

Prospects for Equality for Aboriginal Persons and Nations in Canada: Reflections on the Work of the Royal Commission on Aboriginal Peoples

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I am honoured to be able to speak at this Conference on the prospects for human rights. I have been invited to offer some reflections on implications of the work and experience of the Royal Commission on Aboriginal Peoples for equality rights. In advance of the public release of the Commission's final report by the federal government, I am able to offer some general and some specific comments drawn from oral and written submissions made in the many public hearings we held across Canada, and from the reports that have already been publicized.

If human rights are understood to vest in each individual person because we recognize, value and respect the essential humanity of each person, then human rights are an appropriate mechanism for bringing a measure of justice to Aboriginal persons in Canada. It is painfully obvious that Aboriginal people want to be recognized, valued and respected as human beings.

If human rights mean they must therefore be treated equally and receive an equal benefit in the distribution of social goods of Canada, what conclusions must be drawn from the following accounts?

I was privileged in the course of the public hearings to meet seven women who were present at the signing of Indian treaties. I visited one, over ninety years of age, in her home in a remote northern community. This delightful person, full of humour, kindness and generosity of spirit, lived in a one-room plywood shack without plumbing or central heating, like all the other homes in her community. She offered me no complaints, no entreaties to equality or human rights. I asked her what to tell the government of Canada. "Uphold the treaties" was her reply.

The six others all lived in one Ontario community and one recalled the day she first saw a "White Man". Their faces were bundles of grandmotherly wrinkles wrapped in modest shawls as they spoke to us in Cree, their only and ancestral language. This is the story told by one of them.

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A woman from her village became ill and took a plane to the southern town to get hospital care. She went by herself. She, like all the grandmothers who spoke to the Commission through interpreters, spoke only Cree and no one at the airport in the town spoke Cree. A missed appointment here, a misunderstanding perhaps, and a Cree woman was found frozen to death on the street. The great-grandmother who spoke to us had made up her mind about going south to the hospital. "If I get sick", she said, "I will not go. I will die here".

I believe these persons should be accorded special recognition as national treasures, by themselves symbols of the history of Canada and what was to have been the forging of an honourable political relationship by treaty. How far are we from that vision?

The unilingual grandmother who resides in the town where the strangers live, or close to it, has another story. Her grandchildren are losing their ancient language. She cannot share with them the subtleties of meaning that permit the younger generation to peer into the soul and heart of their ancestors, to understand the world through the lens of their culture. And when the language dies, it dies absolutely, as Aboriginal languages are doing progressively across this country. There is no core population of indigenous speakers in a motherland over the sea to maintain the language. An indigenous Canadian language dies an equal death with imported languages, with unequal effects.¹

And what did the grandchildren at school in the towns have to say to the Royal Commission? Some of them cried as they told of the burden of being an aboriginal person in Canada. Wearing their group identity in their physical appearance, they are vulnerable to the racist taunts of every coward who wishes to inflate his own shrunken ego. Descendants of ancient societies in their ancient homelands, they are now rejected in the cities of strangers, their life chances and prospects for happiness dimmed by the unequal respect their identity and circumstances have given them. I recall the words of the children's teacher who told us she was tired of hearing them say "I can't". Is it notions of equality that would have us hope for a day when all the aboriginal children can stand up and shout "Yes I can!". And shout it in their own language?

I have heard stories in federal prisons about life chances torn away from children forced to grow up in the inhuman brutality of foster homes. I have seen an inmate weep in front of fellow inmates and prison guards as he pleaded with us to try to change the system so that children would not grow up in an atmosphere like he did, and end up where he was. I can recall the horror of the realization that struck me later, when upon visiting a women's prison, occupied mostly by aboriginal women of course, I learned that they too had children, and that upon their incarceration their children were taken away into the foster home system.

1. It appears that the *Van der Peet* test means that Aboriginal languages are protected as aboriginal rights integral to the culture of each Aboriginal people. Quare, whether anything is gained because these are positive rights that require government action to make effective, or whether the courts will interpret them merely as negative rights protected by interference from governmental action: *Van der Peet v. The Queen* (1996), 137 D.L.R. (4th) 289 (S.C.C.).

What notion of justice is it that warrants the label criminal justice system? There is certainly no equality in the statistics about or the treatment of Aboriginal people. The Commission heard from many elders, and I recall the words of Art Solomon who has the experience to justify his label of the prison system as "an Evil Empire [...] a blasphemy in the face of God".

There are many stories of injustice and inequality from the hearings of the Commission. Stories of removals of entire communities, of removals of young children to grow up in residential schools designed to obliterate their identity and culture, often breaking their spirit in the exercise. Stories of sombre families watching the coffins of their relatives floating on the new lake formed by the hydro dam; stories of despair and violence, of places where abnormal behaviour has become accepted as normal.

Stories like this are complemented by many stories of courage and tenacity, stories of hope that testify to the capacity to endure and the decency, good humour and generosity of most people in most places.

