

Justice, the Courts and Aboriginal People

Ovide MERcredi*

I am very happy to be here and I hope that the invitation issued to me will not be without some impact on the people here. When I was asked to say a few words, I immediately accepted because I have a lot to say about justice, about the courts and about aboriginal people.

I wanted to do it as best as I could from a personal perspective because I think that, sometimes, this is the safest course to take. It is difficult for someone to dissect a personal perspective and to challenge it especially if it is based on your own experience. Nevertheless, I will try to do some of that.

The reason I am speaking first is not because the Indians are first in the administration of justice but I was not around this morning when they were picking straws. So I have to go first although sometimes, based on my experience, the journalists go first in terms of reporting on the issues of justice as they affect our people. I will comment on that also, about how effective and how accurate they have been in addressing the justice concerns of the people I represent.

First of all, as Madame Justice Abella indicated, there is more than one public, when it comes to concepts of justice, and there is more than just one public when it comes to assessing the administration of justice. I believe that what has been absent in the operation of law and the administration of that law in Canada is our perspective as aboriginal people. We have not managed to break the walls sufficiently enough to incorporate our perspective into the decisions that are made about our rights as a people, by people who are unfamiliar with our history and our rights.

There is something to be said about a collective consciousness and just to make it clearer to you, I will call it the "tribal memory". Although the concept of a collective consciousness of justice can be given to any group in society, including women as a collectivity, men as a collectivity, or the French Canadians as a collectivity, I am using it in the context of First Nation — the Indian People — as a collectivity. So my talk today about tribal memory and about justice is in that context.

Each generation grows up with a knowledge base, founded on their culture, and which is transmitted to the young people as well as to all the citizens of that culture. This process operates within the Cree society, within the Mohawk Society, within the Montagnais society and within the indigenous society in Canada. There is an ongoing

* National Chief, Assembly of First Nations, Ottawa, Ontario.

exercise of transmitting knowledge from generation to generation. This is what I call "tribal memory".

When it comes to the administration of justice, the recollection I have of it came from my parents and from my community. That recollection is that someone called a "judge" has a court where people are taken to appear. Normally, the RCMP takes you there, and something happens in that courtroom. It is not something which is integral to our community, but an outside institution which is not ours and which belongs to another society.

This is a powerful idea : justice, as it is being administered in this country, is not your institution. You grow up with that knowledge as a young person, and you retain that as part of your "tribal memory" as you get older. It colours your assessment of everything in terms of assessing the administration of justice.

Later in life, when I was about 12 or 13 years old, I went hunting not very far from home and on my way back, I ran into a conservation officer. I was charged with the offence of hunting out of season. But my people have a treaty, and within that treaty we have the right to hunt. It is one of those exchanges that were made between our People and Canada. However, for some reasons, laws were passed in 1919 making it illegal to hunt migratory birds out of season.

The "tribal memory" had nothing to do with the *Migratory Birds Act*, it had to do with the treaty which gave us the right to hunt, fish and trap as we had always done in the past. This is what I learned, this is what I was taught and this is what our people practiced. So when you are confronted with the necessity to appear in court, you develop a sense of injustice, a sense that something is wrong, that somehow this outside system is violating something very integral to your society — a treaty which was made between your People and the Crown.

Now, you don't think like that when you are 12 years old. That comes later, as you grow older. At the time, all you know is that an injustice is being done to you. You grow up with that understanding and you transfer that understanding. You become a transmitter of tribal memory. That experience will be passed on to my own children, to my friends, and to anyone else who wants to hear about it.

The point I am making is this. When I went to court, I was found guilty. Found guilty because I had violated the statute but, as I stood there feeling very innocent, I did not think that I had done anything wrong. However, the fact remains that the system, the institution itself, decided that I was in the wrong and I was given some kind of reprimand in Juvenile Court.

Our collective memory, as a people, is not only about individual experiences like this one, which I used as an example to take you in this direction. When it comes to our collective perception of the courts, the first assumption we make is that this is not "our" court. This is a court which belongs to the other society. The other assumption we make, as we are being taken to court as defendants either in a criminal or civil matter involving treaty and aboriginal rights, is "I don't think we will find justice in that system". But, we don't have a choice, we have to go to court.

You will see many instances, in your own records and institution of justice, where we actually take the initiative to litigate on a treaty or aboriginal right. It is done, but rarely, and when it is done we usually lose really big as, for instance, in the aboriginal title case in British Columbia. This becomes part of our "tribal memory". It is reinforced from generation to generation and you, as an indigenous person, grow up and live this assumption that you will never find justice, for yourself or for your people, in that institution.

The third assumption is that our perspectives will never be incorporated into the reasoning of the courts. It will always be the perspective and the interests of the dominant society that will dominate the reasoning of the court. The public interest becomes something, in our opinion, which means "white" interest — not "Indian" interest. We go to court with the understanding that it is very unlikely that our perspective will be accepted, but we will try anyway. Sometimes, it works out.

