

# **FIRST NATIONS PERSPECTIVE OF THE SPLIT IN JURISDICTION**

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Our people have an inherent right of self-government that includes the administration of justice. This position has been examined in over thirty different justice inquiries since 1967 and the position remains the same. The position of First Nations people about the justice system also remains unchanged because of the over-incarceration of First Nations people in the criminal justice system and its lack of flexibility and accountability to First Nations people. I make this presentation with some reluctance and some hesitancy because my words are empty unless there is action taken, and we can only talk together for so long.

It's an anomaly that this presentation is being made at all, because if you take the positions of the federal and provincial departments of justice about how jurisdiction is divided to their logical conclusions, there is no jurisdiction for Aboriginal people in the criminal justice system nor is there anywhere for them exercise their inherent right of self-government. The positions of the federal and provincial governments regarding division of jurisdiction are based on assumptions the First Nations believe are a misunderstanding of history.

The positions of the Government of Canada and the Government of Saskatchewan on the inherent right of self-government and reform of the Canadian criminal justice system are based on a number of assumptions. The assumptions tend to legitimize the current system and continue to exclude First Nations powers and jurisdiction. There are some noble sentiments expressed in federal and provincial policies and in the Aboriginal justice initiative pursued by the federal government. There is a recognition in these policies that the Canadian criminal justice system has victimized First Nations people and a sincere attempt is being made to ameliorate unjust situations.

Both levels of government offer changes to the present system that they believe will eliminate the unfairness. The federal government speaks in the language of pilot projects, the language of accommodation of First Nations Peoples within the present system. This is a language and a policy that my people have no option but to reject. It is a rejection based on a challenge of the assumptions. The policies of the federal government are based on

their assumption of dominance over First Nations Peoples and the rejection of our inherent powers. They are based on the assumption that the present Canadian criminal justice system is near perfect, even exalted in certain cases, and that in order to fix the damage to the spirits of First Nations people and to First Nations communities only minor tinkering with the system is required.

These assumptions place Aboriginal Peoples in no different a situation than Blacks in Nova Scotia and the Asian communities in Toronto facing discrimination. I do not mean to denigrate the conditions of these good people or to minimize their struggles; however, to place First Nations Peoples in the same minority position is a denial of history. The contemporary dominance over First Nations Peoples by present governments is a denial of the promises made to my forefathers that we would share this land in peaceful co-existence.

While our grandfathers signed treaty with your people, certain protections and guarantees were sought to ensure the long-term survival of the Cree Nation. The most critical protection was that we would continue to exist as a culturally distinct people, and that the values and beliefs of our ancient people would not disappear or be eroded. These protections are not wishes nor are they historical might-have-beens. The position of our people is that they are rights that continue to exist. They are rights that we will use to shield the integrity of our nations and the future of our peoples. If you take the position of the federal government to its logical conclusion and you accept these assumptions, the result is very destructive. We would have to accept that First Nations Peoples are inferior peoples and that First Nations Peoples do not have the right to enforce traditional dispute-resolution within our communities, a right we have exercised from time immemorial.

The positions of the federal and provincial governments should be revealed for what they are—positions based on dominance and an unwillingness to release the power they currently exercise. They are based on artificial barriers, conceptual barriers put forward in sections 91 and 92 of the *Constitution Act*, which shields the present criminal justice system from any attempts by First Nations Peoples to assert jurisdiction and authority within our communities. The power of self-determination we seek to assert within our communities does not flow from Canada or from the House of Commons, it is inherent to our people. It is a power that was first recognized by Europeans in the *Royal Proclamation of 1763*.

The Royal Proclamation recognized that First Nations governments were autonomous political units whose internal political authority was not questioned. It is a power manifest in the words of Treaty 6, which states:

The Cree Nation promise and engage that they will in all respects obey and

abide by the law, that they will maintain peace and good order between each other, between themselves and other tribes of Indians and between themselves and others of Her Majesty's subjects.

The power expressed in Treaty 6 was not a new power. We did not get it in 1876. It is a power that had been exercised by the Plains Cree for thousands of years. It is an ancient power that was never surrendered. The intention of our grandfathers was not to relinquish power over internal dispute-resolution. This power is tied to the wellbeing of future generations. It is inconceivable that the power to pass on cultural values and enforcement mechanisms for proper behaviour was ever relinquished with consent. These are powers against which Canada, the First Nations fiduciary, continues to fight not only in this room here today but at the United Nations and at the World Court at The Hague. Canada's position is that there is no inherent right of self-government and that First Nations Peoples are like any other Canadians, with no special rights.

