

THE PROVINCIAL PERSPECTIVE ON THE SPLIT IN JURISDICTION

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INTRODUCTION

The purpose of this paper is to provide a better understanding of the split in jurisdiction between the federal and provincial governments and to outline how that jurisdictional split relates to the right of self-government of Aboriginal Peoples.

I will sketch the general legislative and institutional framework within which the Canadian criminal justice system operates. The emphasis will be on criminal justice, although there are larger perspectives to the administration of justice. I'll then comment on the wider debate of the justice system's failings in relation to Aboriginal Peoples, and the role that justice reform might play in the resolution of these failings. I will comment on directions Saskatchewan Justice hopes to pursue, keeping in mind that our capacity to succeed hinges in substantial part on the co-operation and goodwill of our Indian, Métis and federal colleagues. I will conclude by commenting briefly on Saskatchewan's stance on Aboriginal justice reform and self-government, focusing again on criminal justice issues.

THE LEGISLATIVE AND CONSTITUTIONAL BASES OF CRIMINAL JUSTICE

The federal nature of Canada means that the criminal justice system is characterized by a complex set of institutional and administrative arrangements. The general framework within which the federal justice system operates is made up of several pieces of legislation. In the conventional view of this jurisdictional universe, the whole is divided between federal and provincial governments, leaving no room for Aboriginal governments.

In the last ten years, however, and profoundly and in more focused ways in the last year or two and perhaps even in the last weeks, this conventional framework has been subjected to increasingly rigorous questioning and is now in the process of being remade. It is useful, though, to speak about the conventional framework and to use it as at least one reference point in contemplating or re-contemplating that universe of jurisdictional

responsibility of sovereign governments.

The framework includes the *Constitution Act, 1867*, the *Criminal Code*, the *Charter of Rights and Freedoms*, and the *Young Offenders Act*. Under the *Constitution Act*, the federal Parliament has the authority to legislate criminal law and procedure. The provinces, in contrast, have responsibility for the administration of justice, as well as for property and civil rights.

- ♦ **LEGISLATION.** In Canada, criminal law is primarily set forth in the *Criminal Code* and its jurisdiction is assigned exclusively to the federal government. There are 840 sections in the Code that cover substantive offences and procedure. The *Criminal Code* applies nationwide. It is also important to keep in mind that legislation, both federal and provincial, is subject to the legal rights, procedural guarantees and equality provisions set out in the *Charter of Rights and Freedoms*, that is, the Charter forms a constitutional backdrop for all government dealings with the citizens of Canada. A number of Charter provisions, not just ones related to Charter procedure, also apply directly to Aboriginal Peoples. Section 25 provides that the guaranteed rights contained in the *Canadian Charter of Rights and Freedoms* shall not be interpreted so as to abrogate or derogate treaty or other Aboriginal rights or freedoms. The reasoning that has been applied with respect to the application of the Charter is that section 25 acts as a shield to ensure that the right of self-government is not to be derogated by the Charter. Furthermore, section 35 of the Charter recognizes and affirms Aboriginal and treaty rights and defines the Aboriginal Peoples of Canada as including Indian, Métis and Inuit Peoples.
- ♦ **POLICING.** Three levels of government—federal, provincial and municipal—presently have responsibilities for law enforcement. However, this arrangement is rapidly changing, as evidenced in this province by the recent entry of First Nations' governments into negotiations on Indian policing options on reserves. In Saskatchewan, *The Police Act, 1990* provides the legal framework for the Saskatchewan Police Commission and the formation and operation of municipal police services. It also provides the province with the authority to contract with the Royal Canadian Mounted Police to provide provincial policing services. The Royal Canadian Mounted Police is established under federal legislation, but is able to provide services either through provincial contracts or contracts with specific municipalities.
- ♦ **PROSECUTORIAL SERVICES.** Responsibility for prosecution of offences under the *Criminal Code* rests with provincial attorneys general,

whereas responsibility for prosecution of federal offences under a variety of other federal statutes rests with the federal attorney general.

- ♦ COURTS. With the exception of the Supreme Court, courts at both the lower and higher levels are established and administered by the provinces. The power to appoint judges to the lower courts rests with provincial governments, for example, in Saskatchewan's case, the provincial court and justices of the peace. The federal government appoints justices to superior courts, for example, Court of Queen's Bench for Saskatchewan, Saskatchewan Court of Appeal, Supreme Court of Canada.
- ♦ CORRECTIONAL SERVICES. The federal government administers penitentiaries and parole services for adult offenders sentenced to terms of two years or more through the Correctional Service of Canada and the National Parole Board. The provinces, in conjunction with the National Parole Board, administer prisons and conditional release services for those sentenced to less than two years.
- ♦ YOUTH JUSTICE. In the youth justice area, the *Young Offenders Act* provides a guiding framework. This is federal legislation, whereas the responsibility for the administration of youth justice programming rests with the provinces. In the case of Saskatchewan, prosecutions are conducted by the attorney general, and youth courts are administered by Saskatchewan Justice. Young offender programs are provided under the direction of the minister of Social Services.