On occasion we will run into a judge who will incorporate our perspective into his judgment, for instance as Brian Dickson used to do. But we don't have Brian Dicksons in the Supreme Court anymore and I am not aware of any Brian Dicksons in the courts of appeal across the country either. We don't really see many people in the system who are champions of our perspective in terms of the administration of justice. And this is the other assumption we have as a people about the administration of justice — there are very few, if any, champions of our rights who are part of the administration of justice.

Even when we are told that the federal government has a fiduciary responsibility to us we know that, while it may give us some comfort to think that, maybe, the courts will force the Department of Justice to defend our rights because of their fiduciary role, we know that it will never happen because what happens is the opposite. The Department of Justice becomes our adversary in the courts, and even though the federal government is supposed to have a trust and fiduciary responsibility concerning my people under our treaty and aboriginal rights, the role they play in terms of the administration of justice is adversarial.

This is why, at the end of September 1995, we protested against a conference involving international judges from all over the world, which was being sponsored by Canada. The Chief Justice of Canada was the co-chair of this conference. On the panels dealing with aboriginal issues, such as language, culture, justice, and the idea of land claims, were individuals from the Department of Justice. No one at that conference was there to present the indigenous perspectives for the benefit of these judges from around the world.

For us, while one of the topics they were talking about was the independence of the court, our position as leaders is that there is no independence of the court in this instance. A conference is organized where two panels, made up entirely of justice lawyers, from a Department of Justice in Canada known to be our adversary in the courts, and they are giving their perspective to the world community about the scope and the nature of our rights. We demonstrated. Only one panel, involving land claims, had an indigenous woman as a speaker, that was all. We contacted the press and they were there but there was not a single report about our protest, not a single commentary. Why is that? Could it be because the Chief Justice of the Supreme Court was there? I think that, in part, it had

something to do with it. The media themselves have certain things they do not report on and when Indians challenge the institutions, as we were doing, they do not report on that because it just isn't done.

When we deal with our tribal memory, this becomes part of it. The conference involved judges from around the world, and Department of Justice Officials were the only ones providing information to those judges about our position as indigenous people. This tells us where the impartiality of the court lies. Although the court was not the one presenting the conference, the individuals who organized it and the ones who were there sit in the courts.

You have to question their impartiality because you have to ask yourselves who they are listening to. What perspective are they hearing? Whose perspective is being reinforced? It is obvious that it is the perspective of the people within the system and the aboriginal perspective is not being heard. As things stand right now, when it comes to our Indian Treaties, you will understand why we are reluctant to go to court to defend our treaties. We don't know what the judges will say because our perspective on our treaties will never see the light of day in the courts because of the rules of evidence. The system itself is so rigid right now that its inflexibility does not allow for our people to provide the evidence to support our perspective. All the different rules work against us. Who should give evidence about the nature of the treaty. It should be given by the people who possess that "tribal memory" about "The Treaty" because there is a "tribal memory". In some of our communities, ceremonies are regularly conducted — every year — to reaffirm the Treaty, to remind the people of what it means and to transfer that knowledge from ceremony to ceremony.

The Indian perspective of the Treaty is very different from that of the Department of Indian Affairs and its officials or from that of the Department of Justice and its lawyers. They believe that with the Treaty we surrendered and extinguished our title. Our belief is that we shared the land and never extinguished our title. What belief is going to prevail in the courts? Whose interests would dominate at some point? Aboriginals make up less than one percent of the population. In terms of the public interest, we are a small minority. However, when it comes to the interest of the provinces, this is a different matter. Because our treaty perspective will challenge the right of the provinces to control the land and resources which they now say are under their jurisdiction, you can be sure that, should we go to court on that point, all the Attorney Generals will be there to defend the Constitution of Canada — the provisions that transfer that property from the Federal Crown to the Provincial Crowns — that mandates the provinces to deal with resources and land in the provinces.

This is why we never go to court. We know what the outcome will be. We will lose the case because our perspective will never survive in the current system of justice.

What do you do about it as judges? I am not sure that there is very much you can do. That is part of your culture, that is who you are. You interpret yourselves, you express yourselves, you are what you are and this is your institution. You don't question it at all in terms of its impact on a different society because the assumption you have is that we should assimilate and there should not be any special rights. We should all be regarded as individuals operating under the same laws and that is a pretty powerful idea. We run into it

all the time, and not just in the courts. In negotiations over any issue with the Crown, we run into that idea. The idea that it would be against public interest to grant special interest, and some reporters are dedicated to reporting their belief that there should never be "special" interests. This is also an opinion which lives within Canadian society. I don't know how strong it is, but it is there.

