

# MÉTIS PERSPECTIVE ON THE SPLIT IN JURISDICTION

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The Métis People have been struggling with the issue of jurisdiction in all aspects of their political endeavours for at least the past one hundred years. This issue has to do with the recognition of the Métis People's entitlement to Aboriginal rights, and it is at the heart of Métis People's identity and existence.

The federal government has for many years refused to grant the Métis People the same degree of recognition as was granted to the people who fell within their artificial definition of status Indian. The federal government had taken a position that since Métis people were not Indians, it had no constitutional obligation to assert jurisdiction over, or take responsibility for, Métis people. The provinces, however, appear quite willing to concede that the Métis People fall within the legislative jurisdiction of the federal government and this, I believe, is largely influenced by the provinces' desire to avoid financial responsibility. As a result, the federal government has never asserted any jurisdiction in relation to the Métis People and therefore has never created any reserves or land to be openly held in trust for the use and benefit of the Métis. Nor have there been passed any special legislation, such as the *Indian Act*, to provide a framework for the federal government to take responsibility for protecting the lives, welfare and property of the Métis people.

The position of the Métis People with respect to their Aboriginal rights is that their situation is no different from that of status Indian Peoples, except that they do not have a treaty with the federal government or with the Crown. The Métis People's position is that, although the birth of their nation occurred in recent history, their Aboriginal rights are inherent and extend back to time immemorial. The Métis People are recognized in the *Constitution Act, 1982* to be one of the Aboriginal Peoples of Canada. They are a special type of Aboriginal People, as are the Inuit. The fact that their communities derive from the intermingling of their Aboriginal ancestors with the European people does not diminish the existence of their Aboriginal entitlement, which they state was transferred, or rather extended, into a new nation of Aboriginal People. This new society, the Métis, incorporated elements from both their traditional Aboriginal and

European cultures and, while they made use of elements of the European culture, they continued to exercise their Aboriginal rights, which included exercising use of and dominion over land. The federal government acknowledged that the so-called half-breed populations had Aboriginal entitlement to land, as evidenced in the *Manitoba Act* and in the *Dominion Lands Act*.

The Métis People state that the scrip system was a fraudulent attempt to extinguish the Aboriginal title of the Métis People, and that the government has wrongly appropriated their land and has wrongly encroached upon the free exercise of their Aboriginal rights. In this regard, Métis People state that they are jurisdictionally, that is with respect to the jurisdiction of their Aboriginal rights, in no different a position than any other First Nation that has not signed treaty with the Queen.

I have heard it said many times that when it comes to issues of implementation of justice programming, and especially considerations of a separate justice system, that treaty Indian Nations—especially with respect to the geographical location of the reserve—are in a much better position to implement such programming. This is said to be because of the large sphere of special federal laws that apply to Indians on-reserve. I do not agree. This to me is a legal fiction that has been erroneously accepted throughout the community involved with Aboriginal programming.

It is true that reserve land is treated differently and that there is a separate jurisdiction—namely, the federal government as opposed to the province—that is responsible for it. However, in Canada reserves are not the jurisdictional enclaves they are in the United States. In Canada, provincial laws of general application apply to Indians on-reserve. When it comes to criminal law, the *Criminal Code* is federal legislation created under the federal government's criminal law power provided for by section 91(27) of the *Constitution Act, 1867*. The *Criminal Code* of Canada, which defines all major criminal offences and establishes procedures to deal with offenders, is a law that is in place throughout Canada on-reserve and off-reserve, and it is applied without respect to race. On the other hand, the administration of justice is a matter that falls to the province under section 92(14) of the *Constitution Act, 1867*. When it comes to issues of Aboriginal justice, the matter of the universal application of the *Criminal Code* is moot. In other words, I submit that it is highly unlikely that any reform of the criminal justice system would involve the creation of two different criminal codes of conduct. When it comes to Aboriginal justice, what is most important is the manner in which the laws with respect to criminal conduct in Canada are applied and administered to First Nations and other Aboriginal people.

The provincial government's power over the administration of justice is of the most significance when it comes to the implementation of Aboriginal programming. And since the province's administration of jus-

tice jurisdiction has not varied with respect to criminal conduct from the Indian reserves to any other geographical community, I believe it is erroneous to argue that the jurisdiction is any different between the Métis People and the status or treaty Indian Peoples. It is true that the *Indian Act* does make special provision for the appointment of justices of the peace. And it also true that the *Indian Act* provides for the enactment of band bylaws that can be administered by the band council. However, the difference in powers granted to status Indians on reserves by the *Indian Act* is not sufficient to justify treating Métis communities any differently from the way in which Indian reserve communities are treated.

The degree to which these matters may affect Indian communities is only a small aspect of the total administration of justice to Aboriginal people. Through agreements with the provincial Department of Justice, Métis communities can, without any jurisdictional impediment, negotiate similar types of programs in relation to justice as treaty Indian communities. This programming can extend from community justice committees, to alternative dispute-resolution mechanisms, to mediation diversion programs, to Aboriginal provincial courts, to community probation services, to sentencing circles, to Aboriginal community police forces and Aboriginal community correction services. Under the present jurisdictional arrangement between the federal government and its power over criminal law and the provincial government and its power over the administration of justice, the Métis are no more limited in the variety and extent of Aboriginal programming that can be instituted than the Indians. The only limitations are those that exist in the willingness and creativity within the department of the attorney general for the province.

I would like to state expressly what my assumptions are on the difference in jurisdiction between status and non-status communities. These are that the Métis People claim that an essential component of their inherent Aboriginal rights is their inherent right to self-government, and that contained within their inherent right to self-government is, of course, their right to administer control over the maintenance of peace, order and civil behaviour within their communities: in other words, the administration of justice for their own people. This inherent Aboriginal right to self-government, which includes the administration of justice, is the jurisdictional basis upon which the Métis People make demands upon both the federal and provincial governments to negotiate accommodations for the Métis People's right to be involved at a decision-making level in the administration of justice and the maintenance of peace in their communities. At the very least, this would mean that the Métis People's inherent Aboriginal right in relation to Aboriginal justice requires that the provinces grant constitutional concessions within their jurisdiction over the administration of justice.

The Métis communities ought to be able to establish Aboriginal courts, which in the beginning may take the form of Aboriginal tribunals. These communities are also entitled to be involved in enforcement and prosecution under the *Criminal Code*, that is, the communities ought to be allowed to negotiate for a police force that suits their needs, which may include establishment of community police forces. Furthermore, Métis are entitled to be involved at the level of deciding how to proceed with and dispose of criminal offences. The community is also entitled to the provision of all support services, including probation services, and to the establishment of correctional programs and facilities.

Finally, it should be noted that the Métis People do not, I believe, wish at this time to encroach upon the federal government's jurisdiction over criminal law. However, Métis people may at some time wish to develop a code of conduct for application in their communities, and their inherent Aboriginal right to self-government and powers of jurisdiction in this area ought to obligate the federal department of justice to negotiate provisions to accommodate the needs of Métis communities in this regard.