One of those solutions is the First Nations Policing Program.

### **The First Nations Policing Policy**

[102] An additional function of the Aboriginal Policing Directorate is the management of funding in Manitoba for existing policing agreements under the First Nations Policing Policy (FNPP), as well as the negotiation of new First Nations policing agreements under the FNPP in Manitoba. The FNPP and the “Indian policing program” are of particular relevance for the purposes of this Inquest. The Inquest heard evidence from Ms. Embuldeniya that in 1992, the Federal government created the FNPP, which was to provide First Nations with professional and enhanced police services on reserve. The policy contemplated that those police services could be provided by way of an existing provincial police service provider - in Manitoba, the RCMP. However, the policy also provided the opportunity for First Nations to enter into negotiations for the implementation of self-administered policing services, such as, in Manitoba, the Dakota Ojibway Police Service.

[103] It was Ms. Embuldeniya’s evidence that the Federal government recognizes that many First Nation communities do not receive 24-hour policing services by the RCMP in Manitoba (the absence of 24-hour policing in Wasagamack is described elsewhere in this report), and that First Nations do not always receive policing from the RCMP that is culturally appropriate; the FNPP provides for both enhanced policing on reserve, and policing that is also culturally appropriate for First Nation communities. Depending on the needs and goals of each First Nation, the agreement negotiated with a First Nation under the FNPP may result in an enhancement of existing police services by way of a community tripartite agreement (CTA) involving the First Nation and the Federal and Provincial

governments, and which provides for policing on reserve by the RCMP with a set number of officers assigned specifically to that First Nation; a self-administered First Nations police service; or a transitional form of police service, where the First Nation would initially contract with the RCMP, and, at some point thereafter transition to a self-administered police service.

[104] The Inquest also heard that the FNPP provides a mechanism for community input with respect to police services. In the case of a self-administered police service, a police services board, or in the case of the RCMP-community tripartite agreement, a community consultative group, will hear community concerns and will then in turn engage with the police service provider to ensure that specific needs and specific concerns of the community are met.

[105] Ms. Embuldeniya testified that under the FNPP, members of First Nation police services are recognized under the Police Act of each province, and have the authority to enforce the Criminal Code, and related Federal and provincial statutes.

[106] The Inquest heard that an underlying assumption of the First Nations Policing Policy is that it would involve the phasing out of the Band Constable program. It was Ms. Embuldeniya's evidence that the basis for this approach was, in part, recognition by the Federal government that in some cases Band Constables were not provided with the ability to remain separate from the Chief and council, and the desires or the wishes of Chief and council. The First Nations Policing Policy is intended to create police organizations independent of Chief and Council. While the problem underlying this approach appears to have been political interference, it should be noted that inherent in the concept of an independent police agency is an agency independent of Chief and Council for its funding, as well as an end to the funding-freeze in place with respect to the Band Constable program.

[107] A self-administered or tri-partite agreement police agency would therefore appear to be a significant step towards addressing the problems identified in the course of this Inquest with respect to underfunding of the policing program at Wasagamack First Nation.

[108] It is also significant to note that the RCMP model under the FNPP would include a monitoring and supervision function. In that regard, I note that Exhibit 24, entitled "First Nations Policing Policy", contains the following description of examples of police service models eligible for Federal funding:

1. First Nations Administered Police Service organized on a band, tribal, regional or provincial basis, including arrangements providing for one First Nation to contract for the policing services of another.

2. Special Contingent of First Nations officers: within an existing police service, including:
  - (a) First Nations officers employed within a provincial or municipal police service with dedicated responsibilities to serve a First Nation community.
  - (b) a group of First Nations police officers employed through a contractual arrangement to provide a policing service to a First Nation community (and)
3. Developmental Policing Arrangement: designed to smooth the transition from one type of policing arrangement to another."

[109] It was the evidence of the Community Justice worker for the ILTC, Stanley Manoakeesick, that the ILTC envisioned Wasagamack First Nation along with the other constituent communities as adopting the third, or "transitional" model, beginning with an RCMP community tripartite policing service and moving to a First Nations Administered Police Service. This model would have the benefit, at least initially, of providing the ongoing support and supervision for the First Nations Police Service which the events surrounding Mr. Fiddler's death, and the evidence at this Inquest, have demonstrated are necessary.

[110] The Inquest heard that of the remaining Band Constables in Canada, fully 80 percent are to be found in Manitoba, including those at Wasagamack First Nation. On behalf of the Federal Aboriginal Policing Directorate, Ms. Embuldeniya attributed the absence of enhanced policing agreements for First Nations in Manitoba as a function of the shared Federal/Provincial jurisdiction for the administration of justice:

-- the First Nation Policing Policy was created to, to provide professional services on reserve, and there was a requirement that the province be a partner because of the shared jurisdiction between First Nations and Justice in the province... And so as a result, we do need the province to come in as a partner to move forward on providing professional and enhanced services to First Nations. In Manitoba... I can't really speak on behalf of the Government of Manitoba...but there has been some reluctance to come forward, to sit at the table in some cases. There has also been...some times where the province hasn't had the funding available to implement the First Nations Policing Policy... We provide 52 percent of the funding...and the province is supposed to provide 48 percent...they haven't been able to, to come up with the 48 percent...Other provincial jurisdictions, British Columbia, Alberta, Saskatchewan, Ontario, those provinces have come up with the funding, the 48 percent matching funding, to implement, for want of a better word, full policing by aboriginals.

[111] Notwithstanding this assessment, some FNPP agreements have been reached in Manitoba: in the creation of the Dakota Ojibway self-administered Police

Service, as well as in four RCMP community tripartite agreements: Swan Lake, Chemawawin, Waywayseecappo, and Opaskweyak Cree Nation.

[112] Joe Guy Wood, a director of both the framework agreement on self government as well as a director of economic development, both with Manitoba Keewatinowi Okimakanak (MKO), gave evidence at the Inquest. MKO is the Manitoba Northern Chiefs Organization, and was founded to address the specific needs of First Nations in Northern Manitoba. MKO is a member of the Assembly of Manitoba Chiefs, made up of over 60 First Nations in Manitoba. As noted previously, Wasagamack First Nation is a member of The Island Lake Tribal Council, which is in turn a member of MKO.

[113] It was Mr. Wood's evidence that MKO's role on behalf of its members includes representations to various government departments relating to issues such as economic development, policing, health and education, and to lobby for additional funds in those areas. MKO is not involved in the actual administration of programs for its member First Nations.

[114] When Mr. Wood appeared at the Inquest on January 6, 2005, he testified that he had just returned from Thompson, where MKO had made a presentation to a meeting of the provincial cabinet. It was Mr. Wood's evidence that MKO was working on developing a Community Tripartite Policing Agreement (CTA) between First Nations and the Federal and Provincial governments, and that "we're having a tough time, you know, getting all the three parties together and we were lobbying for the provincial government to get more involved in the system..."

[115] In response to a question from counsel as to the "stumbling block that's preventing the FNPP from being implemented in the Island Lake area", Mr. Wood testified as follows:

A As recently as 24 hours ago, the presentation was made to the provincial government on this particular incident that, on this issue. And one of them is that they have to participate in that tripartite arrangement because as you know, the Federal government said in that process that 52 percent of it will be borne by the Federal government and 48 percent by the province. Now, for the province to come on board has been a major stumbling block, you know, in spite of all the others.

[116] As noted, evidence at the Inquest was that FNPP agreements have been reached between the province, the Federal government, and the First Nation in the creation in Manitoba of the Dakota Ojibway self-administered Police Service, as well as four RCMP community tripartite agreements: Swan Lake, Chemawawin, Waywayseecappo, and Opaskweyak Cree Nation, along with an additional CTA agreement in the works. Ms. Embuldeniya testified that a number of additional factors may have contributed to the absence of an enhanced policing program

under the FNPP at Wasagamack First Nation. It was Ms. Embuldeniya's evidence that the Federal government has to date received two requests from Wasagamack First Nation with respect to the FNPP. At the beginning of November of 1996, Wasagamack First Nation forwarded correspondence to the Federal government indicating a desire to pursue a self-administered policing service. At the end of November of the same year, Wasagamack wrote a second letter to the Aboriginal Policing Directorate indicating a desire to engage in discussions with respect to an RCMP CTA. It was Ms. Embuldeniya's evidence that correspondence was forwarded to Wasagamack advising that the First Nation would have to determine which of the two policing models they wished to pursue. It was her evidence that there is no subsequent communication from the First Nation on the Federal file in response to the request for clarification. However, there is also no indication of any follow-up on the part of the Aboriginal Policing Directorate with respect to the 1996 requests from Wasagamack First Nation, or an attempt by the Federal government to initiate discussions with the First Nation with respect to an FNPP agreement.

[117] Stanley Manoakesick of the ILTC testified that when he began work with the Tribal Council in 1994, the previous Justice Worker had just completed part one of a two part survey funded by the Solicitor-General's Department with respect to policing services in the Island Lake area. The survey had been initiated as a result of the Federal government's First Nations Policing Policy that had been announced in 1991 and that, as noted above, preceded the 1992 freeze in Band Constable funding. Mr. Manoakesick testified that the first part of the survey was intended to determine what First Nations people in the area were looking for in their policing service. The witness described the second part of the survey as the planning phase, wherein the information received from the member communities was assembled, and a community profile prepared in order to move forward with the planning of a proposed police service. It was Mr. Manoakesick's evidence that the second phase of the survey was never completed by the Island Lake Tribal Council; he was unable to explain why this was so, other than to say that some people in each of the four communities had not completed their tasks.

[118] It was Ms. Embuldeniya's evidence that in 2001 MKO and the Federal and Provincial governments signed a framework agreement for policing services within the MKO region (exhibit 26). Under this agreement, the provincial and Federal governments provide continued funding to the MKO regional consultative group with respect to policing services: at least one CTA has been signed with a First Nation member of MKO since the framework agreement was signed, with another CTA pending.

[119] It was Ms. Embuldeniya's evidence that in order for progress to occur in the case of Wasagamack First Nation, the First Nation must make a request to move forward on a policing service under the FNPP, either as part of the MKO process, or by way of an approach to the Aboriginal Policing Directorate, or the provincial Department of Justice.

[120] As noted previously, implicit in Ms. Embuldeniya's evidence is the position of the Federal government that no additional funds will be provided to First Nations policing services at Wasagamack unless under the umbrella of the FNPP.

[121] It is the view of MKO, as expressed by Joe Guy Wood, that lack of funding has contributed to Wasagamack's inability to move forward with the FNPP:

And as a matter of fact, I think one of the problems associated with it is that there is no, you know, the planning dollars have to be, have to be obtained and implementation dollars, negotiation dollars and all that. So for the band to come in and implement a police force, there's a lot of preparation work that has to be done which cost a lot of money. So there are very few bands in northern Manitoba that are able, you know, to access those dollars and Wasagamack is not one of them.

[122] In a 1995 letter to the then Justice Minister Rosemary Vodrey (Exhibit 38), Wasagamack First Nation made an unsuccessful request for funding from the provincial Government to commence the negotiation process for a policing service under the FNPP. Although Mr. Manoakesick identified the lack of funding to First Nations for the FNPP negotiation process as being the stumbling block to progress, he conceded in cross-examination that ILTC has not made a request to the Federal government for such funding, nor, to his knowledge, has Wasagamack First Nation. Nevertheless, Wasagamack's lack of funds to begin the negotiation process for a FNPP appears to have been a major stumbling block in that process.

[123] To date, there has never been an agreement under the FNPP for enhanced policing services at Wasagamack First Nation: as noted throughout this report, policing in Wasagamack is provided by an RCMP detachment located off reserve on Stevenson Island, as well as by local Band Constables. The significant problems created by this arrangement form the subject matter of much of this report.

[124] Ms. Embuldeniya testified that her department recognizes "a real need" for enhanced policing services for First Nations in Manitoba, and for those services to be negotiated under the FNPP between First Nations and the Federal and Provincial governments. With respect to the situation in Wasagamack, Ms. Embuldeniya testified that in September of 2004, two months after assuming the position she currently occupies, she spoke to the current justice coordinator of Wasagamack First Nation about the issue, provided him with a copy of the Federal government's First Nations Policing Policy, and expressed an intention to follow

up with Wasagamack on this issue following her appearance at this Inquest in January of this year. She indicated that it is her department's current intention to try to move forward on the FNPP as quickly as possible before "we lose any more momentum in Manitoba".

[125] In identifying the perceived impediments to reaching such an agreement in the past, as well as the critical problems created by its absence, it is to be hoped that this Inquest Report will have an impact on all parties in both generating and maintaining that momentum.

### **The Guard**

[126] Once Mr. Fiddler was moved to the second cell in the Band Constable facility, Band Constables Knott and Wood were called out by Band Constable Harper to assist him on a family violence matter. In order not to leave the prisoner with no one watching him, the Band Constables arranged for a guard to watch Mr. Fiddler. Because all three of Wasagamack's Band Constables were now occupied on the family violence matter, of necessity the guard had to be a civilian.

[127] The volunteer civilian guard system is one that is used by police services in remote locations to assist them, including by the RCMP. The civilian guards used by the Band Constables were all volunteer and unpaid.

[128] Mervin Harper testified that two civilian guards were usually used by Band Constables to guard prisoners, but that on the night of the fire the Band Constables had difficulty finding a civilian guard to come out and assist them. It was Band Constable Harper's evidence that it was not unusual to have difficulty finding civilian guards, as the position was unpaid and the guards would often end up having to stay up all night watching a prisoner without compensation. In that regard, it should also be remembered that the call for assistance in this case would have gone out in the early morning hours.

[129] It was the evidence of Joseph Knott, who in fact made the calls in search of a guard, that although he believed that there was a large list of potential volunteers to be called, and that it was standard procedure to have two guards at any time, he called only four potential volunteers that night. When he received no answer at the first three numbers he called, he called a young man by the name of Byron Harper. Knott had no explanation as to why no further attempt was made to contact a second guard, or a more mature guard, in particular since Mr. Fiddler had become a violent and destructive prisoner once in police custody.

[130] When asked whether he'd told Byron Harper that Glenn Fiddler had threatened suicide that night, Band Constable Wood's evidence was that he could not recall. When asked whether in light of all that had transpired with Glenn

Fiddler that night he'd thought at the time that Mr. Fiddler should have been searched for weapons or other paraphernalia before leaving Mr. Fiddler with Byron Harper, he said that he had not. Bernard Wood conceded that he was aware that Byron Harper was a timid and apprehensive young man.

[131] Byron Harper gave evidence at the Inquest. He presented as a shy timid young man. At the time of the incident, he was only 17 years of age. Mr. Harper testified that he had been a guard approximately four times prior to the night of the fire, but had never guarded alone before that night. He testified that he was told by Band Constable to "stay here and look after the building" and "watch over the prisoner." He testified that he was given no specific instruction or advice by the Band Constables as to what to do as a guard, was not told that the prisoner was violent, or that he had threatened suicide. He was not told what to do in the case of an emergency, nor had he received any advice or training with respect to putting out fires.

[132] Mr. Harper also testified that he never went inside the police station to guard Mr. Fiddler; rather, he had remained outside the building throughout. He explained that the reason that he had not gone inside was that he was afraid of people who were intoxicated, and he was aware from hearing Mr. Fiddler that night that he was intoxicated. Although he testified that he looked at Mr. Fiddler's cell through the front window of the building on a number of occasions, both the evidence of Mr. Harper, as well as other evidence at the Inquest, was that it would have been impossible to see into the cells from the vantage point of the front window. It was his evidence that at the point that he saw smoke coming from Mr. Fiddler's cell, he thought of going in to the building and opening the cell door, but that he did not do so because he was afraid of Mr. Fiddler, and was afraid of the smoke that he saw coming from his cell.

[133] According to the evidence of Mervin Harper, some 10-15 minutes after Byron Harper was left supervising Glenn Fiddler he radioed the Band Constables to say that there was smoke coming from the mesh window in Glenn Fiddler's cell. Mervin Harper, and later Joseph Knott, testified that the Band Constables immediately left the call that they were on to return to the police station. They estimated that it took some five to eight minutes for them to return to the police station. Band Constable Knott testified that although it was the job of civilian guards to be watching prisoners in their cells from the desk in the police station, on their return to the police station Band Constables found Byron Harper standing outside of the police station. It was the evidence of RCMP Sgt. Muir that civilian guards employed by the RCMP were instructed that visual observation of a prisoner should occur at least every 15 minutes.

[134] Given Mr. Harper's youth, his relative lack of experience as a guard (and complete lack of experience as a guard on his own), as well as his timid disposition, he was not an appropriate choice to guard an intoxicated, violent and disruptive prisoner such as Mr. Fiddler. All of these characteristics caused Mr. Harper to remain outside of the police station after he was installed as Mr. Fiddler's guard. The fact that Mr. Harper remained outside of the police station when he was to be inside the building guarding Glenn Fiddler created a delay in the detection of the fire, permitted the fire in Mr. Fiddler's cell to burn for some five to eight minutes prior to the return of the Band Constables, and allowed the fire to develop to the point that it was out of control by the time that efforts were begun to extinguish it. Most importantly, Mr. Harper's fear of being inside the building with the prisoner prevented him from entering the building once the fire had been detected, missing the potential opportunity of a rescue attempt at least five to eight minutes before one was finally commenced.

[135] A number of considerations have to be balanced in assessing the decision to use Mr. Harper as a guard. Although relatively few calls were made before the search for a guard ended with Mr. Harper, the Band Constables were needed by their colleague to assist on a domestic violence call. They would not have known how many additional calls they might need to make before finding a more suitable candidate, and what delay that might have caused; as a result, they made a judgement call to stop their search for a guard when they found Mr. Harper. Although he was clearly timid by nature, Band Constables could not have been expected to foresee that Mr. Harper's timidity would extend to a complete inability to perform the core function of his guarding responsibilities: watching the prisoner. Mr. Harper testified that he knew that his responsibility as a guard was to watch the prisoner from inside the building, and that he did not tell the Band Constables that he was afraid of intoxicated people or afraid to be in the police station on his own. He testified that the reason he had agreed to guard that night was that he didn't want to say no.