This view was expressed most recently by the minister of Indian Affairs, Pauline Browne, at a provincial first ministers' meeting, when she said that the federal government could no longer support an inherent right of self-government and that the inherent right of self-government died with the Charlottetown Accord. We can't accept that position because the right didn't start with the Charlottetown Accord and it didn't die with the Charlottetown Accord, yet that is the attitude that prevails.

There is hope, and we could take good direction from the Royal Commission on Aboriginal Peoples in their document *Partners in Confederation*.<sup>1</sup> The document states that the inherent powers of First Nations governments have not been extinguished and that all that is required to recognize the powers of our governments is for Canada to broaden its perspective and to quit hiding behind conceptual barriers. The barriers exist at all levels, from the bureaucracy to members of Parliament and the courts.

Why is it important for First Nations to have jurisdiction over justice and to assert this right? First Nations governments here in Saskatchewan and across Canada are coming to terms with the effects of colonialism. They are beginning to heal the wounds inflicted by this process. We've endured many problems within our communities for the past hundred years. In the delivery of justice, one of the things many communities are now striving toward is to have the community take responsibility for wrongs done within the community. Elders and community and family members will sit together and talk about the wrong, the violation against the person and against the norms of the community, and will put forward recommendations for dealing with the wrong. These recommendations will not emerge easily. There is a great deal of heartbreak involved in trying to heal your own

people. A great deal of pain and suffering is attributable to our experiences in the present system, a system that does not recognize our jurisdiction.

In order to begin to take responsibility for our own justice, beginning with the trial and conviction, we need the co-operation of many people. We need the co-operation of Crown prosecutors and the co-operation of many good judges. Today we do have people in the Canadian criminal justice system who recognize that there needs to be change, and there are programs that try to meet community needs. Unfortunately, what happens after the community attempts to deal with problems in a unique way is that the Crown immediately appeals the verdict. The Crown appeals because it says the decision violates *stare decisis* and that it sets an unacceptable precedent for family violence or for theft or for any of the other criminal offences. What does this do to the community, which has tried to be innovative in dealing with its problems? It puts the community back a step, because after its demonstration of courage and its sincere effort to control dispute-resolution, the community is pushed back and told that its people do not have a legitimate say over what happens in their territory.

This is not a conclusion we can accept because, as I said earlier, we do have the right to run our own justice system and we wish to assert the right. What I tell the Government of Canada and the Government of Saskatchewan is that they should not to be prisoners of false and destructive perceptions. Free your minds and your hearts with respect to self-government. Free your minds from the narrow approaches taken to the rights of my people. Free your minds from the need to dominate First Nations Peoples because the pain and suffering that this criminal justice system has inflicted upon First Nations people cannot continue.

In freeing your mind, have faith that your own system of laws is flexible enough and will not crumble if you accept that First Nations have a right to administer their own justice. I believe that in order for Canada to get it together with respect to the administration of justice we need a fundamental change in thinking. The federal government must realign its attitude toward Aboriginal Peoples if there is to be meaningful and permanent change.

The position of First Nations Peoples will not change. We cannot accept the fact that we do not have the right to run our own justice system because we know we have the right. In continuing our pursuit of a separate system of justice we are heedful of the words of Dr. Martin Luther King when, in explaining why he would rather go to jail than accept the segregation laws of the South, he spoke of the guidance of St. Augustine in formulating a distinction between laws that are just and laws that are unjust. Dr. King described the distinction as "any law that uplifts human personality is just, any law that degrades human personality is unjust." Dr. King spoke of the need for all people to support and abide by just laws, and he also spoke

of the need for people to challenge and question unjust laws until changes are made.

I say that the denial of our inherent right of self-government and the denial of our treaty rights to control dispute-resolution within our territories is unjust, and this injustice will not be ameliorated by minor tinkering. It will not be ameliorated by placing more brown faces in the courtroom. The damage will only cease and healing can only occur when you allow us to assert jurisdiction within our communities over justice. We cannot change our position because we believe it is just and that your position, based on denial and dominance, is unjust.

## NOTES

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