Three additional elements of the criminal justice system merit brief mention. These are criminal legal aid, victim services and justice information services. I think the first two in particular are relevant to our discussion today.

- ♦ LEGAL AID. Criminal legal aid services are generally provided by autonomous agencies independent of both levels of government. In Saskatchewan, legal aid is provided by salaried counsel in the employ of the Saskatchewan Legal Aid Commission.
- ♦ VICTIM SERVICES. Front-line victims' services are being developed under the provincial Victims Services Program. Services to victims include immediate crisis intervention and assistance throughout the court process. Although this is a relatively new program in Saskatchewan, a number of programs are already in place. The program is being delivered by volunteers working under the guidance of and in close co-operation with police and other justice system officials, or by community agencies under contract to the Department of Justice for Saskatchewan. Funding for the programming is generated through

provincially administered surcharges levied on provincial fines and *Criminal Code* offences. The designated priorities for victims' services are that they be concentrated in the areas that support women, children and Aboriginal people.

To summarize the division of powers, the provinces, with general responsibility for administration of justice, have responsibility for the bulk of policing services, carry out prosecutions under the *Criminal Code*, establish and maintain provincial courts that hear the vast majority of criminal cases, appoint judges to provincial courts, deliver community and correctional services to young offenders, provide correctional services to adult offenders who serve terms of less than two years and administer probation services and other community-based sanctions and programs such as fine option, community service orders and victims' services.

The federal responsibilities are enacting the criminal law in the *Criminal Code* and other federal statutes, maintaining the RCMP as a federal law enforcement force to provide services in criminal areas other than the *Criminal Code*, to prosecute offences under federal statutes, to appoint judges to county, district and superior courts, to provide correctional services to more than two-year adult offenders, to maintain the National Parole Board and Parole Services, to provide a central research agency in the justice sector and, although it is not focused in the justice aspect of it, to have constitutional jurisdiction with respect to Indians and land reserved for Indians.

It is fair to say that the Canadian justice system is a complicated mix of national standards overlaid with local delivery mechanisms and responsibilities.

In broad outline, this is the jurisdictional and institutional environment in which Aboriginal justice reforms are taking place. It is often assumed that this is an environment that has little space for progressive innovation and reform. I think this has been true in the past; however, it seems to me that there is significantly more room to manoeuvre than many people appreciate.

THE DISCOURSE ON ABORIGINAL JUSTICE ISSUES

But how has the system, as it has historically existed, served the Aboriginal people of this country? The prevailing view among Aboriginal people is that the criminal justice system has failed them, often with tragic consequences. This failure is most frequently cast in terms of the stark overrepresentation of Aboriginal people among those in jails and prisons, and the apparent inability of the criminal justice system to respond to local conditions and cultural traditions, and to rehabilitate offenders.

Current criminal justice practices are viewed as adversarial, formalistic and punitive. In their place, many advocate a vision of justice that is holistic, therapeutic, conciliatory and rehabilitative. In short, critics seek a system of justice that prevents crime, resolves disputes in an amicable, fair and timely fashion, is responsive to community concerns and reforms offenders. The criticisms levelled at the present justice system are compelling, and the emerging vision of justice is one from which we all can learn.

Unfortunately, often absent from this critique is a careful consideration of the contributing role of disproportionately high levels of offending and victimization among Aboriginal Peoples. Also sometimes neglected is a careful examination of the contribution of wider social problems—devastating levels of poverty, unemployment, substance abuse, family dysfunction and so on—to the over-representation of Aboriginal people among those in conflict with the law.

I raise these matters not to deflect attention from the shortcomings of the criminal justice system, but to affirm our recognition of the need for a broader process of renewal to grapple with the social, economic and political disparities that underpin much conflict with the law, both within the Aboriginal community and beyond.

Such considerations notwithstanding, many critics have concluded that an unbridgeable cultural gulf makes parallel systems of justice, designed and controlled by Aboriginal governments, the only way to move forward. In some instances this may be appropriate, but through genuine dialogue and consultation, I hope we can come to better appreciate those values we hold in common, to understand and respect our legitimate points of difference and to move forward on a joint agenda to tackle our shared concerns.

For it is an undeniable sociological fact that a substantial and growing number of Saskatchewan Indian and Métis people reside in mixed Aboriginal/non-Aboriginal communities, many in urban centres such as Prince Albert, Saskatoon and Regina. In these circumstances, we must strive to reform the existing criminal justice process in ways that respect the maxim that justice is not just a matter between an offender and the state, but one that involves the offender, the victim and the wider community.