[136] Nevertheless, foreseeability aside, the decision to use Mr. Harper as a guard was a poor one, and ultimately simply one more link in the tragic chain of events leading to the death of Glenn Fiddler.

### **The Band Constable Facility**

[137] The building being used as the Band Constable Police Station and jail at the time of the fire was initially the Band Office for Wasagamack. It adjoined the local TV station. There was no clear evidence in the course of the Inquest as to the exact point when the building was turned over for use by the Band Constables, but based on the evidence of a former Chief of Wasagamack First Nation, it appears to have

occurred in approximately 1995. A former Chief of Wasagamack First Nation at the time the facility was likely adapted as a detention facility, Cornelius Wood, testified that the Band's intention was to use the building as a short term detention facility, to deal with individuals who were either too intoxicated to release or required detention until they could be transferred to the custody of the RCMP. Of note, Chief Wood testified that he was unaware of Circular 55 (see "The Detention of the Deceased"), which directs that Band Constables refer cases in which detention is required to a senior police authority.

[138] The building converted for use as a detention facility was of wood construction, and was heated by an oil furnace. At some unspecified point after the building was converted for use as a Band Constable police station, two adjacent cells were built within the building. Immediately outside of the cells was a common area where the Band Constables had a desk and radio. The cells were built of plywood over wallboard, each cell having a heavy plywood door (two sheets of plywood nailed together), approximately 4 feet wide by 8 feet high, which simply slid along a make-shift track on the floor and ceiling. The cell doors had a wooden handle (made of 2x4s) on the outside, and no handle on the inside. A piece of wire mesh window, 4" x 8", was cut into the wall of each cell, about 5' from the floor, to allow prisoners to be observed. Neither of the two cells had any lighting within the cell, nor any windows other than the wire mesh described above. The absence of windows or lighting within the cells made would have made observation of detainees, especially at night, difficult. As noted, Mr. Fiddler was arrested and detained late at night.

[139] Given the way in which they were closed, the cells were not secure. After he damaged his first cell and had been moved to a second cell, evidence at the Inquest was that Mr. Fiddler managed to partially slide open his cell door. The cell door was closed and then secured with a piece of wood 2x4, wedged in the track to prevent the door from being slid open again. After the fire was discovered in Glenn Fiddler's cell, Band Constables were unable to open the door of the cell to remove Mr. Fiddler. Mervin Harper was one of the Band Constables who attempted to open the cell door. When testifying at the Inquest, he was unable to explain his inability to do so. However, it was the evidence of Band Constable Knott that Mr. Harper would have been unaware of the fact that the door had been wedged shut with the 2x4, as this was not the usual method of securing the door, and Harper had not been present at the police station when that had occurred. For his part, Band Constable Knott testified that in the panic of the moment, he forgot that the two by four was wedged in the door, and did not tell Harper that it was there. In part as a result of that, the door could not be slid open. As well, Band Constable Wood testified that as he tried to grab the wood door handle of the cell door to open the

door, the handle had become too hot to hold, and he was unable to do so. He testified that in the course of his efforts to slide open the door he did try to remove the 2x4, but that it had become too hot to grasp.

[140] While it is unclear from the evidence of the Band Constables whether the inability to open the sliding door was as a result, in the panic of the fire, of a failure to remove the 2x4 while attempts were being made to slide the door open, the fact that the fire caused the 2x4 to become so hot that it could not be touched, or some combination of those and other factors, what is clear is that the cell, the cell door, and the method chosen to secure the cell door, were all highly unsafe, and completely inadequate to deal with the potential requirement for rapid exit in the case of an emergency, such as the fire in this case.

[141] It was also the evidence of the RCMP witness at the Inquest that the cells at Wasagamack had debris in them, including paper products. As well, although he could not recall whether he had seen specific instances in Wasagamack, the witness also testified that in cells in some Island Lake communities he had seen names burned into the ceiling, suggesting that prisoners had been left in possession of matches and lighters even after being searched and placed in cells. It was Constable Bernard Wood who confirmed that names had been burned on the cell walls and ceiling at Wasagamack, again leading to the conclusion that prisoners had been left in possession of matches and lighters even after being searched and placed in cells.

[142] In addition to the noted problems with the cells themselves, there was no smoke detector, fire extinguisher, fire axe, bucket, hose, or even running water in the building. There was no fire alarm system of any kind: the only alarm that Band Constables were able to sound in response to the fire was the siren on the police car parked outside the building. There was no safety equipment of any kind in the facility, nor any safety gloves, protective clothing, or tools of any kind that could have been used for the purposes of fighting the fire or extricating Mr. Fiddler from it.

[143] Given the foregoing, the decision by Band Constables to continue to house prisoners, including Glenn Fiddler, in the existing facility leaves the impression that the Band Constables were acquiescing in the use of a dangerous facility when they might otherwise have been able to have Mr. Fiddler housed safely with the RCMP. But a couple of points need to be made in this regard: firstly, while the Band Constables - or at least one of them - appreciated the inadequacy of the facility that they were using, it is unclear whether they appreciated the dangerousness of the facility. In this regard, it was the evidence of Band Constable Knott that Band Constables would pick up and detain prisoners at the request of

the RCMP, and that those prisoners would be detained in the Band police station while awaiting the arrival of the RCMP, from where they would be picked up by the RCMP. The detachment commander of the local RCMP detachment, Sgt. Ron Muir, denied this. It was his evidence that he could not recall any instance of a prisoner being held in the Band police station for the RCMP, and that there had never been a request by the RCMP for a prisoner to be detained in that facility. It was also his evidence that the RCMP was aware that the cells did not meet RCMP standards for cell construction, and that “members were keenly aware of the fact that there was a liability issue with holding someone in those cells, period.” Sgt. Muir described the cells as “unsafe”.

[144] But even if the RCMP had never asked that the facility be used for prisoners taken into custody by Band Constables on their behalf, and even if the cells had never been used by Band Constables for that purpose, the RCMP was aware that the building was being used by Band Constables, at their own initiative, as a detention facility. As noted, the detachment commander testified that the cells were unsafe. The RCMP was aware that the police station did not have any firefighting or fire detection equipment, or even running water. As noted above, there was knowledge that the search of prisoners by some Band Constables was less than satisfactory, including indications in some locations that prisoners had been left with matches and lighters when placed in cells. It was the evidence of Band Constable Wood that no members of the RCMP had advised Band Constables that their holding facility was inadequate or improper, or that it lacked required equipment such as a fire extinguisher or firefighting equipment. There is also no evidence that the RCMP took steps to bring the existence and condition of the Wasagamack facility to the attention of appropriate Federal departments.

[145] It should be emphasized that the RCMP cannot be taken to have given the facility its approval, nor were they in a position to do so. The RCMP had no responsibility to identify or enforce fire and building code violations. As well, it should be noted that it was the assessment of the detachment commander (see “The Band Constable Program”) that the position taken by the Band with respect to the role of the RCMP in their community, and the desire of the Band to self-police, had had a negative impact on the ability of the RCMP to exercise influence with respect to matters such as the safety and structure of holding cells used by the Band. Finally, evidence at the Inquest was that because the Island Lake detachment is established through a provincial funding scheme, rather than the First Nations Policing Program, there is no requirement for the RCMP to share information with the Federal department responsible for aboriginal policing.

[146] Nevertheless, it must be acknowledged that the fact that the holding facility at Wasagamack was being operated with the knowledge of the RCMP may have

played a role in allowing the Band Constables to ignore, or remain unaware of, the danger posed by the facility. While the fact that the Band Constables may have been oblivious to the risk inherent in their facility does not eliminate the onus on Band Constables to have recognized the dangerous situation in which they were placing their prisoners, nor reduce the dangerousness of the facility, it does place their decision to continue using the facility in context.

[147] Secondly, for reasons detailed elsewhere in this report (Why Wasagamack First Nation Requires a Detention Facility), it was highly unlikely that the RCMP would have, or could have, travelled out to Wasagamack at that hour, on a melting ice road, to pick up and transport an individual for breach of the Band alcohol and curfew By-laws.

[148] Thirdly, for reasons noted elsewhere in the same section, there was no other facility in Wasagamack that was any more suited for use as a place to confine prisoners than the one that the Band Constables were using. For the Band Constables to have refused to house prisoners in the Band Constable office would have required them to call the RCMP for every infraction requiring detention. This would have been an unworkable proposition. In addition to the frequent physical impossibility of transportation, the evidence at the Inquest from the former detachment commander was that the local RCMP detachment policed an area of five communities (the four First Nation communities at Island Lake, as well as the community of Stevenson Island), with a total population of somewhere between 7,500 and 10,000 people. This was described by the RCMP witness as a “high” number of people for one detachment to administer. The four cells at the detachment were described as having a total capacity of 20-25 people “at the upper end”. Although the witness who gave this evidence declined to speculate as to whether the detachment could have housed all of the intoxicated and violent prisoners that were being detained in Band Constable facilities in Island Lake, it seems clear that this would almost certainly have been an impossibility.

[149] Clearly, the police station at Wasagamack was not a safe or appropriate location for prisoner detention. The building timbers were old, and the fire here spread quickly. One of the Band Constables described it burning like a lit piece of paper. But the Band Constables were attempting to serve their communities with the resources they were given. This does not erase their significant lapses and failures in the course of doing so, but it does put their conduct in a realistic context.

### **Why Wasagamack First Nation Requires a Detention Facility**

[150] Wasagamack First Nation is located on the west shore of Island Lake, approximately 472 km. northeast of Winnipeg. The RCMP detachment that serves Wasagamack First Nation is located on Stevenson Island, approximately 15 miles

away from Wasagamack. As in other locations in Northern Manitoba, ease of travel between the communities is variable, depending on the season of the year. In the winter, once the lake has completely frozen, travel is over a winter ice road for approximately three months. In the early or late winter, when the lake ice is not completely frozen, travel between the communities can be difficult if not impossible. In the summer, when travel between the communities is primarily by boat, travel can be difficult, dangerous, or impossible at various times, including at night, or when the weather is bad.

[151] And so ability to travel is a significant factor in determining whether a prisoner can be transported to the RCMP detachment from Wasagamack, or will be held by the Band Constables, as per the evidence of Band Constable Harper:

A            Like, if there's a serious offence like assault and all those we, we let the RCMP know what -- for them to deal it -- to deal with that person. Like --

Q            So what would you do? Would you call them?

A            I would call the RCMP and that would be -- like, in the wintertime it's easy to get across.

Q            Um-hmm.

A            Like, we could just transfer that, that person to, to the detachment in RCMP.

Q            Um-hmm.

A            But when it's like late at night, in the summertime like we can't -- we just have to ask that person ourselves. Like, stay up all night and watch the person not to do anything to himself.

Q            Well, that -- what would have been the procedure during March or during that time of year? Would the procedure have been to contact the RCMP at St. Therese Point or some other place?

A            Well, it was hard to travel at that time.

Q            Right.

A            I don't know if -- like, if we would have taken Mr. Fiddler to Garden Hill when we picked him up there probably we would have stalled the vehicle --

Q            Um-hmm.

A            -- because of the -- couldn't hardly drive on the winter road that time.

[152] The following exchange between counsel for Wasagamack First Nation and Sgt. Muir, the commanding officer of the local RCMP detachment at the time of

the fire, confirms the particular logistical difficulties associated with travel and transportation of prisoners in Wasagamack:

Q Now, I'm just going to speak in terms of Wasagamack because I'm not sure of the circumstances with the other communities, but there are times during the year when effectively it is impossible to travel between your detachment and Wasagamack?

A Other than by air, yes.

Q Okay. And by air, we're talking about either scheduled flights or chartered flights.

A There are no -- there's no airport here.

Q Okay.

A You have to fly by helicopter.

Q And the -- do you know whether or not there is a helicopter in Wasagamack?

A No, I do not.

Q If there was not a helicopter in Wasagamack then there really is no way of being able to travel at certain times of the year between Wasagamack and any of the other communities?

A It would be very difficult, yes.

Q Yeah, well it would be almost impossible. When we're talking about the break-up of the ice, you can't take a boat --

A Correct.

Q -- you can't take a snowmobile, you can't take a motorized vehicle?

A The only thing I would say to that is I'm aware that there's been a recent purchase of a hovercraft in this area and I think that that does allow you to travel over the -- in those types of situations.

Q But that wasn't possible though in 1999?

A No.

Q So during those times, if there was a serious crime or they had a person that was -- that had been apprehended, what would your advice to the Band Constables be at that time?

A I would ask them that they sit on them and wait until we can get there in the morning.

Q Okay. And sit on him where?

A Well, that's an excellent point.

Q There's a real problem here in terms of proper facilities to enable either the RCMP or the Band Constables to effectively do their job.

A I agree.

(emphasis added)

[153] And further, from the same witness:

If I might add, Island Lake is unique in this entire province for the challenges it faces, the RCMP members who police here and the Band Constables and everybody who's affected by the, by policing in general, simply because there are -- the RCMP, when I say "we" and I'm going to revert back to -- the RCMP members here attend the majority of their calls in the summer months by boat, which that happens nowhere else. In the wintertime it's by snowmobile, by quad and by truck when the ice allows and sometimes you can't go at all. I think I commented to you that you have to go by air and by helicopter would be the only option. I mean these are, these are challenges that are faced no place else in this province. (emphasis added)

[154] In confirming the need for a detention facility in Wasagamack, Sgt. Muir had this to say:

I can say that it's not the proper type of facility to hold them in, but they were left, they had nothing here. They had no place to hold these people and we would hear things after the fact about how they had numerous intoxicated people on the weekend and they had no place to hold them. And a lot of times travel between Wasagamack and Island Lake is not possible. So they're stuck with no place to hold these people. So on one hand I'm saying officially I can't condone the fact that you put people in those cells because they're not safe, but on the flip side of it, I can't say that I don't understand why they did it.

[155] It should be noted that following the fire in this case, Sgt. Muir wrote a letter (Exhibit 11) supporting the creation of an approved short-term detention facility for Wasagamack First Nation, on the condition that anyone utilizing such a facility be trained in the searching and handling of prisoners.

[156] In summary, a variety of factors, including travel conditions and the nature of the offence and the offender, play a role in determining whether a prisoner will be held in the Wasagamack community, or transported to the RCMP detachment for detention. But depending on the way those factors combine in a given case, detention of a prisoner in the community may be a matter of necessity, not discretion.

[157] In addition to the problem posed by travel conditions in Island Lake, as noted elsewhere in this report (see "The Detention of Glenn Fiddler") the Inquest heard that there are instances when the nature of an offence does not require the intervention of the RCMP, for example, in the case of By-law offences committed by persons who can be controlled by the Band Constables. In that regard, Band Constable Harper testified that the RCMP would lodge prisoners for breach of the band By-law only "when they weren't busy". Sgt. Muir confirmed in his evidence

that By-law offences were typically handled by Band Constables. He also testified that, at the request of the Band, the Band and its Band Constables were given autonomy in the investigation of certain less serious types of offences.

[158] Clearly, the responsibility given the Band Constables of Wasagamack First Nation increased the likelihood that they would become involved in investigation and enforcement requiring the detention of prisoners.

[159] The Inquest also heard that in order for prisoners to be transferred to the RCMP, the RCMP would have to travel to Wasagamack, the Band Constables to Garden Hill, or each would travel halfway. The expenditure of time, the duplication of effort, and the inefficiencies involved in this process are clearly unnecessary in many cases. All other things being equal, at a time when resources, including those of the RCMP, are limited, it simply makes sense for First Nations police to have facilities that will allow them to deal with the requirements of detention independently, without having to involve a second police agency such as the RCMP, and to eliminate the inefficiencies that the involvement of a second agency entails.

[160] As noted elsewhere in this report, detention of prisoners by Band Constables was not contemplated by the former Solicitor-General's Department (now Public Safety and Emergency Preparedness Canada) when the Band Constable system was created. When questioned as to the situation that existed at the time of the fire, the regional manager of the Aboriginal Policing Directorate testified that her Department was unaware of detention facilities at Wasagamack, and would have expected that persons arrested by Band Constables would have been transported and detained at the RCMP detachment at Stevenson Island. The practicality of that assessment aside, given the realities on the ground at Wasagamack as described above, the representative of the Aboriginal Policing Directorate went on to state the following:

I think in the Island Lakes situation, they're -- by having the RCMP detachment located on Stevenson Island, not even within one of the communities at Island Lakes, it becomes more problematic for -- I don't want to necessarily say the word "effective," but for, for immediate policing needs to be addressed, and so I think that becomes a challenge particularly at Wasagamack, that maybe there is a higher need for detention facilities or a greater need for detention facilities within each of those communities at Island Lakes, that are of professional standards and of, and are of provincial, provincially approved standards or RCMP standards. So that way, if the RCMP aren't there to make an arrest initially, the, the Band Constables would most likely be able to make that arrest and then place them in a detention facility that was approved... to standard.

[161] It should also be noted that, for its part, Wasagamack First Nation has recommended that there be no detention facilities at Wasagamack (see Exhibit 62). Given the evidence at the Inquest with respect to the need for detention of prisoners at Wasagamack, as well as the separate recommendation from Wasagamack that detention of prisoners be permitted but be time-limited, the basis for this recommendation is unclear. Notwithstanding that recommendation, all available evidence, including that from the many witnesses from Wasagamack First Nation who testified at the Inquest, as well as the former RCMP detachment commander in that area, supports the need for a detention facility at Wasagamack First Nation.

