

Accommodation of the Aboriginal Justice Perspective

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This paper was prepared as an introduction to a panel organized to explore five matters, described as follows :

1. Examination of the issues, experiences and opportunities for creating new space in the justice system for aboriginal cultures and values, excluding discussion of aboriginal justice theories, explore current realities and applications, and exchange of views on incorporating aboriginal justice values in the Canadian justice system.
2. Discussion of constitutional issues surrounding the response to demands of the aboriginal community for self-government and for a responsive, responsible, and effective justice system.
3. Discussion of constitutional issues including possible constitutional impediments to the creation of blended criminal law systems referring, for example, to section 15, section 25, section 35 of the Charter and section (91)24, section (92)14, and section 101 of the Constitution Act.
4. Exploration of how the justice system is responding to the demands of the aboriginal community in the current constitutional context.
5. Catalyzing thought and discussion on these timely and complex issues.

I. CONTEXTUAL BACKGROUND

A debate is emerging in many circles regarding the creation of a separate justice system for aboriginal peoples, or a single justice system for all Canadians, or a comprise reflected in a blended, incremental system.

In my opinion, there are two salient components to the discussion : firstly, the political and legal issues surrounding self-government, particularly the recognition of aboriginal and treaty rights of the aboriginal peoples of Canada; secondly, whether the existing legal system is liberal and flexible enough to accommodate the concerns of aboriginal peoples. A sub-issue arises under the second component. If you accept that, in theory, the existing system can accommodate the concerns of aboriginal people, what impediments exist when one attempts to transfer the theory into practice? A further is whether there is a political will and a legal ability to overcome identified impediments.

The relationship between aboriginal and non-aboriginal Canadians is terribly flawed. A new positive relationship is desperately needed. How will the new relationship develop in the current constitutional framework, given that we have shared federal and provincial jurisdiction over criminal justice administration? How will this new relationship evolve, given that aboriginal and treaty rights of aboriginal peoples are recognized and affirmed in the constitution?

In 1991, the Federal Government launched an Aboriginal Justice Initiative to provide advisory and financial support to aboriginal communities and organizations in order to conduct research, consultation, and projects to develop new approaches and models for culturally appropriate legal services to aboriginal peoples.

In 1993, in Red Book One, the Liberal Party of Canada committed, "to act on aboriginal justice issues as a priority and to consider major reforms to the present justice system to accommodate the unique cultures of aboriginal peoples."

In 1996, the Federal Government approved the Aboriginal Justice Strategy which was designed to promote a paradigm shift in the delivery of justice to aboriginal peoples. The Department of Justice was mandated to undertake the following primary activities :

1. The negotiation of justice components of agreements negotiated under the aboriginal self-government policy; the negotiation of agreements pertaining the administration of justice with 25-30 First Nations', Inuit and north of 60 degree latitude Metis communities intending to enter into self government negotiations within five years;
2. The negotiation of agreements that would give the Aboriginal community up to 12 urban and rural communities off reserve a significant role in dealing with aboriginal accused;
3. The establishment of an aboriginal justice learning network comprised of mainstream justice system and Aboriginal community representatives which would :
 - a) act as a vehicle of communication between the mainstream justice system and Aboriginal communities and among Aboriginal communities;
 - b) help participating communities prepare for negotiation and ensure that Aboriginal women participate as full partners during both the negotiation and implementation phases;
 - c) train enforcement officers, prosecutors, judges and members of Aboriginal communities in the objectives, values and mechanics of the approaches to justice embodied in the agreements;

to help participating communities and the mainstream justice system implement the agreements, with a focus on ensuring that the new approaches are fully integrated into the day-to-day operation of the justice system.

In 1997 the Liberal Party of Canada, in Red Book Two, known as *Securing Our Future Together* the platform of the party, reiterated a commitment to working with Aboriginal peoples "to improve their quality of life and to expand the opportunities available to them." It stated :

Alternative community-based justice initiatives [...] are critical elements of our efforts to ensure that Aboriginal peoples can participate fully and equally in Canadian society. Community based approaches like family group conferencing, peacemaker tribunals, and sentencing circles are being developed as alternatives to the regular justice system process. An Aboriginal Justice Learning Network will provide community support on training and develop a manual of best practices in community-based justice. Police, crown attorneys, judges and other participants in the justice system will be trained and encouraged to refer appropriate cases to alternative processes. The government will ensure that Aboriginal women are involved in the development and implementation of these practices.¹

Therefore, since 1991 the Federal Government has had a series of policies dedicated to making the current justice system more responsive and therefore more relevant to the needs of Aboriginal peoples. *The question remains, what degree of success has been attained by the implementation of these policies?*

These policies were developed as a response to the following background.

Over the last decade the relationship between Aboriginal people and the Canadian justice system has been the subject of reports from over 30 public inquiries, task forces, and a Royal Commission. These include the Manitoba Justice Inquiry, the Cawsey Report in Alberta, and the Linn Commission Report in Saskatchewan. These reports have consistently concluded that Aboriginal people regard the existing justice system as alien and incapable of meeting their legitimate needs and expectations. These reports have documented that Aboriginal people in Canada experience disproportionately high levels of arrests, convictions and imprisonment and once they are in prison they are less likely to have the benefit of early parole. The present system does not command allegiance from the Aboriginal community because it does not reflect Aboriginal values. It is often seen as an imposition of the values of another culture which presumes to know better.