So far, I have been dealing with cases that appeal to notions of individual equality and justice that are well known in Canada. In our hearings, the Commission found that these concepts of equality are viewed with suspicion by many Aboriginal people in this country. There is a wide perception linked to human rights notions of equality that Aboriginal people are only welcome to the fold of humanity if they come walking, talking, thinking and behaving like everybody else.

This is not to say that human rights are not an appropriate vehicle for pursuing the legitimate claims of indigenous peoples. The major problem with the existing regime and corpus of human rights from the perspective of Aboriginal people is that it is assimilationist. If notions of human rights are to inform the prospects for justice in Canada for Aboriginal peoples into the twenty-first century, however, they will have to be informed by the values underlying the claims of Aboriginal peoples as political groups with a unique constitutional status as historic nations.

Some of the group claims of Aboriginal peoples have been expressed in the language of self-determination. It seems to be widely recognized that "self-determination" offers a range of political choices to a people in whom the right is vested, from political independence to agreed complete assimilation. The regime and corpus of human rights might be expanded to include the values underlying the concept of self-determination, a process that has already begun as "self-determination" becomes more and more infused with related human rights norms.² A scholar has proposed that these values would include "a democratic, participatory political and economic system in which the rights of individuals and the identity of minority communities are protected".³ In this view, self-

2. See H. Hannum, "Rethinking Self-Determination" (1993) 34 Va. J. Int'l. L. 1; S. James Anaya, "The Capacity of International Law to Advance Ethnic or Nationality Rights Claims", (1990) 75 Iowa L. Rev. 837.

3. H. Hannum, *ibid.* at 66.

determination should come to mean not statehood or independence, but the exercise of what might be termed "functional sovereignty".⁴

I suppose that those charged with the making of a political choice under the banner of self-determination have a duty to make their choice in a manner that maximizes the opportunities for their people to maintain their group identity and survive politically and economically. In other words, self-determination must be exercised with its basic goals in mind; it should not be seen as a licence to commit collective cultural suicide. Again, the norm behind the concept of self-determination "includes the right to be different and to enjoy a meaningful degree of control over one's own life, individually and collectively, as well as the right to participate in the affairs of the larger state".⁵

The more familiar concept is that of Aboriginal self-government, and the Royal Commission has proposed that self-government is an aboriginal right recognized by common law and protected by the Constitution. There is a shorthand expression coming into vogue called "the inherent right". This expression has been used to emphasize that such a right is not created by legislation or the Constitution, but recognized as a pre-existing right derived from Aboriginal peoples' occupation of Canada before anyone else. The Commission's approach to the legal argument has been to describe the right protected in the Constitution as being in its source an inherent right that is now circumscribed by the Constitution.⁶

In the final report on Justice issues released in February 1996 the Commission argued that the *Canadian Charter of Rights and Freedoms*⁷ applies to the laws and acts of aboriginal governments:

There is no question that the Canadian Charter of Rights and Freedoms reflects a particular approach to balancing individual and collective rights. The unmodified application of the Charter to Aboriginal nations might well make development of Aboriginal justice systems that are responsive to the needs of the people difficult but not impossible. Fortunately, we do not have to choose between having the Charter apply to Aboriginal nations in precisely the same way as in the rest of Canada or not having it apply at all. The provisions of the Charter itself, particularly section 25, operating in conjunction with the development of unique Aboriginal charters, means

4. *Ibid.*

5. *Ibid.* at 67.

6. Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services, 1993).

7. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

*that Aboriginal nations have a degree of flexibility within the provisions of the Constitution Act, 1982 to set their own course in the justice field.*⁸

It is the maintenance of permanent group difference that is seen as offering the best route to the political autonomy to establish a political regime that is needed to protect the individual and group identity, territorial base, culture, and values and ensure democratic participation in political and economic life. In this context, it is important to appreciate that the Aboriginal nations in whom group rights are vested are in their nature political communities. The membership of these nations involves the exercise of political choice by both the members and the community. The false description of Aboriginal self-government as a "race" issue is used by opponents as an ill-conceived appeal to the public's well-placed apprehension about race-based governments.

In conclusion, the prospects for notions of human rights being able to do justice to meet the legitimate aspirations of Aboriginal people in Canada require a consideration of what rights attach to distinct political communities, including historic nations of Canada, which includes many Aboriginal peoples as well as the more familiar questions about rights that attach to individual persons on account of the respect due to their essential humanity.

It is right to accord respect to different values about how the project of building happy neighbourhoods within distinct nations should be conducted. If large nations have such group rights, surely equality requires the small and weak nations to have them too. Canadians are generally supportive of the Golden Rule injunction to treat your neighbour as you would yourself like to be treated. Aboriginal people are challenging Canadians to please consider their neighbour's view on how they would like to be treated.

8. Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services, 1996) at 267.