[162] The Inquest heard evidence that at present, prisoners at Wasagamack are not placed in cells, but are either detained in the lobby of the Band office, or are taken along with Band Constables in the course of their investigations. Given the particular circumstances of Wasagamack First Nation, it seems clear that its police service should not have to choose between leaving detained persons in grossly unsafe or insecure conditions, and having prisoners accompany them in the course of their investigations. It seems clear that a Wasagamack First Nation police service requires an appropriate detention facility in order to properly exercise its role of public protection.

[163] Finally, it should be noted that the various forms of policing arrangements available to be implemented in Wasagamack under the First Nations Policing Policy would almost inevitably result in approved detention facilities at Wasagamack First Nation.

### **The Cause of the Fire**

[164] As previously noted, the evidence is clear that Mr. Fiddler had consumed a substantial quantity of alcohol by the time that he came into the custody of the Wasagamack Band Constables, and that he was intoxicated.

[165] It is also clear that Mr. Fiddler's mood that night was not good. The witness Jamie Day said he had seen Mr. Fiddler become angry two or three times before when he was drinking. Although he described Mr. Fiddler as being "happy" that evening, he also testified that Mr. Fiddler got into an argument with his mother when she tried to take the alcohol he was drinking away from him. Mr. Day was unable to calm Mr. Fiddler down, and Mr. Fiddler left the residence in what Mr. Day described as an angry mood.

[166] Toby Wood had also heard the sounds of an argument coming from inside the house, and saw Mr. Fiddler emerge. Mr. Fiddler told him to start running, because his mother had called the police on him. It appeared to Mr. Wood that

because Mr. Fiddler had been drinking, he was concerned about being charged with a breach of the Band's By-law, which prohibited the consumption and possession of alcohol at Wasagamack First Nation.

[167] As to the effect that alcohol had on Glenn Fiddler, Toby Wood testified that the deceased had told him on a couple of occasions that when he drank he became "hard core". In the following exchange with counsel, Mr. Wood explained what he understood Mr. Fiddler to have meant by this expression:

Q     Yeah. What does that mean, becomes hard-core?

A     Like, like, like -- you know, like I don't know how to explain this. Like start running towards the wall and just jump on it. Like that. Like, hard-core. Like, no pain or something like that.

Q     No pain. He'd get tough?

A     Feel tough.

[168] It's unclear from the evidence to what extent Mr. Fiddler's usually non-aggressive personality changed when he drank, and whether that change occurred every time he drank. But there are a number of things that are clear. It is clear, based on the evidence of Mr. Fiddler's friend Jamie Day that Mr. Fiddler had a long-standing addictions problem: this problem had caused him to require treatment away from the Reserve, at a group home in Calgary. He had also told his friend Jamie Day that he had sniffed solvent in the past, and Mr. Day had seen him drinking hairspray. Mr. Fiddler had also expressed suicidal ideation to his friends Wood and Day on a number of occasions. Mr. Wood testified that he had had a conversation with Mr Fiddler approximately two years before the fire in which Mr. Fiddler said that he was going to kill himself. Exhibit 10 sets out Mr. Fiddler's lengthy history of depression, alcohol and drug addiction, a previous suicide attempt, and suicidal ideation.

[169] It is also clear that when Mr. Fiddler came into contact with the Band Constables on the evening of his death, he ultimately became aggressive and combative with them. While given the evidence of his friends this behaviour appears not to have been typical of Mr. Fiddler, even when under the influence of alcohol, there is evidence that Mr. Fiddler had become angry in the past when under the influence of alcohol, and he was clearly angry when he left his mother's residence that evening. It should also be noted that based on the evidence of Mr. Day and Mr. Wood, by the time he came into contact with the Band Constables, Mr. Fiddler had consumed at least a mickie and a half (or some 560 milliliters) of rye whiskey, in addition to the alcohol that he had already consumed earlier that day. And so it is also reasonable to conclude that in addition to whatever effects the alcohol may have had on his disposition, Mr. Fiddler's judgment would have

been significantly impaired by the time that he came under control of Band Constables. A further indication in that regard is his decision to walk, in the early morning hours, on a thawing ice road, in a jacket and runners, to a community that was 1 to 2 hours away on foot.

[170] By the time that Mr. Fiddler was placed into Band Constable cells, he was belligerent and violent. He was threatening suicide. He caused significant damage to the first cell he was put into, and physically resisted attempts to move him into the station's second cell.

[171] During the move between cells, Band Constables found a second bottle of alcohol on Mr. Fiddler's person, and the assumption of Band Constable Harper was that Mr. Fiddler had continued to drink after he was placed into cells, rendering him more impaired and more belligerent.

[172] As well, both Toby Wood and Jamie Day confirmed that Mr. Fiddler smoked, and that he normally carried a lighter in one of his pockets. Given that, and given the cursory nature of the searches conducted on Mr. Fiddler, which missed an object as large as a bottle of whiskey on his person, it is not unlikely that when placed into cells he was either left in possession of a lighter (which he may have found after initially requesting a light for his cigarette), or ultimately found a lighter in what the evidence suggests was likely a debris-laden cell.

[173] When the civilian guard contacted Band Constable Knott to report the fire, he said "he's building a fire", referring to Mr. Fiddler. After the fire had started, the civilian guard Byron Harper heard Mr. Fiddler say "Help, I'm sorry" from his cell.

[174] Although there were other potential sources for fire in the Band police station, including an oil furnace in the building to which the police station was attached, no smoke or flame was seen coming from those areas at the time of the fire. The civilian guard Byron Harper, who was the first person to discover the fire, saw smoke coming only from Mr. Fiddler's cell, and later flames from the same location. When Band Constables returned to the police station after being notified of the fire, they found smoke and flame coming only from the cell in which Mr. Fiddler was being confined, and not from any other location in the building. The cell into which Mr. Fiddler was placed had no heating device of any kind, and no electrical wiring into the cell. There was no obvious method for a fire to have started accidentally within the cell.

[175] The fire here was investigated by the Provincial Fire Commissioner's office. Kenneth Carmichael from that office gave evidence at the Inquest. Although Wasagamack First Nation falls within Federal rather than Provincial jurisdiction, the attendance of a representative of the Provincial Fire Commissioner's office to

investigate this fire was pursuant to its responsibility under the provincial Fire Preventions Act to investigate and determine the cause of fires within the province, and at the request of the RCMP.

[176] The investigation of the Provincial Fire Commissioner was able only to rule out the furnace in the police station as a source of the fire. However, because of the extent of devastation caused by the fire, the remaining physical evidence did not permit the cause or area of origin of the blaze to be positively determined. But given the circumstances described above, including the fact that Mr. Fiddler had the means, the motive (given his state of mind at the time), and the opportunity to start the fire in his cell, it is almost certain that he did so.

## **The Fire Department**

### **Events of the Fire**

[177] Wasagamack's Fire Chief at the time of the fire, Terrance McDougall, testified that he received a telephone call from Band Constable Joseph Knott at approximately 2:30-3:00 a.m. on the morning of the fire, notifying him of the fire at the police station. He testified that he arrived at the fire some 5-10 minutes later. Although there were three volunteer members of the Fire Department at that time, it was Mr. McDougall's evidence that he did not have time to contact them to request their assistance. By the time he arrived at the fire, he observed smoke and flames coming out of the door of the station. By this point, the heat and flames in the building were too intense to permit him entry into the building, and he was able only to attend to the side of the police station in what was ultimately an unsuccessful effort to make an escape hole into Glenn Fiddler's cell from the outside of the building. According to McDougall's evidence, this process took less than 10 minutes from the time he arrived. By the time he attended to the side of the building, the fire had already spread to the gables of the building.

[178] As a result, Wasagamack's Fire Department, in the person of its Fire Chief, was obliged to stand by and watch as the building burned over the course of what Mr. McDougall estimated was the following one to two hours.

### **Personnel**

[179] In addition to three volunteer members, at the time of the fire Wasagamack's Fire Department consisted of one employee: Fire Chief McDougall. Mr. McDougall testified that he had graduated from the Fire College in Teulon Manitoba (which he testified is associated with the Manitoba Emergency Services College in Brandon) in 1990 or 1991. He testified that he had been the Fire Chief

at Wasagamack for approximately five of the next 8 to 9 years, alternating between his positions as Fire Chief at Wasagamack and attending school.

[180] Mr. McDougall testified that his training at the fire college had initially involved two ten month training periods over the course of two years, at the conclusion of which he had received a Level 2 firefighting certification. Although his returns to school thereafter were not fire-training related, it was his evidence that he had also attended some firefighting refresher courses after his graduation from fire college. It was the evidence of a witness from the Provincial Fire Commissioner's Office that an individual who received Level 1 and 2 certifications would be considered a well-qualified firefighter.

### **Equipment**

[181] Tragically, the state of the firefighting equipment in the Fire Department at the time of the fire provided a complement to the complete lack of fire detection and firefighting equipment in the building it was responsible for protecting. It was Fire Chief McDougall's evidence that when he first became Fire Chief in the early 1990s, the Wasagamack Fire Department was properly equipped, with proper firefighting gear, breathing apparatus, ladders, tools to maintain the fire truck, hoses etc. However, it was also his evidence that by the time of the fire on March 29, 1999, a combination of theft, vandalism and inadequate maintenance had left the Fire Department with no functioning firefighting equipment, including no working fire truck.

[182] Wasagamack First Nation's financial report for the fiscal year April 1, 1998-March 31, 1999 discloses that the non-operational fire truck was purchased in that fiscal year. Mr. McDougall was unable to say exactly how long the fire truck had not been working prior to the fire, but identified one of the reasons for it as being water that had been left in the truck's pump over the winter and frozen, cracking the pump, suggesting that the truck had been out of service for some time prior to the end of the March. Mr. McDougall testified that attempts to have the pump repaired, which included an attendance at Wasagamack by a representative of the company that had sold them the fire truck, were unsuccessful. He testified that he also believed the fire truck's engine to be non-functioning as well.

[183] The state of the fire truck and firefighting equipment meant that there was no equipment to fight the fire that killed Glenn Fiddler, including no fire truck to pump water onto the burning building. As a result, the Wasagamack Fire Chief attended to the fire with no firefighting equipment or clothing, and no tools with which to fight the fire. Mr. McDougall testified that there was not even a fire extinguisher at the fire station for him to use: the fire station's fire extinguisher had

been stolen some time before. As a result, the Fire Chief had only his bare hands to use when attempting to fight this major fire in his community, and he along with the Band Constables and other members of the community had to rip boards from the exterior of the burning building in an unsuccessful attempt to make an escape hole in the outside wall of Glenn Fiddler's cell.

### **Security**

[184] As noted, it was the evidence of the Fire Chief that theft and vandalism had effectively eliminated all of his department's firefighting equipment. He also testified that as a result of the problem posed by theft and vandalism on the reserve, certain facilities had 24 hour security, including the school and the nursing station. Mr. McDougall testified that when he sought similar security arrangements for the Fire Hall, he was advised by Band Constables that there were simply insufficient resources for that to occur.

### **Communication**

[185] There was no ability for the Band Constables to contact the Fire Department once they were alerted to the fire. While the Band Constables had a radio system, it was internal to the Band Constables and could not be used to contact the Fire Chief. The Fire Chief was notified of the fire by telephone some time after the Band Constables arrived at the scene of the fire.

### **Transportation**

[186] In addition to having no functioning fire truck, the Fire Chief testified that he had no functioning transportation of his own to get him to the fire. He was obliged to run to the scene of the fire. He testified that it took him 5-10 minutes to arrive, and that if he'd had a vehicle, he could have arrived in 2-3 minutes.

[187] As with the Band Constable Program, the question raised by the profound deficiencies in the Wasagamack Fire Department is "How could this have happened?"

### **Funding**

[188] Mr. McDougall testified that prior to the fire he had made "a couple" of verbal requests of the Chief and Council for funds to repair the fire truck. Although his evidence as to the results of that request was somewhat unclear and contradictory, the net effect of that evidence was that those funds were not

forthcoming. He believed he was told that the council wanted to assist, but that he would have to wait until the next fiscal year, which he thought was April 1, for those funds to be available.

[189] Mr. McDougall testified that he had also sought funds from the Chief and Council to obtain other replacement equipment for the Fire Department, but that it was only in his first year as Fire Chief that he had been successful in obtaining funds for that purpose. Again, his evidence in this regard was to the effect that the Band had no money for this purpose.

[190] He testified that he had also advised the Fire Services Officer of the Island Lake tribal Council of the problem with the fire truck. He could not recall that individual's response, but that no monies were received from the Island Lake Tribal Council (as set out below, Island Lake Tribal Council provides an advisory service, and is not a funding agency).

[191] Mr. McDougall testified that he had also attempted to borrow equipment from a nearby First Nations community, but was told that they had none available to lend.

[192] He also testified that he contacted the Fire Commissioner's office in Winnipeg to advise of the problem, and was referred to a company in Winnipeg that sold used firefighting equipment. Because he was aware that the Band had no money to purchase even used equipment, he contacted the company and asked if they could lend equipment to Wasagamack, which request was declined.

[193] In addition to these steps, Mr. McDougall testified that he had attempted to address the problem of the absence of proper equipment in the Fire Department by talking to people who stopped by his office during that time period, some twelve in number, about the importance of fire prevention.

[194] Between 1997-1998, Frederick Mills was the manager of program planning and allocation funding services with the Manitoba region of the Department of Indian Affairs and Northern Development (DIAND). In that capacity, Mr. Mills was responsible for allocating resources to First Nations in various program areas, including the operation of community facilities, which included the operation and maintenance (O and M) of Band assets, as well as Band administration costs.

[195] Mr. Mills testified that there are four types of Band assets funded by DIAND. For the purposes of this Inquest, category one and category three assets are relevant. Category one assets are assets which benefit the community as a whole and in Wasagamack included the fire hall and fire equipment. Operations and maintenance costs for category one assets in Wasagamack are funded at essentially a 100% level by the Federal government. Category three assets are

community buildings, including the Band office and virtually all other community buildings other than police stations, medical service facilities, or nursing stations. As described elsewhere in this report, police stations are funded by the former Solicitor General's department. Operations and maintenance costs for category three assets is at a 20% level.

[196] Mr. Mills also testified as to the process for capital funding on First Nations. Capital funding by DIAND is broken down into two parts: i) a capital account process for major facilities, such as school construction and water and sewer systems; ii) a Band-based capital allocation process, where DIAND allocates funds directly to the First Nation, in order for the First Nation to decide what the priorities are in the community.

[197] By way of example as to the uses to which Band-based capital allocation resources could be put, it was Mr. Mills' evidence that Band-based capital allocation funds could be used to construct a fire hall, to repair a fire truck, or to purchase items such as fire protection equipment and fire trucks. Responsibility for maintenance of assets purchased or constructed with Band-based capital allocation funds rested with the Band, with funds from the Band's O and M account, funded by DIAND.

[198] In order to access capital funds, the Band is required to complete a project identification form, which provided relevant details as to the work to be performed. As part of that process, DIAND assesses whether DIAND had authority to fund the item, and whether the proposed allocation is in line with the actual cost of the asset and its proposed purpose.

[199] It was Mr. Mills' evidence that the annual Band-based capital allocation funding for Wasagamack First Nation is between \$900,000-\$1,000,000. Annual funding from DIAND to Wasagamack for the operation and maintenance of the fire hall, the fire truck and the volunteer Fire Department, was approximately \$56,000, of which \$16,000 was dedicated to maintenance for the fire hall building. It was his evidence that First Nations are expected to maintain DIAND-funded assets with the resources provided to them, which includes the provision of fire protection services for those assets by the First Nation. The copies of the Comprehensive Funding Arrangements (CFA) for Wasagamack First Nation between fiscal years 1995/96 and 1999/2000 (Exhibits 45, 47, 49, 51, 52) each contain clauses confirming that Wasagamack First Nation will arrange for the provision of fire protection services.

[200] With respect to emergencies that may arise on a First Nation, Mr. Mills testified that DIAND's expectation is that First Nations will budget for "minor emergencies" from their capital or O and M programs. As to other emergencies

involving exceptional circumstances, his evidence was that DIAND would consider those requests on a case by case basis. It was Mr. Mills' evidence that he could not recall DIAND having been approached by Wasagamack First Nation for emergency funding to address serious deficiencies in its fire protection services, or of having been advised of those deficiencies.

[201] Anita Degagne also testified at the Inquest. Ms. Degagne is manager of community services in the Funding Services Directorate with DIAND. The Directorate manages funding arrangements that are signed between the First Nations and DIAND. Ms. Degagne testified that funds are transferred to a First Nation by way of a Comprehensive Funding Arrangement (CFA). There are three types of funding in a CFA. The first is grant funding, which is unconditional. An application is submitted by the First Nation, with no terms and conditions that have to be met. The second type of funding is contribution funding, which is conditional, requiring the First Nation to meet certain terms and conditions in order to receive those funds. The purpose of contribution funding is to reimburse a First Nation for eligible expenditures. The final type of funding in the comprehensive agreement is flexible transfer payment, in which specific terms and conditions also have to be met.

[202] Ms. Degagne confirmed that First Nations, including Wasagamack First Nation, receive fire protection funding, which is meant to support a voluntary Fire Department, to maintain assets for fire protection, including the purchase of firefighting equipment, as well as maintenance of a fire truck and a fire hall, and training for members of the Fire Department. Fire protection funding is a flexible transfer payment. Mechanisms are in place by which the Funding Services Directorate monitors that the First Nation is indeed meeting the terms and conditions of the funding arrangement. Reports must be submitted on an annual basis, as well as the preparation of audited financial statements at the end of the fiscal year.

[203] Ms. Degagne confirmed that the First Nation receives operating and maintenance funding, including a line in the budget specifically designated for fire protection, which is intended to support the Fire Department and to maintain the Fire Department's firefighting equipment. She confirmed the funding figure for fire protection services for Wasagamack First Nation was approximately \$55,000.

[204] Ms. Degagne testified that a request from a First Nation for additional funding for fire equipment, fire services, or related training would be in written form, and there is no record in DIAND files of such a request having been made by Wasagamack First Nation.