FUTURE DIRECTIONS

What then, is the future direction that Saskatchewan Justice hopes to pursue on Aboriginal justice reform?

I suggest that we need to work together on three major streams of activity. First, we need to focus on crime prevention and crime reduction. Second, we must work to build bridges to Indian and Métis justice systems, whether in conjunction with self-government, as part of a wider process of

self-determination or as part of general criminal justice reform. A third stream of activity, I suggest, must tackle the need for employment equity programming and race-relations training across the justice sector. Underpinning each stream of activity is a desire on our part to foster a system of criminal justice that treats all citizens with dignity, fairness and equity.

CRIME PREVENTION/CRIME REDUCTION

The basic goals of Saskatchewan crime prevention initiatives should be as follows:

- ♦ to reduce the incidence of crime, especially serious crime;
- ♦ to promote understanding of, and respect for, justice values and processes, and
- ♦ to foster an accessible system of criminal justice that is more responsive to the unique needs of Aboriginal Peoples.

In pursuit of these goals, special emphasis can be placed on youth, women and vulnerable people, as well as on inner city and northern communities.

Examples of possible initiatives include community-based public legal education, crime prevention programming and police-based victims' services specifically geared to the needs of Aboriginal victims of violent crime—women and children in particular.

BUILDING BRIDGES WITHIN THE JUSTICE SYSTEM

At its most basic, building bridges involves facilitating the active participation of Aboriginal institutions, communities and governments in the formulation and delivery of justice services. In building bridges to Aboriginal communities and future justice arrangements, we must strive to develop options that are community based, built on co-operation, open and accountable, sustainable and affordable. As well, we must recognize that there is a broad continuum of self-determination possibilities. Depending on a particular set of circumstances, these might range from sensitization of programs to Aboriginal concerns, to partnership or co-operative development or to self-government. Because the justice system services multiple client communities and both victims and offenders, the needs of all clients have to be taken into account. In this way, we can foster a climate of support for change and a positive appreciation of diversity.

An important example of work in this regard is the May 1993 signing of a five-year master agreement on First Nations policing. This three-way agreement, involving the province, the FSIN and the federal government, provides a framework whereby individual First Nations can play active

roles in determining the type of policing services they want, including the identification of policing priorities for their communities. Also worthy of note are discussions with the FSIN concerning the development of tribal courts, as well as discussions with Métis and Indian representatives about the delivery of select youth justice services.

There are several jurisdictional hurdles that will have to be overcome before tribal courts with criminal law powers akin to those of provincial courts can become a reality. One is which level of government, federal or provincial, possesses the constitutional authority to establish Aboriginal courts. In the case of Indian tribal courts, the Saskatchewan government is of the view that the federal government's exclusive jurisdiction over Indians under section 91(24) of the *Constitution Act* renders the provincial government's power to create a tribal court, of inferior or superior level, doubtful.

Concerning Métis courts, the province's legislative power would appear to be limited, at best, to establishing a court of inferior level. This consideration aside, the major hurdles to be overcome revolve around the issue of jurisdiction as the Métis, at present, lack a definable land base. For example, how would a Métis court's jurisdiction over persons be defined? Would it be limited to Métis accused? Métis victims? Or Métis accused and Métis victims? Or would it be based on an offence occurring in a community designated or recognized as Métis?

Another example of bridge building are the continuing negotiations on reinstatement of a province-wide Aboriginal court worker program, which we hope to have up and running by late this year. Other future initiatives under this heading might include:

- ♦ a community justice worker program to facilitate a range of community-based justice and public legal education activities;
- ♦ continuing work on sentencing alternatives for youth and adults through the expanded use of alternative measures, sentencing circles, elders' panels and other community-based bodies, and
- ♦ the devolution of responsibility for the delivery of correctional and aftercare programming to community-based Aboriginal service providers.

EMPLOYMENT EQUITY PROGRAMMING AND RACE RELATIONS TRAINING

In conjunction with the Public Service Commission, Saskatchewan Justice is actively working on employment equity programming to ensure the appropriate representation of Aboriginal people among Justice staff.

Work is also underway on a number of cross-cultural, race relations and anti-harassment initiatives. Our goal is to foster a workplace environ-

ment that is supportive of the dignity of all persons within it, be they employees, clients or service providers. To do this, we must work to better reflect the composition of the communities we serve, incorporate the values and sensibilities of Indian and Métis Peoples into the ways we do things, and respect and honour the dignity and worth of all people.