The rate of incarceration of Aboriginal people is nearly four times the national average.

The adversarial nature of the criminal justice system operates as a significant barrier to acceptance in Aboriginal communities. Traditional Aboriginal approaches to justice are generally based on integrated, consensus based, restorative justice approaches. The principles that support those approaches are not easily reconciled with the adversarial, evidenced based mainstream justice system. The situation is aggravated by the fact that many Aboriginal people do not understand the justice system, a system which knows relatively little about the customs and traditions of Aboriginal people.

1. Aboriginal Justice Learning Network Report on Activities, 1997.

The non-Aboriginal community generally has difficulty accepting that there is more than one way to look at the world. Further, it has difficulty accepting that Aboriginal people do in fact look at the world from a different perspective. We need to accept that proposition. This is critical. If we accept the notion, we must then turn the telescope around and look through the other end; we have to see justice from the Aboriginal perspective.

Aboriginal people have a different notion of justice. It is not a set of rules to achieve some abstract notion or principle. Rather it refers to a natural order in which everyone and everything is interrelated. Justice does not stand outside society as a system, but sits within it as a part of the fabric of society. It is part of the responsibility felt by each member of that society for one another. Justice requires a holistic approach. When a crime occurs it is seen as a hurt against a community of people, not as against an abstract state. In addressing crime there is more emphasis placed on modifying future behaviour than on penalizing the wrong doer for past misdeeds. This emphasis on restorative justice or justice as healing, on making whole that which is broken, necessarily involves the community at large, for it was that community that was damaged. Justice is about restoring harmony in the community. The common goal is to provide safe communities and reduce crime. We must acknowledge that we might have to reach that goal using a different track.

II. TREATY AND ABORIGINAL RIGHTS

In November 1996, the Royal Commissioner on Aboriginal Peoples released its report which clearly indicated that treaties created a social, perpetual relationship designed to evolve as different needs arise in the future.

In January 1998, Jane Stewart, the Minister of Indian Affairs, in "Gathering Strength, the Government of Canada's response to RCAP" said, regarding the treaty relationship, that treaties between the Crown and First Nations are the basic building blocks in the creation of our country and that a vision for the future must recognize the rights of Aboriginal people and the treaty relationship.

At the time of treaty making, chiefs such as Cote and the Gambler in Treaty 4 and Mistawasis and Ahtakakoop in Treaty 6 entered into the treaty with a vision for their people, for the children yet unborn. These highly revered First Nations statesmen were builders of Canada. They helped to put the treaties — a key building block for our country — into place.

I suggest their efforts to obtain and maintain "just terms" for the Cree and Saulteaux Nations' union with Canada represent the beginning of Canada's search for a soul, and continue to speak to us about the unresolved contradictions in our national values and identity. One problem is that there is limited understanding of the First Nations' dynamics, needs and aspirations. In many ways the First Nations have been excluded from political discussion forums which help to form our core values.

The treaty making process demonstrated mutual recognition of the parties' authority and capacity to enter into treaty. The process and the relationship it created required the honour of the Crown and the honour of First Nations to maintain the relationship and to maintain the vision of the statesmen present at the time.

In 1763, King George III granted the Royal Proclamation which gave guidelines for peaceful expansion of territory in British North America. The Proclamation is viewed as the *magna carta* for Aboriginal rights because it protected First Nations lands and recognized Aboriginal peoples as nations.

While the Royal Proclamation was derived from the King and set the legal framework for treaty making for the British Crown, the First Nations had long experience with a tradition of treaty making according to their own laws, customs and protocols, and elders explain that the laws governing treaty making are derived from the Creator.

III. THE CURRENT CONSTITUTIONAL CONTEXT

The Royal Proclamation has become one of the founding constitutional documents of Canada. It is appended as a schedule to section 25 of the **Constitution Act** 1982. Further, section 35 of the same Act constitutionally entrenches Aboriginal rights and treaty rights.

Yet treaty relationship has not found its rightful place within the Canadian state. Rather, the good intentions of the original treaty parties were replaced by the paternalistic policies inherent within the **Indian Act** regime.

The **Indian Act** took away responsible government. A new relationship should restore to the First Nations accountable, transparent, and responsible government.

The future of Canada when dealing with Aboriginal justice issues is inextricably linked to the definition and implementation of Aboriginal rights and treaty rights.

When I speak of "The Honour of the Crown," I mean our capacity as Canadians operating in a mature society to act from principle. Honour lies in loyalty to fundamental values that lie behind the Crown's authority. What are the core values of Canadians? How are those core values reflected in the relationship between the First Nations and Canada, in the past? More importantly, how will they be reflected in the relationship in the future? How will those values be demonstrated in practice in the future vis-à-vis the First Nations?

I believe that Canada, as one of the world's leading democratic countries, should be prepared to act in a manner that demonstrates that **justice, honour** and the **principles** that we so painstakingly negotiated in our constitution are given prime importance, as we define and implement Aboriginal rights and treaty rights, in respect to Aboriginal justice.