## **Supervision**

[205] Evidence at the Inquest was that there was no internal supervision or monitoring within the Wasagamack Fire Department: the Fire Chief was the head of that Department and its sole employee.

[206] As to supervision from outside the Fire Department, Mr. McDougall testified that his immediate supervisor was the Band Manager, who in turn reported to the Chief and Council. Neither the Band Manager nor the Chief and Council had experience or training with respect to firefighting.

[207] As to supports for the Fire Department outside of Wasagamack First Nation, it was the evidence of Frederick Mills that DIAND has no direct responsibility with respect to the training or supervision of Band Fire Departments. Rather, the funding of a fire services officer in the Island Lake Tribal Council was intended to provide Wasagamack First Nation with that responsibility.

[208] Evidence at the Inquest was that Tribal Councils are creations of First Nations, created to provide economy of scales in the provision of certain services to First Nations. In the case of Wasagamack, it is a member of the Island Lake Tribal Council (ILTC), comprised of Wasagamack, St. Theresa Point, Garden Hill and Red Sucker Lake First Nations. Funding to the tribal council is provided by DIAND for technical services, community planning advisory services, economic development, Indian government advisory services, and financial advisory services. As well, three additional areas outside of the normal funding process are also funded: housing inspections and housing advisors to the First Nations, preventative maintenance officers, and a fire services officer. It was Mr. Mill's evidence that it is the expectation of DIAND that tribal councils will employ professional advisors to provide assistance to its member Bands in the areas funded by DIAND, including fire prevention.

[209] Funding for tribal councils is based on the number of First Nations in the tribal council and the population to be served. The funding for the Fire Services Officer at ILTC is \$52,000 per year, of which (according to the evidence at the Inquest from the Director of Operations for ILTC) \$40,000 is taken up by the salary of the FSO - the balance being used for travel by the FSO to the four communities.

[210] It was Mr. Mills' position that in the case of Wasagamack, both the Band and the ILTC (in particular the Fire Services Officer) share responsibility for ensuring that standards with respect to the condition of firefighting equipment are met.

[211] As noted previously in this report, Stanley Manoakesick, the Director of Operations for the ILTC, gave evidence at the Inquest. It was Mr. Manoakesick's evidence that it was part of the mandate of the ILTC Fire Services Officer (FSO) to ensure that equipment was kept operational on the First Nations that were part of the ILTC.

[212] It was Mr. Manoakesick's evidence that approximately one year after the fire that took the life of Glenn Fiddler, he heard from the FSO-Ivan Mason- with respect to fire services at Wasagamack First Nation. He testified that Mr. Mason told him about a problem that Wasagamack First Nation was having in paying for repairs to its fire truck. Mr. Mason advised him that he was having difficulty obtaining information from the Band about making funding available for payment. He also testified that in the same conversation, Mr. Mason made mention of inadequate firefighting equipment at Wasagamack which, he testified, was an ongoing problem with the First Nations that are part of the ILTC. It was his evidence that the problem with inadequate firefighting equipment for the member First Nations of the ILTC was at "crisis" level for years. However, he testified that he was not told by Mr. Mason in that conversation, and was not aware, of the complete absence of firefighting equipment at Wasagamack First Nation before and after the fire.

[213] Ivan Mason testified at the Inquest. Mr. Mason testified that he is a level 3 firefighter, and has been employed with the ILTC since 1992. His evidence was that his initial employment was as a Fire Services Officer, but that in the last four or five years "it kind of transpired into more with respect to emergency services". He testified that his new role evolved as a result of community and regional needs, and involved "training of various emergency response fields". It was Mr. Mason's evidence that emergency response involved dealing with forest fires and people who were lost.

[214] Mr. Mason testified that he had been at Wasagamack First Nation in 1997 and 1998, and that he had noted that the Wasagamack fire truck was operational. He also attended to Wasagamack at some point in the first three months of 1999, and found that the fire truck had a broken pump and was not operational. Mr. Mason testified that he brought this fact to the attention of the Wasagamack Band Councillor with responsibility for fire protection. Thereafter, with the approval of the Chief and Council, he contacted the fire truck supplier to determine if the necessary repair would be covered by warranty. He was advised that because the damage had been caused by water left in the pump, the repair was not covered by warranty. (the Operation and Maintenance Guideline for Physical Facilities on Indian Reserves (Exhibit 20) directs that fire pumps must be drained after use.)

[215] Mr. Mason testified that thereafter, he, several Band Councillors, as well as the capital projects manager for Wasagamack attempted without success to argue the warranty issue with the suppliers. Mr. Mason then obtained a quote from the supplier for the replacement of the pump (\$20,000), and provided that information to the Wasagamack Band Council. Mr. Mason testified that he also discussed with Band Councillors raising the fire truck problem with the funding services officer of DIAND, and that it was his understanding that the Band was going to do so. As noted in the evidence of Frederick Mills (above), he could not recall DIAND having been approached by Wasagamack First Nation for emergency funding to address serious deficiencies in its fire protection services, or of having been advised of those deficiencies. Similarly, there is no record in DIAND files of a request having been made by Wasagamack First Nation for additional funding for fire equipment or fire services. No evidence was presented to the Inquest in support of a contention that this information had been conveyed to DIAND, or that a request for emergency funding had been made.

[216] Mr. Mason also testified that the ILTC had requested that its member communities file inventories of their firefighting equipment, but could not recall whether an inventory had been received from the Wasagamack Fire Department after 1998. Although he testified that he was in regular contact with Wasagamack Fire Chief Terrance McDougall, and that Mr. McDougall made inquiries of him to obtain “information about how to get more firefighting equipment”, he could not recall if these discussions occurred before or after the fire in this case. He testified that he made suggestions to the Fire Chief as to potential solutions, which included speaking to Wasagamack’s capital projects manager, but that given ILTC’s advisory role, ILTC had no funds to provide for equipment purchase.

[217] Mr. Mason also testified that two of the other three Island Lake communities had originally purchased their fire trucks at approximately the same time as Wasagamack (1997/1998) and that these fire trucks had remained operational. Mr. Mason attributed the difference in result to the larger Federal funding available to those communities, which is a result of their larger populations. Obtaining information about those other communities sufficient to make a definitive assessment as to the reason for the different results in those communities was well outside the scope of this Inquest. However, based on information that is before the Inquest, improper maintenance with respect to firefighting equipment at Wasagamack would appear to have played at least an equally significant role in those results.

[218] It was Mr. Mason’s evidence that other than the fire truck, the state of the firefighting equipment in the other Island Lake communities was comparable to

that in Wasagamack: as a result of loss and theft, firefighting equipment in those communities is minimal.

[219] Mr. Mason testified that he attended at the Wasagamack Fire Station during the course of his pre-fire visit. His assessment of the firefighting equipment in the Fire Station at that time was that it was “minimal”. When asked about the Fire Department’s ability to fight even a small fire in a small building with the equipment he saw available, his answer was again that it would have been minimal.

[220] As to the situation in Wasagamack in 2005, it was Mr. Mason’s evidence that the current state of Wasagamack’s Fire Department is worse than it was at the time of Mr. Fiddler’s death. It was Mr. Mason’s evidence that there is currently no operational fire truck in Wasagamack. He testified that he has not seen firefighting equipment in Wasagamack for several years. It was his assessment that the present ability of the Wasagamack Fire Department to respond to a fire such as the one that took the life of Glenn Fiddler would be “very minimal”.

[221] Curtis Smith, the executive director of the Manitoba Association of Native Fire Fighters (MANF) testified at the Inquest. He testified that MANF was created in 1994 and is funded by DIAND. He confirmed that MANF’s provincial counterpart is the Provincial Fire Commissioner's Office, and characterized MANF’s role as involving two aspects: emergency planning, and fire protection programs and inspection of Federally-funded Band buildings. With respect to the first aspect, Mr. Smith testified that MANF is funded to provide advice and assistance to all First Nations to assist with the development of emergency plans for each First Nations community. With respect to fire protection programs for First Nations, including firefighting, training and education, it was Mr. Smith’s evidence that MANF is Federally funded to provide those services only to First Nations that are not affiliated with tribal councils. For those First Nations that do belong to a tribal council, such as Wasagamack, it was Mr. Smith’s evidence that MANF’s role with respect to fire protection services is performed by the tribal council generally, and by the tribal council’s fire services officer in particular. It was Mr. Smith’s evidence that MANF is prepared to provide advice and assistance in the area of fire protection to First Nations that are members of tribal councils, but would negotiate with the tribal council for payment for those services.

[222] It was Mr. Smith’s evidence that if a fire chief in Wasagamack had difficulties with respect to training or equipment, maintaining equipment, having adequate equipment, working equipment, that fire chief would turn firstly to his Band council for assistance, and if assistance was still required thereafter, to the fire services officer at the Island Lake Tribal Council. It was his evidence that

other than a telephone inquiry from the Wasagamack Fire Chief inquiring as to information re firefighting training, which was referred to the Island Lake Tribal Council, MANF had not been requested to provide fire protection to Wasagamack First Nation.

### **Assessment**

[223] The Wasagamack Fire Chief testified that by the time he arrived at the Band Constable Police Station, the fire had progressed to the point that even had he possessed proper firefighting equipment, he could not have stopped the fire. It was his evidence that even had he possessed protective clothing, the fire had become too hot for him to be able to enter the building. He testified that even if the fire truck had been in working order, given the extent of the fire by the time he was notified, it could not have put out the fire.

[224] Evidence at the Inquest was that minutes and seconds can be important in the course of a fire. The absence of a mechanism such as a shared radio system that would have permitted immediate communication between the police and Fire Department meant that an additional 5-8 minutes elapsed between the time the Band Constables were first notified of the fire and their arrival at the police station, when notification could have gone out to the Fire Chief. This delay allowed the fire to burn for additional time before the Fire Department was notified.

[225] It took the Fire Chief 5-10 minutes to arrive at the police station. The absence of a fire truck, or even motorized transportation of any kind, meant that once notified of the fire, precious additional time was taken up when Wasagamack's Fire Chief had to run from his residence to attend at this major fire in his community. As well, had the Fire Department actually possessed firefighting equipment and clothing, the absence of a vehicle would have prevented necessary tools and equipment from being transported to the fire.

[226] As noted elsewhere in this report, at the point when the Band Constables arrived at the police station, they were still able to enter the building and attempt a rescue of Glenn Fiddler. If a properly equipped Fire Department had been notified of the fire in a timely manner, and had they then been able to arrive at the fire at the same time as, or earlier than, the Band Constables, armed with equipment and protective clothing that permitted an effective firefighting/rescue effort, the result with respect to Mr. Fiddler may well have been very different.

[227] As to how matters could have reached the stage that they were at the time of the fire, unlike the circumstances of the Band Constable Program there is insufficient evidence to determine with certainty whether the problem with the Wasagamack Fire Department arose from insufficient funding levels, or if it was a

matter of inefficient management within the First Nation. However, it should be noted that the Operations and Maintenance budget for the Wasagamack Fire Department is approximately \$56,000 per year, and that there has been no explanation offered by Wasagamack First Nation as to why that amount was inadequate to maintain basic firefighting services. It should also be noted that while the overall status of firefighting equipment at Wasagamack First Nation is generally comparable to that of the other First Nations within the Island Lake Tribal Council, fire trucks purchased by two of the other three Island Lake communities at approximately the same time as Wasagamack First Nation have remained operational. Prior to the fire, the ILTC Fire Services Officer discussed with Wasagamack Band Councillors that they raise the fire truck problem with the funding services officer of DIAND; there is no evidence that this occurred, or that the absence of firefighting equipment generally was brought to the attention of the Federal Department responsible for funding. Even after the fire, the FSO of the Island Lake tribal Council reported difficulty in obtaining information from the Wasagamack Band with respect to making funding available for payment for repairs to the fire truck.

[228] It is beyond the scope and evidence of this Inquest to determine appropriate funding levels for Wasagamack First Nation. It is clear, however, that restoration of fire protection services for Wasagamack First Nation is essential, and that the existing situation must be corrected. As an interim step, an allocation of emergency supplementary funding to Wasagamack First Nation to revive its Fire Department, as described in the evidence of DIAND's former manager of funding services, would address the immediate problem. Over the longer term, Wasagamack First Nation and DIAND must work together to attempt to identify additional funding sources within Wasagamack's budget to address the problem.

[229] Of equal importance is that concurrent with the restoration of Wasagamack Fire Department to operational status, measures be put in place to prevent a repetition of the present situation. Lack of monitoring and supervision appears to have been one of the factors leading to the disintegration of fire protection services in the Wasagamack Fire Department. In summary, there was no effective internal or external monitoring or supervision of Wasagamack's Fire Department. The Department of Indian Affairs and Northern Development has no direct responsibility with respect to the supervision of First Nation Fire Departments. The primary role of the Manitoba Association of Native Firefighters is assistance to non-affiliated First Nations. The Island Lake Tribal Council appears to be in, or to have adopted, an advisory, rather than supervisory role. And so while ILTC appears to have been aware that there was a serious problem with the Fire Department, and offered advice as to what might be done to address the problem, it

had no obligation to ensure that the advice was followed or a solution achieved. It is critically important that proactive monitoring and supervision of fire protection services at Wasagamack are put in place, to ensure that professional standards, in particular with respect to equipment and resources, are maintained, and that its citizens are protected.

[230] Similarly, evidence at the Inquest was that the Fire Department's most expensive asset, its fire truck, was rendered non-operational as a result of failure to comply with basic maintenance requirements. Wasagamack First Nation Fire Department has an obligation of responsibility towards the citizens it is duty bound to protect. Once its services are restored, the bare minimum to be expected is that Wasagamack First Nation will take all appropriate steps within its control, including maintenance of its assets, to ensure that its assets and citizens are protected.

[231] Finally, it was the evidence of Wasagamack's Fire Chief that theft and vandalism had virtually eliminated all of his department's firefighting equipment. He testified that as a result of the problem posed by theft and vandalism, certain facilities at Wasagamack have 24 hour security, including the school and the nursing station. The availability of effective and properly equipped firefighting services on First Nations is as essential as its educational, medical, and police services. Clearly, given the limited resources available to refurbish those services when they have been depleted, it is necessary not only that firefighting services in Wasagamack be restored, but that when they are restored, adequate security measures, and funding for those measures, are put in place to protect them.

**It is clear that if no steps are taken to ensure that fire protection services in Wasagamack are restored, protected, and maintained, another tragedy of proportions equal to that of the death of Glenn Fiddler is only a matter of time.**

### **The Fire Commissioner**

[232] Kenneth Carmichael, an emergency services officer with the Provincial Fire Commissioner's Brandon office testified at the Inquest. The Inquest was told that the Provincial Fire Commissioner's office investigated the fire at Wasagamack First Nation at the request of the RCMP, pursuant to its responsibility under the provincial Fire Preventions Act to investigate and determine the cause of fires within the province. It was Mr. Carmichael's evidence that there is no requirement for the Provincial Fire Commissioner's office to notify the Federal government of the fact of a fire at a First Nation, nor to notify the relevant Federal agencies of the result of its investigation of such a fire. As a result, deficiencies identified in the

course of an investigation with respect to, for example, firefighting equipment, fire detection equipment, and building construction, are not areas about which the Provincial office is mandated to notify its Federal counterparts. In this case, the extent of the damage caused by the fire did not permit identification of deficiencies re firefighting equipment, fire detection equipment, and building construction within the destroyed building. However, the provincial investigator was made aware in the course of the investigation as to some of the major deficiencies in the Wasagamack Fire Department, including the absence of a functioning fire truck. In this case, although the provincial fire investigator did recommend that the Wasagamack Fire Chief contact MANF (Manitoba Association of Native Firefighters) to obtain assistance with respect to the serious equipment deficiencies in his fire department, he did not contact his Federal counterpart to advise as to the results of his investigation, nor did a representative of the Federal government contact him.

[233] As well, it was the evidence of the emergency services officer that because the fire in this case occurred on a First Nation, and fell within Federal jurisdiction, no investigation was conducted by him with respect to Fire Code compliance, as per the following exchange with the Court:

Q Let me construct a hypothetical for you and you can give --

A Okay.

Q -- me your answer. Let's say, for the sake of discussion, I'm not suggesting that this applies here --

A Um-hum.

Q -- or that your answer will apply to this situation, but let's say, for example, that you investigate a fire in a building that you can plainly see is, to use the colloquial expression, a fire trap, that it's constructed of extremely flammable substances, there's no fire extinguisher, the exit...is barred by some object to prevent people from fleeing, et cetera, et cetera.

A Um-hum.

Q Would that not be something that would be a relevant and pertinent piece of information to include in your report and, more importantly, to advise someone about?

A Yes. If you're getting into a life safety issue like that that can be blatantly seen, there again, though, it would all depend on the type of building and everything else that you would go back and reference to find out, like, what part of the code it meets and whether or not it does meet it. And it, it would be brought up to the local authority having jurisdiction as, as a concern or an area

that they should be checking into.

Q Now, did you engage in that process here, that is, did you go back and check the code and make a determination as to compliance?

A No. No, because it's on Federal land and we do not deal with that.

Q And as to whether or not your Federal counterpart chooses to do so, that's their call, effectively?

A Yeah. I don't know what their mandate is or anything with regards to this.

Q And if you can't answer this next question, that's fine, as well, but was there anything that you observed in the course of your examination of this building and this fire that leapt out at you as being an obvious code violation problem?

A I would have to say no, because there again, I didn't --

Q You weren't looking that closely?

A I wasn't, I wasn't there for --

Q That purpose.

A -- for that purpose, and like there probably is, and if I went and did some research I might be able to find it, but that was a Federal problem and that was left in their hands.