Other illustrations of ongoing and planned activity in this regard include:

- ♦ our continuing financial and in-kind support for cross-cultural programming such as that offered through the Katapamisuak Society in the Battlefords area;
- ♦ workshops and seminars on ways to combat gender and racial harassment, and
- ♦ expanded Aboriginal spiritual, cultural and counselling programs in correctional institutions.

Having identified the shortcomings of the current justice system in its interaction with Aboriginal people and, I hope, having made clear the need for progressive innovation and reform to achieve meaningful change, I will now briefly discuss how the need for justice system reform relates to Aboriginal self-government.

SELF-GOVERNMENT AND ABORIGINAL JUSTICE REFORM

Both the premier and Mr. Mitchell have indicated the strong support of Saskatchewan for constitutional recognition for the inherent right of Aboriginal self-government within Canada. I would like to make the following points. First, the federal government, by virtue of treaty and federal powers in relation to "Indians and Lands reserved for the Indians" under section 91(24) of the *Constitution Act*, must take a lead role in negotiations on, and continuing funding for, self-government arrangements in the justice sector. In passing, I should note that the constitutional paper *Partners in Confederation*¹ is a valuable contribution to the continuing discussions about ways to dramatically, but necessarily, transform this recognition into a practical reality where Aboriginal Peoples can exercise greater control over matters that affect their daily lives. Furthermore, despite its other shortcomings, the Charlottetown process contained a number of valuable principles that could guide negotiations on self-government.

While Saskatchewan is fully prepared to do its part and indeed is prepared to, in the language of Don Worme or Nike, "Just Do It," wherever we can, we take the view that self-government ought to be a national priority and as such, it is one that requires sustained support at all levels of

government—and at the federal government level in particular.

Federal ministries have had the unfortunate tendency to limit funding for innovative or pilot Aboriginal programming to two- or three-year projects. It seems to me this has to stop. There has to be money made available to give Aboriginal self-government the opportunity to succeed. Particularly in the justice sector, Aboriginal Peoples have to have full access to stable sources of long-term funding. As well, the Saskatchewan Treaty Indian Nations have repeatedly indicated their preference to proceed on a bilateral basis on self-government with the federal Crown. We understand and respect this view.

At the same time, we are, however, engaged in tripartite processes with Saskatchewan First Nations and federal colleagues to identify areas in which we can move forward. Indeed, I think we are seeking to identify areas in which we are able to move forward unilaterally.

Similarly, we support the Métis Society of Saskatchewan's stance that the Métis, as a constitutionally recognized Aboriginal People, ought to be included within the federal responsibility for Indians. This is one aspect of a general concern that the federal position has not been more responsive to the issues of an inherent right of self-government, notwithstanding Charlottetown. The obligation of a more expansive and more appropriate recognition and acceptance of federal jurisdictional responsibility for Aboriginal Peoples is writ broad.

Working together is essential. There are times when we are bound to conflict, and I think we need to make our positions as clear as possible. It is appropriate, as well as wise, to work together. No one should go it alone, but if the choice is to go it alone or not at all, it is my understanding that the Saskatchewan position is to go it alone as far as we can.

We recognize that Aboriginal justice systems, whether as part of self-government or self-determination arrangements, will take time to develop. For the foreseeable future, Aboriginal justice systems will take shape in compliance with the provisions of the *Criminal Code*, as well as with the process and equality guarantees contained in the *Charter of Rights and Freedoms*. Even when up and running, there is every likelihood that Aboriginal justice systems will need to have strong and continuing links with other parts of the criminal justice system, including those administered by the province. Accordingly, federal/provincial/Aboriginal tripartite processes, forums and agreements will be essential to their successful negotiation and implementation.

CONCLUSION

The Aboriginal Peoples of Saskatchewan and Canada have demonstrated extraordinary patience in their quest for justice. It is incumbent on us all to

ensure that the limits of this patience are not put to the test. At the same time, let us be under no illusions. The process of forging new partnerships is not without its moments of frustration and misunderstanding, but through genuine dialogue built on mutual respect, and with concrete action to back our expressions of goodwill, progress on our common goals can be achieved.

I will end with what I think is a fundamental message about working together. I'd like to quote King George VI. I apologize for taking his words slightly out of context and changing them in a very limited way, but on this point I think his words are fundamental and full of meaning. He said during some other difficult times:

So I said to the woman who stood at the gate of the rest of my life, "What shall I do that I may tread safely into the future?" And she said: "Go and put your hand in the hand of a friend. And that shall be to you brighter than a light, and safer than any known way."

The future here is complex. It is not well understood by any of us. If we can find ways to work in genuine friendship and partnership, I think putting our hands in each other's hands will help us to find our way through that gate and into the future in the most constructive way possible.

NOTES

- 1 Royal Commission on Aboriginal Peoples, *Partners in Confederation* (Ottawa: Canada Communication Group, 1993).