This is sometimes the subject of debates amongst ourselves as leaders and the consensus usually is "why bother, why don't we just move on." Do the best we can by asserting our rights. However, when we do that, we run into the RCMP because when we assert our rights, someone says "you don't have that right". The judge is not the one who says that, unless there is an injunction granted. It usually comes from a white politician.

I will give you an example of very recent memory. In Saskatchewan, Indian Chiefs in Council on the reserve decided that gaming was within their jurisdiction, so they set up a casino. They opened the doors and were raided by the RCMP because the NDP government in Saskatchewan did not think that the Indians had jurisdiction over gaming. Since then, the courts have supported that same view in Ontario. Indians have no jurisdiction over gaming. This right belongs to the provinces by virtue of the *Criminal Code*.

Therefore, our rights are always interpreted within the context of the laws that exist in the dominant society. If there is any flexibility, any willingness to recognize our rights, it is always an effort to make it a little more flexible but it is never an endorsement of our perspective. It is our perspective somehow assimilated into the existing laws. Some judges take the view that they are there to interpret the law and until they are told that, under the law, Indian people have jurisdiction over gaming, then the right does not exist.

This is why there is such a gap between the aboriginal people and the larger society on the issue of inherent rights. That is why no progress has been made in terms of the aboriginal people having authority to proceed on a range of subject matters or to make our own laws. Somehow this is considered contrary to the public interest — against the law as people interpret it now.

But, our "tribal memory" will carry on from generation to generation and my experience as a leader is not just mine as Ovide Mercredi, it is a collective experience of Indian leaders across the country. My frustrations with the administration of justice are theirs. My assessment of the court system is their assessment. The next generation will have that knowledge and it will pass on from generation to generation. Where does it end.

If the Canadian government wants to integrate society, if they want to harmonize our society with the rest of the country they have to do it on our terms. In other words, it has to be a negotiated social contract, it cannot be dissenting positions. However, the history of our people is that the federal government, through their bureaucrats, have always imposed decisions on us. This, again, has been made evident by the most recent announcement by Ron Irwin on the inherent right to self-government. This paper, devised in secret without any input from our people, was announced as a cabinet decision recently and we were told to fit into it.

We can't because it does not reflect our perspective. The cabinet decision reinforces provincial and federal jurisdictions, and forces us to assimilate into the current system of justice and current political structure. In effect, all we can have in the mind of this government is a delegated form of government. As First Nations, we have no inherent powers to govern ourselves and if we are to acquire any, it is only because they have granted those powers to us as a result of negotiations. The problem is that they have predefined the outcome of negotiations to the policy discussion paper which narrows down the potential result to making the existing system safe in order for it not to become disruptive. It is not altered so we have to disrupt *ourselves* and alter *our* perspective in order to get self-government.

This is also part of our collective memory. The imposition of laws, the imposition of policies and the injustice which results from it all.

One more personal comment before I conclude. Because of the *Indian Act*, I was not an Indian in the mind of the Canadian law until I was forty-four years old. My children, my daughter Danielle, are not considered Indians within the meaning of the *Indian Act* right now. However, I have always seen myself as an Indian, as a Cree, because this is what I was raised as. But, if you interpret the *Indian Act* and apply the law as a judge, you could not have regarded me as an Indian until Bill C-31, which allowed my mother to be reinstated, was passed because she had lost her right as an Indian woman when she married my father who was a non-status Indian, or a Metis. That is the law. That is part of our collective memory and there is no way anybody in this room can convince me that this law is just, that this law is right. But the law has affected me, and it still affects my family. This is why we talk about our own laws, this is why we talk about our own inherent rights — to try to preserve our society, our own culture, our own rights. But, at the same time, we talk about negotiations, we try to have an accommodation. We are not advocating violence and we have not advocated having these rights defined by the courts. We believe in political solutions.

The difficulty we face as Indian leaders in advocating political solutions is that the politicians who make the laws don't share our perspective either and they see it as outside of the institution of government, something peculiar and in many cases, something to be ignored — which, by the way, they do very effectively.

This is the perspective I wanted to share with you. When we look at the system of justice, we have assumptions about it. Our assumptions are not part of the public opinion because the press doesn't pick them up. They are not part of our public opinion, they are the "white press" and they only talk about "white" public opinion, nothing else. This is all they know and this is all they report. Never the Indian perspective. Eventually, I guess things will change, but we will not change. We will always, always, have that "tribal memory" which will be our pride and which will be asserted by our people from generation to generation. This is what you must remember.

And the courts can help. Brian Dickson helped me a lot in the liberal interpretation of treaties. He helped the Indian people a great deal with the idea of fiduciary responsibility and by interpreting Section 35 in a very liberal way. So justice can help but right now, as I mentioned earlier, we are reluctant to go to court because we are not sure which judge we are going to appear before or what his opinion will be. Your

institution is based on precedent and — whether good or bad — it is applied and a bad decision could mean a hard time for the Indian people.