[234] The difficulty created by this policy is that if it is only the Provincial Fire Commissioner's office that is investigating a fire on First Nations' land, there is no mechanism by which deficiencies in fire code compliance relating to the fire can be brought to the attention of the responsible Federal agency. As noted elsewhere in this report, it is the Labour Program, a division of the Federal Department of Human Resources and Skills Development, which is responsible for the administration and enforcement of occupational safety and health issues with respect to Federally regulated employers, which includes First Nations. As well, the Labour Program administers an agreement to provide fire services to First Nations communities for a specified list of major Band-owned buildings. As part of its responsibilities in this regard, HRSDC is responsible for inspecting buildings that fall within this category, to ensure that they meet the national building and fire codes. Notwithstanding this area of responsibility, it was the evidence of the representative of the Labour Program that her department learned of the fire on the Reserve by way of a newspaper report. When her department attempted to conduct an on-site inspection and an investigation of the fire, those requests were declined by representatives of Wasagamack First Nation. Efforts by the Labour Program to

obtain the report of the provincial Fire Commissioner's Office with respect to its investigation of the fire were declined on privacy grounds. The Labour program was able only to obtain the RCMP's report with respect to the fire.

### **The Fire Code**

[235] Ms. Diane Kocela is the director of the Labour Program for the Federal Department of Human Resources and Skills Development Canada (HRSDC), (formerly Labour Canada) in Manitoba. Ms. Kocela testified that the Labour Department administers the Canada Labour Code, which applies to Federally regulated employers, including First Nations. Part II of the Canada Labour Code deals with occupational safety and health, and includes regulations with respect to fire safety. As well, under a memorandum of understanding with Treasury Board, the Labour Department administers an agreement to provide fire services to First Nations communities for a specified list of major Band-owned buildings, which list includes offices, fire stations, and fire halls. As part of its responsibilities in this regard, HRSDC is responsible for inspecting buildings that fall within this category, to ensure that they meet the national building and fire codes.

[236] HRSDC also has fire safety engineers on staff. If a First Nation is planning to build a new building, or to renovate an existing building, the First Nation has the option to submit plans to the Labour Department, whose engineers will review those plans to ensure that all national building and fire code requirements are designed in to the building. Following the initial request by the First Nation, an HRSDC engineer makes contact with the First Nation, and a plan review is done. Code compliant features are designed into the building, and once construction has begun an interim inspection will often be conducted by the engineer to ensure that the noted design features are in place and workable. When the building is completed, the engineer will then conduct a pre-occupancy inspection to ensure that all codes are met.

[237] The process is obviously detailed and thorough. It is also done without cost to the First Nation. However, Ms. Kocela testified that the process is also not mandatory, and is made available at the request and initiative of the First Nation.

[238] Labour Department records for the Wasagamack building in which the fire occurred on March 29, 1999 show that the building was recorded as a Band Constable office and radio station (the other portion of the building that housed the police served as the TV and radio station for Wasagamack.) It was Ms. Kocela's evidence that in 1995 the Labour Department did receive preliminary drawings from a construction company, ostensibly hired by Wasagamack First Nation, for the construction of a prisoner holding facility in that community. Labour engineers

reviewed the plans, made comments with respect to details that had to be addressed in order to comply with the national building code, and encouraged the contractor to provide further plans once completed. Labour Department records do not indicate a response from either the contractor or Wasagamack First Nation, and they received no indication that further plans were prepared or that building had begun.

[239] It was Ms. Kocela's evidence that had the Labour Department been advised of a continuing intention to change the use of the building from an office facility to a prisoner holding facility, the process would have been as described above: if plans had been provided to the Labour Department representatives, code complaint features would have been designed into the plans, and inspectors sent in to inspect the completed project. If plans had not been provided but advance notice of the proposed change still provided, Labour Department representatives would have explained to the First Nation the requirements for fire protection under the national building and fire codes, to ensure that the holding facility and holding cells complied with applicable codes.

[240] Per the requirements of the Canada Labour Code, First Nations (as with other Federally-regulated employers) also have an obligation to provide a safe and healthy workplace for their employees. The Labour Code provides for financial penalties for non-compliance. It was Ms. Kocela's evidence that Band Office buildings, as well as holding facilities, would fall under the ambit of the Canada Labour Code, and were subject to Federal inspection. It was Ms. Kocela's evidence that the last pre-fire inspection of major Band-owned buildings was conducted by representatives of the Federal Labour Department in Wasagamack in 1993, which included an inspection of the building that ultimately came to be used as the police station and holding facility at the time of the fire. However, other than an inspection of the Wasagamack School conducted in 1997, there were no other inspections of major Band-owned buildings conducted by the Labour Department between 1993 and the time of the fire in this case. It was Ms. Kocela's evidence that facilities such as the RCMP detachment building in Island Lakes were inspected on a regular basis, which she defined as every 2-5 years. As to why 6 years had gone by from the time of the last inspection of major Band-owned buildings at Wasagamack, it was Ms. Kocela's evidence that "it was on the work plans for 1998, but, at the time, we were somewhat understaffed, and so it was postponed one year".

[241] John Mills, a fire protection engineer with the Fire Protection Engineering (FPE) Unit of HRSDC, Labour Program, also testified at the Inquest. He confirmed the role of FPE as the provision of fire protection service to First Nation communities for major public access buildings. He also confirmed the evidence of

Ms. Kocela with respect to the role of FPE in voluntary pre-construction reviews of plans and specifications for First Nation buildings to ensure that they meet the national building code. He also confirmed that FPE provides site services, including an interim inspection while a facility is being constructed and a project turnover inspection when it is completed. As well, FPE conducts inspections of existing buildings, either to bring the building up to code, or to an acceptable life safety standard.

[242] Mr. Mills testified that had FPE been advised of a change of use or occupancy of a building, and in particular a conversion to a detention facility, FPE would have asked the First Nation to forward the preliminary plans for review by FPE, and would have discussed with the First Nation what would be needed to bring the building to a position that would comply with the present building code. Mr. Mills confirmed that FPE's services are provided with the approval or at the request of the Chief and Band Council or their designates. It was Mr. Mills' evidence that Code compliance on First Nations land is voluntary.

[243] Although representatives of the Federal Labour Department have authority pursuant to Part II of the Canada Labor Code to enter First Nations' land to conduct building inspections, Ms. Kocela testified that the Labour Department has a policy to work collaboratively with First Nations communities, and "to obtain voluntary compliance and to facilitate compliance". As a result, the Labour Department will often send letters or make phone calls to Band and/or Council to ensure that the Band is in agreement with inspections being done in the community. It was also her evidence that if a request for inspection is declined by a Band, the matter will be deferred to a time when consent can be obtained, and that this will sometimes mean a delay until new Band leadership is elected. It should be noted that it was the evidence of the Labour Department's director that if there was reason to believe that there was a particular or imminent danger in a given workplace, Labour Department representatives would attend with or without permission.

[244] The catch-22 inherent in the latter position is that an inspector may not know of a particular or imminent danger without an inspection. Employees of other Federal agencies were also apparently not in a position to offer that information to the Labour Department: as noted elsewhere in this report, members of the RCMP were in the Band Constable Police Station on a regular basis and saw what an RCMP witness described as the unsafe conditions in that facility; that information was not conveyed to the Labour Department. And so, given the particular situation in Wasagamack, a policy of mandatory inspections in situations of imminent danger is a somewhat hollow one.

[245] As noted, the pre-fire delay in inspection of the Band Constable's office-between 1993 and 1999 in this case was not attributable to a refusal by the Band to permit an inspection, or to the policy of voluntary inspection. However, the policy of voluntary inspection could well have permitted a deferral of an inspection of the Band Constable police station, had one been scheduled prior to the fire. As well, the policy of voluntary inspection, along with other factors, did create a complete inability by the Labour department to conduct a post-fire inspection and investigation in this case.

[246] As noted above, Curtis Smith - the executive director of the Manitoba Association of Native Fire Fighters (MANF) - testified at the Inquest. It was Mr. Smith's evidence that MANF works closely with the Labour Program of HRSDC, and, like HRSDC, performs inspections of major Band buildings at the request of First Nations not affiliated with Tribal Councils. It was his evidence that MANF had not been requested to provide building inspection services to Wasagamack First Nation.

[247] Stanley Manoakesick, Director of Operations for the Island Lake Tribal Council (ILTC) testified that one of the responsibilities of the Fire Services Officer (FSO) at ILTC, Ivan Mason, was building inspection at the request of the First Nation. However, it was his evidence that if an inspection were conducted, and if the FSO were to find deficiencies in design or fire safety concerns, the FSO has no power or mandate to compel the first nation to bring them up to code:

A No, he can only suggest. We're, we're just an advisory group.

[248] Mr. Manoakesick also testified that part of the responsibility of the FSO with respect to the inspection of newly renovated public buildings on First Nations is to "keep on top of what's happening in that regard" in each community.

[249] As noted elsewhere in this report, FSO Ivan Mason testified at the Inquest as well. He testified that he was one of three members of the ILTC technical services program, along with a housing inspector and an operation maintenance officer. He testified that building inspections were conducted by all three members of the technical services program, with each officer examining their respective area: the fire service component, the operation maintenance component, and the housing component.

[250] As to which buildings are inspected on First Nations, and by whom, Mr. Mason testified that CMHC requires newly constructed or renovated residences to be inspected, but that these inspections are conducted by ILTC at the invitation of the First Nation. As to the inspection requirements with respect to Band-owned public buildings, such as the Band police station, Mr. Mason testified that: "From

what I understand, the Indian and Northern Affairs, what they do is they usually have a, I believe they refer to as the Band property assessment. I'm not sure what -- but something to that nature where they come in once a year and they kind of look at doing the inspection themselves.”

[251] Mr. Mason also testified that to the extent that members of the ILTC technical services program do conduct inspections of First Nations public buildings, these are also at the invitation of the First Nation. If a breach of the fire code is noted, Mr. Mason testified that the problem is brought to the attention of the First Nation member responsible for the project, but that the ILTC has no means by which to compel compliance. Mr. Mason also testified that no reports are prepared by him with respect to the results of ILTC inspections of public Band buildings. It was his evidence that after the fire in this case, he proposed to the Board of the ILTC (comprised of the Chiefs of the four member First Nations) that he be given authority to conduct mandatory fire code inspections, as well enforcement power. He testified that this proposal was rejected by the Board.

[252] With respect to the police station in this case, converted from a Band building to a detention facility, Mr. Mason testified that he had not been made aware of its change of use, that he had never been on that premise for the purpose of conducting an inspection, nor was he aware of any other inspection that had been conducted at the building following the change of use.

[253] It was the evidence of Frederick Mills, manager of program planning and allocation funding services with the Manitoba region of the Department of Indian Affairs and Northern Development (DIAND) between 1997-1998 that DIAND's expectation was that construction plans would be vetted by Labour Canada, that sites would be inspected, and that projects would meet the standards that are required by the type of facility being built.

[254] It was his evidence that DIAND also hires outside consultants every three years (prior to 2003 every five years) to examine the assets for which they had provided funding, and to determine whether or not the level of maintenance was appropriate. An asset condition report is prepared as a result of that process. A copy of the report is provided to the DIAND financial services officer, the technical officer of the First Nation, and to the First Nation's tribal council. It was Mr. Mill's evidence that if standards are not met, DIAND has the ability to stop funding from flowing to the First Nation, but that DIAND's normal procedure is to work with the First Nation on a capacity development process, to develop an action plan to ensure that the asset is maintained properly and to fix those deficiencies that have been identified.

[255] It was Mr. Mill's evidence that depending on the asset and the seriousness of the deficiency, DIAND also has the authority to enter onto First Nations land to address a particular deficiency. Mr. Mills offered the example of the fire alarm system or the sprinkler system in the school not working: if the band had no resources to fix the problem, then DIAND would do so. As Mr. Mills put it: "obviously, we've got to be concerned about the safety of the children and the occupants of the facility".

[256] Exhibit 19 is the asset condition report prepared in October of 1995 for what was then the former Band Hall at Wasagamack. It was Mr. Mills' evidence that it was the last asset condition report completed for that building prior to the fire in this case. Of particular note, the report identifies a variety of fire code related deficiencies within the building, including the absence of a fire alarm, fire extinguishers, and emergency lighting. The report also identifies the need to perform a fire/building code study with respect to the occupancy of the building. The report identifies the urgency level for a code study and the need to address the other noted deficiencies as "immediate". As previously noted, it was also the evidence of the DIAND representative that prior to 2003 asset condition reports were prepared every five years, and there were no further asset condition reports prepared with respect to this building prior to the fire in 1999. As well, as noted above, a planned inspection of major Band-owned buildings by representatives of the Federal Labour program was postponed from 1998 to 1999, which meant that there was no other form of Federal inspection at Wasagamack prior to the fire to identify and remedy these deficiencies. No evidence was presented to the Inquest to suggest that the noted deficiencies were ever addressed; to the contrary, the evidence at the Inquest was that at the time of the fire none of the above-noted deficiencies had been addressed.

[257] It was Mr. Mills' evidence that as of March 29, 1999, the building being used by Band Constables was identified in DIAND records as a former Band Office building. It was his evidence that DIAND had received no notification prior to March 29, 1999 that the building use had changed to that of a police station and holding facility. It was Mr. Mills' evidence that although DIAND does not fund or have responsibility for police stations on First Nations, had it been made aware that the building was being used as a prison or detention facility, and that it had no firefighting equipment or fire detection devices, DIAND would have directed the Band to Labour Canada, to make sure that the building met appropriate code standards. But it is also clear from Mr. Mills' evidence that the operation and maintenance building in question, which DIAND had identified in its records as the Old Band Office Building, was being funded by DIAND as a Band building. It was his evidence that had DIAND been aware that the building was being used as a

police station, the building would not have been eligible for funding by DIAND, as police stations are the responsibility of the Solicitor General's (now HRSDC) Department.

[258] Anita Degagne, manager of community services in the Funding Services Directorate with DIAND, testified that the Funding Services Directorate of DIAND has no record of funds being allocated to do renovations, repairs or any construction with respect to the former Band Office, the building that in March of 1999 was being used as Band Constable police station and holding facility. Ms. Degagne confirmed that had DIAND received a request for funding this project, it would not have provided funding as policing is not within its mandate. Specifically, the Funding Services Directorate had no record of the existence of the former Band Office building. When Ms. Degagne began working with Wasagamack and began visiting the community the Band administration was operating out of a new band office building, and it was Ms. Degagne's evidence that she had no occasion to attend to the old building. As well, Ms. Degagne testified that the Capital Assets Inventory System, which is an inventory of all infrastructure at the First Nation based on information provided by the First Nations, has no record of the existence of the Band Constable police station.

[259] As noted elsewhere in this report, evidence at the Inquest was that circular 55, a set of provisions governing Band Constable policing services for First Nations (exhibit 23), does not contemplate the detention of prisoners by Band Constables. Paragraph 7 of that policy states:

In cases where detention is required, the case should be referred to the responsible Senior Police Force.

It was the evidence of the regional manager of Aboriginal Policing Services for the Public Safety and Emergency Preparedness Canada (formerly the Solicitor General's Department) that her department was unaware of any detention facilities at Wasagamack First Nation. It was her evidence that her department's assumption would have been that any person detained in that area would be detained at the RCMP detachment, the responsible senior police force with respect to Wasagamack First Nation.

[260] It is clearly an available inference that the Wasagamack Band did not advise DIAND or the Aboriginal Policing Services of the construction of a detention facility, and did not avail themselves of the free review and inspection service offered by HRSDC's Labour Department, because they were aware that they were constructing a facility that they had no authority to build.

[261] The copies of the Comprehensive Funding Arrangements (CFA) for Wasagamack First Nation between fiscal years 1995/96 and 1999/2000 (Exhibits 45, 47, 49, 51, 52) each contain clauses requiring that designs for all public access buildings be approved by HRSDC Labour Program, and that facilities under construction be inspected by them to ensure that fire codes are met. Clearly, this was not done by Chief and Council with respect to the Band Constable Police Station.

[262] When asked if there had been any discussion between the Chief and Band Councillors as to safety concerns in using a building that wasn't originally intended as a detention facility for that purpose, former Band Chief Cornelius Wood responded as follows:

A I don't recall. Like, when I was Chief we had so many things happening. Like, you're talking about the health and safety of your community members that are not adequately like with fire extinguishers or sprinkler system. None of our houses had that, even the homes in the community, so it wasn't something that we felt that was a threat at that time because we were so used to having limited resources.

The essence of Chief Wood's answer is that one has to understand this decision in context: the building was not that different from what the population of Wasagamack was used to living in, and so the Chief and Council didn't identify the building's deficiencies as a problem in the way that perhaps others elsewhere might have.

[263] It should be noted, of course, that as indicated elsewhere in the course of this decision, detention facilities have an additional requirement for safety, given that they are occupied by people whose judgment and physical capacities are often impaired, and whose freedom of movement is deliberately constrained.

[264] As noted elsewhere in this report, it was the Provincial Fire Commissioner's office that was asked to investigate this fire. Evidence at the Inquest was that members of the Federal Labour Department learned of the March 29<sup>th</sup> fire by way of a newspaper report. Notwithstanding the Labour Department's area of responsibility with respect to occupational safety and health on First Nations, as well as inspections of major Band-owned buildings for code compliance, when representatives of that department attempted to conduct an on-site inspection and investigation of the fire, those requests were declined by representatives of Wasagamack First Nation and (given the policy of voluntary inspection) not pursued by the Labour Department. Efforts by the Labour Department to obtain the report of the provincial Fire Commissioner's Office with respect to its

investigation of the fire were also declined, on privacy grounds. The Labour Department was able only to obtain an RCMP report with respect to the fire.

[265] Given the extent of the damage to the Band Constable's building, it is difficult to predict with certainty what may have been learned by a post-fire inspection of the site. But what is clear is what a code inspection of the Band Constable police station prior to the fire would have revealed, and that the Federal policy of voluntary inspection has the potential of allowing unsafe conditions to exist undetected and unaddressed on First Nations.

[266] Although an absence of detailed information with respect to the specifications of the building in this case prevented a definitive determination as to its fire code compliance, Mr. Mills described the national building code requirements for a police station/detention facility with roughly the size, dimensions, and occupancy of the facility in this case: those being a sprinkler system, a fire alarm system connected to a fire department or similar emergency services agency, a fire extinguisher, cell walls that would withstand the passage of fire and transmission of heat for not less than one hour, key-operated locks, and emergency lighting. As well, given that the police station was non-sprinklered, it was Mr. Mills' evidence that the interior finish on the walls of the building would have had to have a "flame spread rating" of less than 75 (flame spread rating being the speed of spread of flame on the surface of a material). As per Exhibit 22, a fire Code analysis prepared by Mr. Mills, the flame spread rating on three of the four walls in the cell occupied by Mr. Fiddler was approximately 150. The tests conducted by Fire Protection Engineering (FPE) Unit of HRSDC suggest that it might take approximately twice as long for untenable conditions to have developed in Mr. Fiddler's cell if the flame spread rating of the walls of the cell had been 75 rather than 150. (Mr. Mills also notes, in Exhibit 22, that if a mattress or clothes were the principle items burning, a fire can develop very quickly regardless of the flame spread rating; as well, he notes that smoke from a fire is an additional factor that can also quickly make a room's environment untenable).

[267] Although, as noted, no definitive assessment could be offered with respect to the code compliance of the Band police station given the limited information available, it is clear that the Band Constable building and the cells occupied by Mr. Fiddler were entirely deficient in virtually every aspect of the code requirements relating to fire protection.

[268] The Fire Chief of Wasagamack First Nation at the time of the fire testified that he was not certified to conduct fire code inspections. He testified that he had asked the Chief and Council for funding to attend a course to be certified as an inspector, but had been turned down. He testified that he had never been advised

by any government agency that the police station at Wasagamack did not meet fire code requirements. Nevertheless, he acknowledged his assessment that fire safety conditions in the police station were “very poor”. He was certain that the building had no fire detector, thought it had no fire alarm, and was unaware as to whether it had fire extinguishers.

[269] The Fire Chief was also uncertain as to who was responsible for Fire Code inspections on the First Nation, as reflected in the following exchange with counsel for Wasagamack First Nation:

Q Well, well, for instance, who was responsible for, for ensuring fire safety or fire prevention at the nursing station? Was that your job or someone else's job?

A You mean inspections, you mean?

Q Yes.

A Should have been mine, but, well, it's not. I should be accompanying with a, a fire marshal or fire inspector.

Q Right. So, so typically you have, typically who would that fire marshal or inspector be?

A I, it's, would, they asked or, asked that, whoever is looking after that building, or the government building --

Q Right.

A -- from I don't know who. They'd usually ask their insurance guy to, or they'd send their own inspector.

Q And, and I'm just using the nursing station now as an example; we're going to get around to some other examples. It, typically would you be notified that a fire marshal or inspector was coming up to check, let's say, the nursing station?

A I should have been notified.

Q Well, okay. My question is, were you notified?

A No.

Q Did you understand anyone to have an obligation, anyone in this community or elsewhere to have an obligation to do an inspection on the Band Constables' police station for safety, for fire safety compliance? Someone had that obligation as far as you were aware?

A No. Only I was --

Q Only you.

A -- I was supposed to.

Q And you didn't do that.

A No.

Similarly, the following was the Fire Chief's understanding with respect to Fire Codes at the Band Constable police station:

Q Do you know what fire codes, regulations would have applied to that type of building?

- A There's no regulation.  
Q None at all?  
A None.

[270] As noted earlier in this section, evidence at the Inquest was that fire codes did indeed apply to the Band Constables' police station, and that the Band Constable building failed to comply with those Codes. As to the responsibility for inspection, as noted earlier in this report, fire engineers and inspectors with the HRSDC Labour Program, as well as the Fire Services Officer of the Island Lake Tribal Council were all available to conduct reviews and inspections of buildings at Wasagamack First Nation, at the invitation of the First Nation.

[271] Mr. McDougall testified that he had asked the Chief and Council for funding to attend a course to be certified as a code inspector, but had been turned down.

[272] In summary, the renovation of the old Band Hall into a police station and detention facility should have been disclosed by the First Nation, and when it was not, should have been identified by Labour Program inspection (scheduled for 1998, but delayed because of staffing shortages), as well as the asset condition report system.

[273] The failure to identify the code violations in the Band Constable police station appears to have resulted primarily from a lack of disclosure by Wasagamack First Nation, as well as a lack of timely inspection and follow-up by the relevant Federal departments.

### **Delay**

[274] Given the length of time from the date of death to the completion of the Inquest in this matter, a chronology of events is required.

[275] The captioned Inquest was called by the Chief Medical Examiner on December 27, 2000 to investigate a death by fire that occurred while the deceased was in the custody of Band Constables at Wasagamack First Nation on March 29, 1999. There was a lengthy delay in the matter being set down for hearing. The hearing of the Inquest was initially scheduled to proceed on October 28 - November 2, 2002 in Garden Hill.

[276] Four weeks before the Inquest was scheduled to proceed, Crown counsel sought an adjournment of the hearing: the hearing had been set for a time of year during which travel to the Island Lake area was extremely difficult, the issue of whether the affected parties wished to have counsel had not been addressed, and a change of venue was required: although the death that is the subject matter of the

Inquest took place in Wasagamack, the Inquest had been scheduled to take place in Garden Hill.

[277] The Crown was granted an adjournment of the Inquest in order to address the noted issues. In April of 2003 the Crown scheduled new hearing dates of August 11-15, 2003.

[278] Five days of evidence were heard during the week of August 11th. The inquest could not be completed as a result of issues that had not been identified prior to the commencement of the inquiry, and that had become apparent only in the course of evidence. The outstanding issues were identified, and the inquest adjourned sine die for the necessary investigation and inquiries to be made by Crown counsel. Continuation dates of November 25, 26, and 27, 2003 were set thereafter.

[279] One witness had been subpoenaed for the noted continuation dates, which left unaddressed the majority of the outstanding issues identified in the course of the August hearing. On November 25, 2003 the inquest was further adjourned, in order to allow the inquiries with respect to the outstanding issues to be initiated, conducted and completed by Crown counsel prior to the next continuation dates.

[280] On November 26, 2003, Crown counsel raised an issue as to the jurisdiction of the Inquest to proceed. It was Crown counsel's submission that a constitutional prohibition appeared to exist which prevented a provincial Inquest from taking place with respect to a death that had occurred on First Nation land. Distilled to its essence, the basis of the jurisdictional concern raised by the Crown arose from the fact that First Nation lands, and First Nation peoples, fall generally under Federal jurisdiction, and therefore outside the ambit of provincial jurisdiction and legislation, such as the Manitoba *Fatality Inquiries Act*. The Court directed Crown counsel to provide the formal position of the Provincial Department of Justice on this issue, and to obtain the position of the Federal Department of Justice as well. The Inquest was unable to continue until the threshold issue was addressed and resolved, and the Inquest was adjourned, pending submissions from both the Provincial and Federal Crown.

[281] In the lengthy time period between the date on which the jurisdictional concern was raised and formal submissions were made at the Inquest, on September 9, 2004, the position of Provincial Crown counsel had evolved. It was Crown counsel's position that there was no constitutional impediment to the convening of this Inquest, nor its continuation. The Federal Crown agreed. However, both the Federal and Provincial Crown also took an additional position with respect to the jurisdiction of a provincially convened Inquest as it relates to a subject matter under Federal jurisdiction. In summary, that position was that an

Inquest which derives its authority from provincial statute (as does this Inquest) may not make any inquiry, or recommendation, with respect to the policies, procedures, management, and administrative decisions of a Federal Department or Agency. The ruling on that issue is set out in the body of this report, and permitted the Inquest to proceed.

[282] Continuation of evidence in the Inquest proceeded on September 28<sup>th</sup>, 30<sup>th</sup>, and October 1<sup>st</sup>, 2004, with evidence from representatives of some of the Federal departments with involvement in areas of concern to the Inquest. However, because not all necessary witnesses had been identified and produced, the Inquest was further adjourned to January 4-7, and February 21, 2005. Closing submissions to the Inquest were made and completed by counsel on March 10, 2005.

### **Jurisdictional Issue**

[283] The initial jurisdictional issue in this matter was initially raised by counsel to the Inquest. The Provincial Crown took the position that a constitutional prohibition appeared to exist that would prevent a provincial Inquest, including this one, from taking place with respect to a death occurring on First Nation land. Distilled to its essence, the basis of the jurisdictional concern raised by the Crown arose from the fact that First Nation lands, and First Nation peoples, fall generally under Federal jurisdiction, and therefore outside the ambit of Provincial jurisdiction and legislation, such as the Manitoba *Fatality Inquiries Act*.

[284] The Inquest was adjourned, pending submissions from both the provincial and Federal Crown on this threshold jurisdictional issue.

[285] In the time period between the date on which the jurisdictional concern was raised and formal submissions were ultimately made to the Inquest, the position of counsel to the Inquest evolved. The ultimate position of counsel to the Inquest was that there is in fact no threshold constitutional impediment to the convening of this Inquest, nor its continuation. The position of counsel in this regard is confirmed, inter alia, by the decision of the Supreme Court of Canada in *Cardinal v. Alberta (A.G.)*, [1974] S.C.R. 695, which stands for the principle that First Nation lands are not enclaves of exclusive Federal jurisdiction, and provincial laws will apply unless they relate to matters integral to Indian status or lifestyle, or to the extent that they affect the use or management of First Nations lands.

[286] I also had the benefit of receiving the submission of the Federal Crown with respect to this aspect of the jurisdictional issue. The Federal Crown agreed that there is in fact jurisdiction for this Inquest to be convened, and to hear certain evidence with respect to the death of Glenn Fiddler.

[287] In other words, it is clear, and I found, that this Inquest has the jurisdiction to hear evidence with respect to a death occurring on First Nation land, as it had already done in part when the initial jurisdictional issue was first raised, and with respect to the circumstances of the death that occurred in this case; that is, with respect to the circumstances of the arrest and detention of Glenn Fiddler by Band Constables at Wasagamack First Nation, the conditions of the jail cell in which Mr. Fiddler was kept, the fire that ultimately claimed his life and its cause, as well as the unsuccessful efforts made to rescue him from that fire.

[288] However, both the Federal and Provincial Crown took an additional position with respect to the jurisdiction of a provincially convened Inquest as it relates to a subject matter under Federal jurisdiction, which I would summarize as follows:

That an Inquest which derives its authority from provincial statute (as does this Inquest) may not make any inquiry, or recommendation, with respect to the rules, policies, procedures, management, organization, administrative decisions, and/or reasons for administrative decisions, of any Federal Department or Agency.

[289] The Federal Crown took its position in this regard from the decision of the Supreme Court of Canada in *Quebec (Attorney General) v. Canada (Attorney General)* [1979] 1 S.C.R., commonly referred to as “*Keable No.1*”, per Pigeon J. for the majority:

I thus must hold that an inquiry into criminal acts allegedly committed by members of the R.C.M.P. was validly ordered, but that consideration must be given to the extent to which such inquiry may be carried into the administration of this police force. It is operating under the authority of a Federal statute, the Royal Canadian Mounted Police Act, (R.S.C. 1970, c. R-9). It is a branch of the Department of the Solicitor General, (Department of the Solicitor General Act, R.S.C. 1970, c. S-12, s. 4). Parliament's authority for the establishment of this force and its management as part of the Government of Canada is unquestioned. It is therefore clear that no provincial authority may intrude into its management. While members of the force enjoy no immunity from the criminal law and the jurisdiction of the proper provincial authorities to investigate and prosecute criminal acts committed by any of them as by any other person, these authorities cannot, under the guise of carrying on such investigations, pursue the inquiry into the administration and management of the force. The doctrine of colourability is just as applicable in adjudicating on the validity of a commission's term of reference or decisions as in deciding on the constitutional validity of legislation. As Viscount Simon said in *Attorney General for Saskatchewan v. Attorney General for Canada* [[1949] A.C. 110.], (at p. 124) "you cannot do that indirectly which you are prohibited from doing directly".

[290] Issues had, in fact, arisen in this Inquest that touched upon administration and management involving Federal Departments and Agencies; inter alia: the identification of Federal codes, regulations and standards that are applicable in respect of both buildings and fire prevention in First Nation reserves and at Wasagamack First Nation; clarification of the roles of the relevant Federal agencies or departments and Band Council respecting fire protection and inspection on First Nation Reserves; the role of Federal fire authorities with respect to inspection at Wasagamack First Nation specifically; and the funding, monitoring, and supervision of Band Constables and the Fire Department at Wasagamack First Nation.

[291] Given the above-noted finding with the constitutional issue to be determined in this case was no longer the constitutional validity of this Inquest per se, but rather the breadth of the inquiry that could be made in the course of the Inquest.

In that regard, the Federal Crown also took a position with respect to compellability of witnesses employed by Federal Departments or Agencies, which I would summarize as follows:

A provincially constituted Inquest cannot compel the attendance of representatives of the Federal Crown to give evidence at this Inquest; that is, that there is no statutory authority for this Inquest to subpoena witnesses who would be called to give evidence in their capacity as representatives, or employees, of the Federal Crown/Government.

[292] The Federal Crown again took its position in this regard from the decision of the Supreme Court of Canada in "*Keable No.1*", per Pigeon J. for the majority:

I do not find it necessary to review at great length the numerous authorities cited on the fourth constitutional question. Because, at common law, a commission of inquiry has no power to compel the attendance of witnesses and to require the production of documents, any jurisdiction for such purposes depends on statutory authority, and it seems clear that provincial legislation cannot be effective by itself to confer such jurisdiction as against the Crown in right of Canada.

[293] However, the Federal Crown also took the position that it was prepared to volunteer certain assistance to the Inquest, through Federal witnesses, as follows:

Clarification of the existing roles of the relevant Federal agencies or departments and Band Council respecting fire protection and inspection services on First Nation reserves; identification and explanation of codes, regulations and other standards that are applicable in respect of both buildings and fire protection on First Nations reserves and Wasagamack particularly; and clarification of the

respective responsibilities of the relevant provincial and Federal agencies or departments and Band Council with respect to (a) and (b) above.

[294] The position of the Federal Crown in this regard was further clarified in the course of submissions to the Inquest on September 9, 2004. The Federal Crown agreed that its witnesses would also testify as to specific acts of its agents vis a vis Wasagamack First Nation, to the extent that this evidence did not enter into the areas set out in the summary of the Federal Crown's position above, and which areas may be generally described as involving the administration and management of Federal Departments and Agencies. Therefore, the Federal Government made its participation and cooperation in this Inquest contingent on the condition that no inquiry is made with respect to the administration and management of its Departments and Agencies, while agreeing that its witnesses may testify as to the specific acts of its agents, to the extent that this evidence did not enter into the aforementioned areas. Federal counsel took the position that Federal witnesses were prepared to testify, for example, both as to the nature of fire codes applicable at Wasagamack First Nation and whether inspections pursuant to those codes were conducted. If certain inspections were not conducted, Federal witnesses were prepared to testify as to the rationale for same, to the extent that such evidence would not intrude into the areas of administration and management of the Federal Department or Agency.

[295] As noted, both counsel for the Federal and Provincial Crown were ad idem on this aspect of the jurisdictional limitation of this Inquest. Both counsel recommended that the Inquest proceed on the basis of the inquiry proposed by counsel for the Federal Crown.

[296] Mr. Barga, as counsel for Wasagamack First Nation, also submitted a brief on this issue: Mr. Barga's submission, on behalf of Wasagamack First Nation, may be summarized as follows: that there is provincial jurisdiction to conduct this Inquest, and that the Inquest had coercive investigatory powers to compel the evidence of Federal witnesses.

[297] Having considered the submissions of counsel, as well as the decision of the Supreme Court of Canada in "*Keable No. 1*", I accepted the position of the Provincial and Federal Crown that this Inquest lacked jurisdiction to compel evidence from Federal witnesses in their capacity as representatives of the Federal Crown. In other words, although witnesses employed by the Federal Crown may be compelled to give evidence in a proceeding with respect to matters that do not involve their positions as Federal employees (for example, as witnesses in a personal capacity, or in the course of a criminal proceeding,) they may not be compelled by a subpoena issued by a Provincial authority to give evidence

specifically directed at their role as representatives of the Federal Crown. However, notwithstanding the lack of compellability of representatives of the Federal Crown in their capacity as such, the Federal Crown may, in certain circumstances, voluntarily provide such witnesses and evidence to a Provincial Inquiry.

[298] Given my findings re the issue of compellability, I concluded that given the circumstances described above, I did not have the ability to compel Federal evidence in the present proceeding, and that as a result the evidence I would hear with respect to the involvement of Federal Departments and Agencies in this matter would of necessity be limited to that which the relevant Federal agencies and departments were prepared to provide voluntarily. Therefore, in order to obtain all available and relevant evidence that would shed light on the material circumstances of the death of Glenn Fiddler, as per the mandate of this Inquest under s. 33 of *The Fatality Inquiries Act*, this Inquest was constrained to hear evidence from Federal witnesses on the basis of the conditions set out by counsel for the Federal Government. Counsel were advised that the Inquest would not, however, be fettered in its fact-finding role with respect to witnesses who were compellable to the extent of Provincial jurisdiction, and which would involve consideration of evidence from those compellable witnesses with respect to all acts or omissions that may be found to form part of the material circumstances of Mr. Fiddler's death.

[299] Following the interim decision with respect to the jurisdictional issue, witnesses from the Federal departments did voluntarily attend the Inquest to give their evidence. However, notwithstanding the initial position taken by counsel with respect to the limits that would be placed on their evidence, the Federal witnesses without exception provided full and complete evidence with respect to all aspects of their respective departments involvement in this matter, including the policy, procedure, and decision-making of those departments as it related to the subject matter of this Inquest. The Inquest received this evidence pursuant to its role, under s. 33 of *The Fatality Inquiries Act*, to determine the material circumstances surrounding the death of Glenn Fiddler.

[300] Given the noted development with respect to the evidence actually provided by Federal witnesses at the Inquest, I have restricted the jurisdictional decision in this matter to the two issues that ultimately required the decision of the Court: the first, the issue of compellability of Federal witnesses at a provincial inquiry, is set out above.

[301] The second issue is the nature of the recommendations that may be made as the result of a provincial inquiry. Subsection 33(1) of *The Fatality Inquiries Act* states, in part:

33 (1) After completion of an inquest, the presiding provincial judge.... may recommend changes in the programs, policies or practices of the government and the relevant public agencies or institutions or in the laws of the province where the presiding provincial judge is of the opinion that such changes would serve to reduce the likelihood of deaths in circumstances similar to those that resulted in the death that is the subject of the inquest.

*The Fatality Inquiries Act*, as noted, is enacted by the provincial government, and the reference in section 33 to recommendations for change in the programs, policies, and practices of “the government” is clearly a reference to the provincial, and not Federal, government. As well, the doctrine of inter-jurisdictional immunity (see *Stoney Creek Indian Band v. British Columbia*, [1999] 1 C.N.L.R. 192) would also preclude an inquiry created by provincial legislation from making recommendations addressed specifically to a Federal undertaking. As a consequence, I find that a Provincial Judge presiding at a provincial Inquest is without jurisdiction to make recommendations to the Federal government specifically directed to the policies, procedures, and management of Federal departments and agencies.

[302] However, a provincial Inquest does have the jurisdiction to make inquiries into the material circumstances of the death of one of its citizens, including, as noted above, a death occurring on First Nation land. While there is a jurisdictional limitation with respect to the nature of the recommendations that may be made as a result of that inquiry, it does not restrict the fact finding aspect of the inquiry. Similarly, the jurisdictional limitation does not prevent the inquiry from identifying, without recommendation, the problems or deficiencies within Federal departments and agencies that may have formed a part of the material circumstances of death. It remains within the purview of the Federal government to determine what action it will take as a result of the findings of the provincial inquiry in that regard.

This principle informs the recommendation portion of this report.

### **Assessments and Recommendations**

#### **Policing Services at Wasagamack**

[303] The Inquest heard evidence that the First Nations Policing Policy (FNPP) was established by the Federal government in 1992 to create enhanced policing

services for First Nation peoples. An underlying assumption of that policy was that the Band Constable Program on First Nations would be phased out, and that professional police organizations, independent of chief and council, would be created. A professional police agency created under the FNPP would receive increased Federal funding for its police services (funding for the Band Constable program having been frozen by the Federal government since 1992).

[304] As described in the body of this report, inaction on the part of the Provincial and Federal governments and Wasagamack First Nation appears to have contributed in part to the absence of a policing agreement for Wasagamack First Nation. Wasagamack's lack of funds to begin the negotiation process for a FNPP also appears to have been a stumbling block in that process. As a result, there has never been an agreement under the FNPP for enhanced policing services at Wasagamack First Nation. The significant problems created by this situation in Wasagamack, including the effect on the quality of police service at Wasagamack First Nation, forms the subject matter of much of this report.

[305] The representative of the Federal Aboriginal Policing Directorate testified that her department recognizes "a real need" for enhanced policing services for First Nations in Manitoba, and for those services to be negotiated under the FNPP between First Nations and the Federal and Provincial governments. She indicated her department's intention to try to move forward on the FNPP as quickly as possible before "we lose any more momentum in Manitoba". In identifying the perceived impediments to reaching such an agreement in the past, as well as the critical problems created by its absence, one of the objectives of this Inquest Report is to have an impact on all parties in both generating and maintaining that momentum.

**1) An agreement for a professional police agency at Wasagamack First Nation, negotiated between the Federal and Provincial Governments and Wasagamack First Nation under the FNPP, would be a significant step in addressing the problems created by the Band Constable Program at Wasagamack First Nation.**

**I recommend that the parties take immediate steps to initiate a negotiation process between the Provincial and Federal Governments and the First Nation to establish enhanced police services at Wasagamack First Nation.**

[306] A professional corps of First Nation police officers presupposes that the officers who comprise that corps will be properly trained. As noted in the body of

this report (see “The Band Constables”), it was the evidence of one of the Band Constables that he had never received any police training before becoming a Band Constable at Wasagamack First Nation. While the lapses in performance by the untrained officer, in particular with respect to the inadequate search of the deceased, were little different than those of his colleagues who had been properly trained, it is clear that although proper training is not a guarantee of effective job performance, it is the foundation for it. No one ought to be hired to perform the critical task of community protection without having first received the training to perform that function.

The evidence at the Inquest (see “The Band Constable Program”) was that training for Band Constables is also essentially voluntary; training is a pre-requisite only for an appointment as a special constable by the province of Manitoba, not for employment as a Band Constable. For those Band Constables who do attend training, the training is only of three weeks duration.

**2) It is critically important that while the Band Constable system continues, and as part of a new policing agreement and the transition to same when it does not, training of the police corps at Wasagamack First Nation is made mandatory, and of duration comparable to other professional police agencies, in order to provide a foundation for proper policing procedures. To the extent that this area will form part of the subject matter of negotiations between the Federal and Provincial Governments and Wasagamack First Nation to create enhanced policing services at Wasagamack First Nations under the FNPP, I strongly recommend that the Provincial Government advance this position in the course of those negotiations.**

[307] A professional corps of First Nation police officers presupposes that the officers who comprise that corps will receive continuing education and training. As noted in the body of this report, one of the Band Constables involved in this incident testified that in the eight years after he graduated, he had attended only one refresher course, and that no one had conducted a professional assessment of the manner in which he was executing his responsibilities. The other two Band Constables involved in this incident had received essentially no ongoing training after becoming Band Constables. The records of the Aboriginal Policing Directorate reveal that no Band Constables from Wasagamack have attended for training since 1996.

[308] Evidence at the Inquest disclosed that ongoing training for Band Constables is essentially voluntary. As described elsewhere in this report (see “The Band

Constables”), the effects of the initial training received by the Band Constables in this case had clearly deteriorated over time, and did not translate into effective performance; procedures had become, at best, haphazard, including those involving search and handling of prisoners.

**3) It is critically important that while the Band Constable system continues, and as part of a new policing agreement and the transition to same when it does not, continuing training of the police corps at Wasagamack First Nation is made mandatory, to ensure that proper policing procedures are being followed, and that new developments in techniques and procedures are brought to the attention of First Nations police and incorporated by them. To the extent that this area will form part of the subject matter of negotiations between the Federal and Provincial Governments and Wasagamack First Nation to create enhanced policing services at Wasagamack First Nations, I strongly recommend that the Provincial Government advance this position in the course of those negotiations.**

[309] Training and continuing education alone are not sufficient. The facts of this case demonstrate how the combination of a variety of factors, including the effects of limited resources and difficult circumstances, ongoing exposure to the practices of others who are not properly trained, the inclination of human nature to do what is easier and more expedient, the passage of time, and the absence of supervision, direction and continuing training and education to counteract these factors, can cause even effective training to disintegrate over time. While the Band Constable Program remains in existence, active supervision of First Nation Band Constables is necessary, both by a hierarchy within the police force, by Band administration, by the Aboriginal Policing Directorate, and by a professional police agency such as the RCMP.

[310] The role of the RCMP in providing ongoing guidance and support to the Band Constables is identified in Circular 55, the 1971 Department of Indian Affairs and Northern Development document which governs Band Constable policing services for First Nations. It’s clear from the evidence of the RCMP at this Inquest, as well as the Federal representative of the agency responsible for the Band Constable program, that the current nature of that guidance and support is not clearly defined; the various forms which it may take depends on a variety of factors, including the nature of the relationship between the Band and the RCMP generally. As a result, a group of Band Constables, like those in the instant case, may end up being left largely to their own devices on a day to day basis, with disastrous results in terms of job performance and public safety. The specific result

in this case was the gross lapses in search and supervision of Glenn Fiddler that permitted the fire in this case to start and remain undetected.

[311] It was evidence at the Inquest that the Island Lake Tribal Council envisioned Wasagamack First Nation as adopting a “transitional” policing service, beginning with RCMP community policing and moving to a First Nations Administered Police Service. This model would have the benefit, at least initially, of providing the ongoing support and supervision for the First Nations police service which the events surrounding Mr. Fiddler’s death, and the evidence at this Inquest, have demonstrated is necessary.

**4) While the Band Constable Program remains in place, a regularized system of ongoing support and guidance for Band Constables from the RCMP and the Aboriginal Policing Directorate, in cooperation with the First Nation, is necessary to assist in the early identification of deficiencies, including those that might otherwise compromise public safety. As well, a policy and procedure manual for Band Constables (which currently does not exist) setting out standards with respect to performance is necessary to allow Band Constables to be evaluated against those standards.**

[312] Wasagamack First Nation requires a police service of greater size. When Band Constables were moving the deceased Glenn Fiddler between cells, they were unable to control him sufficiently to complete a thorough search of his person; this appears to have been in part a function of insufficient manpower. The inadequate search of the deceased likely left him with incendiary materials that were used to start the fire that caused his death. Similarly, when a family violence investigation arose while Mr. Fiddler was in custody, the three Wasagamack Band Constables had no remaining Band Constables to call upon to guard their prisoner, and were obliged to seek the assistance of a civilian guard. The civilian guard’s youth and other factors created a delay in the detection of the fire, permitting the fire in Mr. Fiddler’s cell to develop to the point that it was out of control by the time that efforts were begun to extinguish it. Most importantly, the guard’s fear of being inside the building with the prisoner prevented him from entering the building once the fire had been detected, missing the potential opportunity of a rescue attempt at least five to eight minutes before one was finally commenced.

[313] Beyond the particular circumstances of the death of Glenn Fiddler, evidence at the Inquest was that the funding for the Band Constable program did not allow for a police force of sufficient size to address the policing needs of Wasagamack First Nation generally. The precise number of police officers (Band Constables or

otherwise) required to properly police Wasagamack cannot be determined on the basis of the evidence presented to this Inquest on that issue. That number must be determined on the basis of consultation between the parties, including Wasagamack First Nation, the Provincial and Federal governments, and the RCMP.

**5) There are two points with respect to the issue of police manpower at Wasagamack First Nation that are clear from the evidence heard at this Inquest. The first is that the number of Band Constables currently funded for policing at Wasagamack First Nation is completely inadequate, and must be increased to a level that permits the policing function to be performed in a safe, responsible, and professional manner.**

**The second is that the consultations and negotiations between the Federal and Provincial Governments and Wasagamack First Nation that will lead, amongst other things, to the increase of police manpower at Wasagamack First Nation must begin now. The inadequacies of the Band Constable program at Wasagamack First Nation have existed for far too long.**

[314] The Inquest heard evidence from the regional manager of the Aboriginal Policing Directorate that the annual budget for Band Constables at Wasagamack First Nation is \$43,000, and that in the case of Wasagamack this amount is intended to cover non-capital costs relating to the operation of a Band Constable program, including salary and operations and maintenance. At the time of the fire, this amount was used to cover the salary and expenses for three Band Constables. Funding for Band Constables has essentially been frozen since 1992.

**6) Part of the requirement of a professional police corps is sufficient funding to allow for salaries sufficient to attract competent candidates. It is important that while the Band Constable system continues, or as part of a new policing agreement and the transition to same when it does not, salaries for the police service at Wasagamack First Nation be raised to a level comparable to that of First Nations police operating under the FNPP elsewhere in Manitoba.**

[315] A professional corps of First Nation police officers at Wasagamack presupposes that the officers who comprise that corps will be peace officers. Although the Provincial Government requires that a Band Constable be trained

before they can be appointed a special constable/peace officer, there is no requirement that individuals receive that appointment as a condition of their employment as Band Constables.

[316] Other than in exceptional circumstances, the law does not permit civilians to arrest persons for summary offences. A significant portion of the police work done by First Nation police services of necessity involves the enforcement of Band By-laws and other summary conviction offences, as was the case in the arrest of Glenn Fiddler. One of the Band Constables who purported to arrest Mr. Fiddler in this case was not a peace officer, and had no authority to arrest in the circumstances of this case.

**7) Given Wasagamack's isolated location, the role played by its Band Constables is often not limited to the investigation of summary conviction matters. It is axiomatic that police services, including First Nation police services, will have the authority in law to properly perform their duties. I recommend that while the Band Constable system continues, the conditions of Band Constable employment include eligibility for appointment as a peace officer by the Province of Manitoba.**

[317] For the reasons set out in the body of this report (see "Why Wasagamack First Nation Needs a Detention Facility") a police service at Wasagamack First Nation requires a proper facility in which to detain prisoners. As noted in the body of this report, (see "The Band Constable Facility") the police station and cell in which Mr. Fiddler lost his life were wholly inadequate to the role that they were to perform. The building and cells were not constructed in compliance with fire or building codes. Cell doors were sliding pieces of plywood jammed in place with wooden 2x4s. There was no smoke detector, fire extinguisher, fire axe, bucket, hose, or running water in the building. There was no fire alarm system of any kind: the only alarm that Band Constables were able to sound in response to the fire was the siren on the police car parked outside of the burning building. Although the problems that existed in the Wasagamack police station building may not have been unique to that building in Wasagamack, those problems were (and are) of critical concern in the case of a facility where people's freedom of movement is restricted, and where the danger inherent in any restriction of movement is further compounded by the frequent impairment of judgment and physical capacity of those confined.

[318] It should be noted that the various forms of policing arrangements available to be implemented in Wasagamack under the FNPP (see Recommendation '1'

above) would likely result in approved detention facilities being created at Wasagamack First Nation. Assuming that a police agency is created at Wasagamack with the legal authority to detain suspects, that agency will require a modern, code-compliant detention facility that permits the safe detention of detainees.

**8) Given Wasagamack's remote location, properly trained and supervised Band Constables must be provided with code-compliant facilities to safely detain prisoners until they can either be released back into the community or transferred to the custody of the RCMP. A First Nations police service ought not to have to choose between leaving detained persons in grossly unsafe or insecure conditions (as occurred in this case), and having prisoners left in a lobby, chained to a snowmobile, or taken along with police in the course of their investigations.**

[319] As noted elsewhere in this report, Circular 55, a set of provisions governing Band Constable policing services for First Nations, does not contemplate detention of prisoners by Band Constables.

**9) Assuming the creation of an approved detention facility at Wasagamack, a professional policing service in Wasagamack or, in the interim, properly trained and supervised Band Constables must be given the authority to detain prisoners onsite in Wasagamack.**

[320] Evidence at the Inquest was that Band Constables often have difficulty finding civilian volunteers to assist them, since the position is unpaid, and those who do volunteer are often rewarded for their community spirit by having to stay up all night watching prisoners without any form of compensation. In this case, as noted above, the Band Constables had to rely on the assistance of a 17 year old civilian guard who was so frightened of the prisoner he was guarding, he waited outside the building while, unbeknownst to him, the person he was to be guarding was alone in the facility, lighting the fire in his cell that ultimately took his life.

[321] At Wasagamack First Nation, the criteria for civilian guards was that individuals who filled these positions be of good behaviour and did not drink. There was no age or other requirements, and the training of these guards was done by the Band Constables themselves. In this case, this meant that the guard would have been trained by at least one individual who himself had no formal training as a Band Constable. It also permitted an individual to become a guard when his

young age, as well as his shy and timid disposition, made him entirely unsuitable for this position.

[322] While it may be unrealistic to expect that a small, remote community will have sufficient police resources on hand to handle all potential emergencies without resort to community assistance, it is not unrealistic to expect that civilians should be ready and available within the community to assist in situations such as the one in the present case, and that these individuals will be both qualified and trained for these positions.

**10) Funding for a training program and compensation for civilian guards at Wasagamack First Nation is necessary to ensure that supervision of prisoners remains at a consistent and acceptable level of safety.**

[323] Given the remote location of Wasagamack First Nation, as well as the troubled history of its Fire Department (see below), emergencies may arise that may either overwhelm existing firefighting resources, or become uncontrolled before firefighting personnel can attend. As noted above, firefighting ability is of critical concern in particular when freedom of movement is restricted, and where the danger inherent in any restriction of movement is further compounded by the frequent impairment of judgment and physical capacity of those confined.

[324] As noted in the body of the report, two of the three Band Constables in this case, and their civilian guard, had no training in firefighting. While such training may not have made any difference in the particular circumstances of this case, given the gross lapses in search and supervision that permitted the fire to start, combined with the egregious deficiencies in fire code compliance and observation of the prisoner that both permitted the fire to spread rapidly and prevented the extrication of the deceased from his cell, in other circumstances such training and equipment may well make the difference between a fire being quickly controlled or raging out of control; the difference between life and death.

**11) Wasagamack Band Constables or First Nations police, as well as their volunteer civilian guards, should receive training in basic firefighting procedures, as well as receive basic firefighting equipment, to allow early response to fires such as the one that took the life of Glenn Fiddler.**

## **Fire Protection**

### **i) Inspections and Code Compliance**

[325] The Inquest heard evidence that a Federal Labour Department inspection of major Band-owned buildings in Wasagamack had last been conducted in 1993, which included an inspection of the building that ultimately came to be used as the police station and holding facility. Other than an inspection of the Wasagamack School conducted in 1997, there were no other inspections of major Band-owned buildings conducted by the Federal Labour Department between 1993 and the time of the fire. Although facilities such as the RCMP detachment building in Island Lake were inspected on a regular basis, which was defined as every 2-5 years, 6 years had elapsed from the time of the last code inspection of major Band-owned buildings in Wasagamack until the time of the fire. An inspection of major Band-owned buildings in Wasagamack “was on the work plans for 1998, but, at the time, [the Labour Department was] somewhat understaffed, and so it was postponed one year.” Although, as noted elsewhere in this report, the Federal Labour Department had not been informed of the existence of a holding facility in Wasagamack (which would have had to meet stringent fire and building Code requirements), had there been a fire code inspection of Band-owned buildings prior to 1999, the deficiencies of the facility that claimed the life of Mr. Fiddler could have been identified and rectified.

[326] As well, the Federal Labour Program conducts building inspections of major Band-owned buildings on a voluntary basis. If a Band declines to permit a code inspection to take place, the inspection is deferred to another time. As noted, the pre-fire delay in inspection of the Band Constable’s office-between 1993 and 1999 in this case was not attributable to a refusal by the Band to permit an inspection, or to the policy of voluntary inspection. However, the policy of voluntary inspection could well have permitted a deferral of an inspection of the Band Constable police station had it been scheduled prior to the fire. As well, the policy of voluntary inspection, along with other factors, created a complete inability by the Labour department to conduct a post-fire inspection and investigation in this case.

**12) It is clear that the Federal policy of voluntary inspection has the potential of allowing unsafe and dangerous conditions to exist undetected and unaddressed on First Nations.**

**The creation of a fixed schedule of mandatory annual inspections for major Band-owned buildings on First Nations would prevent potentially critical inspections from being postponed, and would permit life-threatening code deficiencies to be identified and addressed on a**

**timely basis, before harm is done. The details of the inspections (for example, whether they would be conducted by Labour Department personnel, representatives of the Manitoba Association of Native Firefighters, a Fire Services Officer from the Island Lake Tribal Council, the Wasagamack Fire Chief, or a combination thereof) should be a matter of negotiation between the First Nation and the Federal government.**

[327] As noted in the body of this report, the Fire Chief at Wasagamack First Nation at the time of the fire was uncertain as to where the responsibility for fire code inspections at Wasagamack rested, and appeared to be unaware of fire code requirements for the Band Constable Police Station. It was also his evidence that he was not notified as to the results of fire code inspections.

[328] It was the Fire Chief's evidence that he had asked Chief and Council for funding to attend a course to be certified as an inspector, but had been turned down. Given the obvious relevance of fire code inspection and compliance to the role of fire chief, a high level of coordination is required between the First Nation Fire Chief and the Federal department responsible for code inspections-HRSDC. Given the isolated location of Wasagamack First Nation, and given that the Fire Chief is on site, that individual is in the best position to quickly and regularly identify code deficiencies.

**13) Funding and training of the Wasagamack Fire Chief to conduct code inspections at Wasagamack, as a supplement to, but not a replacement for, code inspections conducted by Human Resources and Skills Development Canada, would both increase the frequency of inspections, and also provide the Federal department with a highly improved system of notification with respect to situations of imminent danger.**

[329] An asset condition report (Exhibit 19) was prepared for DIAND- funded Band assets in October of 1995. An asset condition report was prepared for the building that became the Band Constable police station at Wasagamack. The report identifies a variety of potential fire code-related deficiencies within the building, including the absence of a fire alarm, fire extinguishers, and emergency lighting. The report also identifies the need to perform a fire/building code study with respect to the occupancy of the building. The report identifies the urgency level for a code study and the need to address the other noted deficiencies as "immediate." Prior to 2003, asset condition reports were prepared for DIAND every five years,

and as a result were no further asset condition reports prepared with respect to this building prior to the fire in 1999. As well, as noted above, a planned code inspection of major Band-owned buildings by representatives of the Federal Labour program was postponed from 1998 to 1999, which meant that there was no other form of Federal inspection at Wasagamack prior to the fire to identify and remedy these deficiencies.

[330] No evidence was presented to the Inquest to suggest that the noted deficiencies were addressed; to the contrary, the evidence at the Inquest was that at the time of the fire the building was not code-compliant.

**14) In addition to the requirement for mandatory, regularly-scheduled building inspections, a system of mandatory follow-up of identified code deficiencies, along with penalties for non-compliance, would prevent serious code violations from remaining unaddressed.**

[331] As was noted in this report, the fire in this case was investigated by the office of the Provincial Fire Commissioner. However, because the fire in this case occurred on a First Nation, and fell under Federal jurisdiction, no investigation was conducted by the Provincial fire investigator with respect to fire code compliance in the building where the fire occurred. As well, the information that was gathered by the Provincial Fire Commissioner's office in the course of its investigation of the fire was not shared with its Federal counterpart.

[332] The difficulty created by this policy is that if the provincial Fire Commissioner's office is the only agency to investigate a fire on First Nations' land (as was the case here), there is no mechanism by which deficiencies in fire code compliance can be identified and brought to the attention of the responsible Federal agency.

[333] The result of the investigation by the Provincial Fire Commissioner's office should not have been purely statistical. Where information with respect to fire code deficiencies, or serious deficiencies in local firefighting capabilities, or similar critical information can be recorded by the Provincial Fire Commissioner's office, whether or not that office is directly responsible for inspection and enforcement in that area, that information should be documented and a process created for inter-governmental sharing of that information. That information, properly disseminated, may allow similarly constructed buildings to be inspected, and problems in those buildings to be identified and addressed; it may also prevent other buildings from being similarly constructed and utilized. Even if the Federal government maintains its position that inspections of First Nation buildings will be conducted only on a voluntary basis, sharing of information would still allow the appropriate Federal

agency to make a specific approach to request that such an inspection be permitted. It may also permit deficiencies in firefighting capacity to be identified, and efforts made to address that problem.

**15) It is my recommendation that a protocol be established with respect to the Provincial Fire Commissioner's office for cases in which that office is the sole governmental agency investigating a fire on First Nations land. The protocol would direct that all relevant fire-related issues be examined by that agency, including fire code compliance within the area of the fire, and that the Provincial Fire Commissioner's office establish a process that will allow it to share information acquired in the course of its investigation with its Federal counterparts.**

[334] Evidence at the Inquest was that the RCMP was aware of the existence of the detention facility at Wasagamack First Nation; as noted, the existence of such a facility was in violation of the policies of the Department of Indian and Northern Affairs and the Aboriginal Policing Directorate. There was also evidence that the RCMP was aware of the condition of that detention facility, which was unsafe and in breach of both fire and labour codes. There was also evidence at the Inquest that because the Island Lakes detachment is established through a provincial funding scheme, rather than the Federal First Nations Policing Program, there is no specific protocol by which the RCMP regularly shares information with the Aboriginal Policing Directorate, the Federal department responsible for aboriginal policing. (A review of the sections of this report dealing with this issue, in particular "The Band Constable Facility", is necessary to place the role of the RCMP in context; inter alia, it should be emphasized that the RCMP did not approve the facility, and had no responsibility to identify or enforce fire or building code violations).

[335] Because of its remote location, travel to Wasagamack is often difficult; this difficulty has a number of consequences, including an effect on the ability of representatives of various Federal departments to attend to Wasagamack as frequently as they otherwise might.

**16) Because of the ongoing presence and involvement of the RCMP in the community, the RCMP is uniquely positioned to both provide not only advice and guidance to the Band Constables with whom they work, but also to alert other Federal agencies to potential problems that fall under Federal jurisdiction within the community. A protocol for the sharing of information amongst Federal agencies, including with respect to manifest problems that impact upon safety and health such as those**

**in this case, would provide an additional assurance that notice is provided to the agencies responsible for addressing them.**

**ii) Fire Department**

[336] The inability of the Wasagamack Fire Department to respond to the fire in this case was not a result of lack of training or diminished skill level. The Chief of the Wasagamack Fire Department was well-trained and knowledgeable. He had continued to attend ongoing training even after graduating from the fire college. The problem was not a lack of knowledge or lax procedures, but, at its most basic level, a lack of equipment to do the job.

[337] As noted in the body of this report (“The Fire Department: Equipment), the state of the firefighting equipment in the Wasagamack Fire Department at the time of the fire provided a complement to the complete lack of fire detection and firefighting equipment in the Band Constable police station where the fire took place. At the time of the fire, Wasagamack Fire Department had no functioning firefighting equipment: no fire truck, firefighting gear, breathing apparatus, ladders, tools, hoses etc. Even the fire extinguisher in the Fire Hall was gone.

[338] The state of the fire truck and firefighting equipment meant that there was no equipment to fight the fire that ultimately killed Glenn Fiddler. As a result, the Fire Chief had only his bare hands to use in an unsuccessful attempt to fight this major fire in his community.

[339] Evidence at the Inquest is that the current state of Wasagamack’s Fire Department is, if possible, worse than it was at the time of Mr. Fiddler’s death. There is currently no operational fire truck in Wasagamack, and there has been no firefighting equipment in Wasagamack for years. Evidence at the Inquest was that the present ability of the Wasagamack Fire Department to respond to a fire such as the one that took the life of Glenn Fiddler would be “very minimal”.

[340] Once notified, it took Wasagamack’s Fire Chief 5-10 minutes to arrive at the location of the fire. The absence of a fire truck, or even motorized transportation of any kind, meant that precious time was taken up when Wasagamack’s Fire Chief had to run from his residence to attend at this major fire in his community. As well, had the Fire Department actually possessed firefighting equipment and clothing, the absence of a vehicle would have prevented necessary tools and equipment from being transported to the fire.

[341] Evidence at the Inquest was that Wasagamack’s existing fire truck is not suitable for its terrain, and that had it been operational it would have had to be driven to the fire at a slow speed and would have taken some 15 minutes to arrive. It was the assessment of the executive director of the Manitoba Association of

Native Firefighters that Wasagamack requires a 4x4 fire truck to negotiate the terrain in its community.

**17) A key component of the restoration of Wasagamack's fire protection service will be the re-acquisition of its firefighting equipment, including an operational fire truck suitable for the terrain and location in which it will be used.**

[342] Evidence at the Inquest was that minutes and seconds can be important in the course of a fire. The absence of a mechanism such as a shared radio system that would have permitted immediate communication between the police and Fire Department meant that an additional 5-8 minutes elapsed between the time the Band Constables were first notified of the fire and their arrival at the police station, when notification could have gone out to the Fire Chief. This delay allowed the fire to burn for additional time before the Fire Department was notified. If a properly equipped Fire Department had been notified of the fire in a timely manner, and had they then been able to arrive at the fire at the same time as, or earlier than, the Band Constables, armed with equipment and protective clothing that permitted an effective firefighting/rescue effort, the result with respect to Mr. Fiddler may well have been very different.

**18) The creation of a communication system that permits immediate communication between police and fire services is an integral component of the reorganization of Wasagamack First Nation's emergency services.**

[343] As to how matters could have reached the stage that they were at the time of the fire, unlike the circumstances of the Band Constable Program, there is insufficient evidence to determine with certainty whether the problem with the Wasagamack Fire Department arose from insufficient funding levels, or if it was a matter of inefficient management within the First Nation. However, it should be noted that the Operations and Maintenance budget for the Wasagamack Fire Department is approximately \$56,000 per year, and that there has been no explanation offered by Wasagamack First Nation as to why that amount is inadequate to maintain basic firefighting services. It should also be noted that while the overall status of firefighting equipment at Wasagamack First Nation is generally comparable to that of the other First Nations within the Island Lake Tribal Council, fire trucks purchased by two of the other three Island Lake communities at approximately the same time as Wasagamack First Nation have remained operational. Prior to the fire, the Island Lake Tribal Council Fire Services

Officer discussed with Band Councillors raising the fire truck problem with the funding services officer of DIAND; there is no evidence that this occurred, or that the absence of firefighting equipment generally was brought to the attention of the Federal Department responsible for funding. Even after the fire, the FSO reported difficulty in obtaining information from the Wasagamack Band with respect to making funding available for payment for repairs to the fire truck.

[344] It is beyond the scope and evidence of this Inquest to determine appropriate funding levels for Wasagamack First Nation.

**19) It is clear, however, that restoration of fire protection services for Wasagamack First Nation is essential, and that the existing situation must be corrected. As an interim step, an allocation of emergency supplementary funding to Wasagamack First Nation to restore its Fire Department will address the immediate problem. Over the longer term, Wasagamack First Nation and DIAND must work together to attempt to identify additional funding sources within Wasagamack's budget to ensure a fully functioning Fire Department at Wasagamack.**

[345] Of equal importance is that concurrent with the restoration of Wasagamack Fire Department to operational status, measures be put in place to prevent a repetition of the present situation. Lack of monitoring and supervision appears to have been one of the factors leading to the disintegration of fire protection services in the Wasagamack Fire Department. In summary, there was no effective internal or external monitoring or supervision of Wasagamack's Fire Department.

**20) It is critically important that the establishment of proactive monitoring and supervision of fire protection services is negotiated between Wasagamack First Nation, the Federal Government, and the Island Lake Tribal Council to ensure that professional standards, in particular with respect to equipment and resources, are maintained, and that the citizens of Wasagamack First Nation are protected.**

[346] Similarly, evidence at the Inquest was that the Fire Department's most expensive asset, its fire truck, was rendered non-operational as a result of failure to comply with basic maintenance requirements.

**21) Wasagamack First Nation Fire Department has an obligation of responsibility towards the citizens it is duty bound to protect. Once its services are restored, the bare minimum to be expected is that Wasagamack First Nation will take all appropriate steps within its**

**control, including maintenance of its assets, to ensure that its assets and its citizens are protected.**

[347] Finally, it was the evidence of the Fire Chief that theft and vandalism had virtually eliminated all of his department's firefighting equipment. He testified that as a result of the problem posed by theft and vandalism, certain facilities at Wasagamack have 24 hour security, including the school and the nursing station. The availability of effective and properly equipped firefighting services on First Nations is as essential as its educational, medical, and police services.

**22) Clearly, given the limited resources available to refurbish emergency services when they have been depleted, it is necessary not only that firefighting services in Wasagamack be restored, but that when they are restored, adequate security measures, and funding for those measures, are put in place to protect them.**

[348] It is clear that if steps are not taken to ensure that fire and police services in Wasagamack are restored, protected, and maintained, another tragedy of proportions equal to that of the death of Glenn Fiddler is only a matter of time.

DATED at the City of Winnipeg, in Manitoba, this 7<sup>th</sup> day of September, 2005.

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**Sidney B. Lerner, Provincial Judge**

**EXHIBIT LIST**

<b><u>Exhibit No.</u></b>	<b><u>Description</u></b>
1	Medical Examiner's Report
2	Forensic Lab Report
3	Lab Report by Todd Christianson
4	Forensic Lab Report of T. A. Krepiakevich
5	Black Binder of Scene Photos
6	Aerial Photo of Fire Scene
7	Letter from Jerry Knott to Cpl. Muir
8	Drawing of Mesh Window
9	Wasagamack Band Bylaws
10	Medical Reports dated February 13 <sup>th</sup> , 1996
11	Letter from Cpl. Muir - not dated
12	Curriculum Vitae of Kenneth Hugh Carmichael
13	Notes of Kenneth Carmichael
14	Fire Investigator's Report
15	Red Booklet of Photographs
16	Curriculum Vitae of Diane Kocela
17	Canada Labour Code Part II and Regulations respecting occupational health and safety made under Part II of Canada Labour Code
18	Letter dated February 2 <sup>nd</sup> , 1995 to Monengo Engineering
19	Asset Condition Reporting System Report
20	Operation and Maintenance Guideline
21	National Building Code
22	Description of Wasagamack Band Police Station
23	Indian Affairs' Circular #55
24	First Nations Policing Policy
25	June 6, 2001 MKO Agreement
26	Wasagamack Police Station Proposal
27	Indian Programs Manual
28	Fire Department Analytic Review Report
29	M.A.N.F. Work Plan 2004-5
30	Specialized Inspection Plan for First Nations
31	Letter from Roy Smith with resumé
32	Resumé for Joe Guy Wood
33	Policing Proposal dated April 22, 1996

<b><u>Exhibit No.</u></b>	<b><u>Description</u></b>
34	Wasagamack Presentation - Policy Concerns 1997
35	Update of the MKO Policing Initiative
36	Federal Government Funding to First Nations
37	Presentation to The Honourable Allan Rock, July 18, 1994
38	Letter to The Honourable Rosemary Vodrey dated February 6, 1995, together with response dated June 30, 1995, and attachments
39	Letter to The Honourable Herb Gray dated November 6, 1996
40	Presentation to The Honourable Vic Toews dated August 7, 1998
41	Certificate of Completion for Band Projects Wasagamack First Nation dated February 20, 1992
42	Certificate of Completion for Band Projects Wasagamack First Nation dated April 15, 1993
43	Wasagamack First Nation Financial Management Plan 1994/1995
44	Certificate of Completion for Band Projects (Fire Hall Upgrade) dated April 13, 1995
45	Comprehensive Funding Arrangement 1995
46	Series of Wasagamack Band Comprehensive Cash Flow Spreadsheets 1995 to 2000
47	Comprehensive Funding Arrangement 1997
48	Indian and Northern Affairs Assets for Wasagamack First Nation 1997
49	Comprehensive Funding Arrangement 1998
50	Wasagamack Education Authority non-consolidated financial statements dated March 31, 1998
51	Comprehensive Funding Arrangement April 1, 1999
52	Comprehensive Funding Arrangement August 1, 1999 and October 16, 1999
53	Wasagamack First Nation Annual Financial Reports March 31, 1999
54	Wasagamack Education Authority non-consolidated financial statements March 31, 1999
55	Wasagamack Economic Development Corporation financial statements March 31, 1999
56	Wasagamack First Nation Remedial Management Plan

<b><u>Exhibit No.</u></b>	<b><u>Description</u></b>
57	Audited financial statements 1998/1999, February 10, 2000
58	Wasagamack First Nation Annual Financial Reports, March 31, 2000
59	Fiddler Inquest Wasagamack First Nation Summary
60	Wasagamack Capital Plan
61	Wasagamack First Nation Project - Water and Sewer
62	Submission from the Wasagamack First Nation, Fiddler Inquest and Appendix