ALL IS NEVER SAID

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In the autumn twilight of Saskatchewan, the brilliant yellow leaves of the trees cast complex shadows on the colonial Saskatoon castle where the established legal profession in Canada has convened to discuss the problems of the administration of justice. As the fast-flowing river continues its restless, eternal journey, each participant, at different times, has experienced the thrilling presence of an emerging vision of justice. Sometimes it was felt during a lecture; other times in a talking circle or personal dialogue. In these transitory enchanted moments, the participant understood the complaints about applying federal laws to Aboriginal Peoples—about the criminal justice system failing Aboriginal Peoples and about the Canadian government failing to become an authentic democracy—and gained some understanding of the power of the Aboriginal tradition of justice as healing.

In formal presentations, talking circles and dialogues, Aboriginal perspectives of the existing criminal system and its failures made sensible people think about the unresolved social contract in Canada. By the end of the Conference, all agreed that a pervasive ambiguity of an intractable nature exists in the administration of justice in the constitutional order, yet those with the authority to resolve this ambiguity appeared reticent to clarify any boundaries. Instead they searched for co-operation and shared authority between the different holders of imperial entitlement. Federal and provincial speakers at the Conference continued to rely on the jagged partition of power imposed by the imperial Parliament in the *Constitution Act, 1867*, while the Aboriginal presenters stressed the original imperial entitlements—treaties and Aboriginal rights—as recently affirmed in the *Constitution Act, 1982*. Although by conference end all agreed that conventional notions of the split in jurisdiction between the federal and provincial governments have not been reaffirmed by the courts and that room must be made for Aboriginal and treaty rights, the federal and provincial officials still failed to understand that the essential issue is about colonial domination and the lack of an authentic social contract with Aboriginal Peoples.

The imperial acts that created the *Criminal Code* and the structure for the administration of justice were applied to Aboriginal Peoples without their consent. They did not delegate such broad sweeping powers to the Crown. The application of federal or provincial authority over Aboriginal

Peoples through the *British North America Acts* is based on biological descent—as a birthright of the Crown and the English—rather than on Aboriginal consent. Divine justice or fate provides the rationale for the application of Canadian criminal law to Aboriginal Peoples, since they were imagined by the colonizers to lack law or order by evolutionary command. Thus the application of the *Criminal Code* to Aboriginal Peoples finds its origin in colonial myths, racism and the colonizers' "sacred trust" of civilizing the savage. Few of the federal or provincial speakers at the Conference seemed remotely aware of this constitutional predicament.

As with most of Canadian law, the criminal justice system, its funding and its administration have never known the consent of the Aboriginal Peoples. This unacknowledged problem was the unifying position of the First Nations and Métis participants at the outset of the Conference. While the division of power in the criminal justice system was an existing constitutional fact at the time the Victorians were making treaties with First Nations, none of the prerogative treaties ratify this division. Indeed, as was made clear by First Nations' Conference participants, in the Victorian treaties, the Crown and the First Nations established an alternate system—the peace and good order system—that is separate and distinct from the 1867 system. The unresolved problems in the present criminal justice system are a legacy of colonial domination. The present system binds neither by text of the treaties nor by identifiable Aboriginal tradition, and its tragic interactions with Aboriginal cultures—as discussed by various presenters—illustrate the wisdom of the separate peace and good order system the treaty makers established initially.

All Conference participants agreed that the proposition that, in Canada, the government should be one of consent rather than of descent ought not to provoke controversy. (Even in feudal regimes in England, where the sovereign represented the entire populace, royal powers were limited by the rights of the aristocracy and by the customs of the people.) In the immigration process, immigrants to Canada consented to the country's constitutional system and laws. Aboriginal Peoples have not consented to these laws. This is particularly true for the Aboriginal Peoples who have not treaty or relationship with the Crown, for example, in British Columbia and the Northwest Territories. The First Nations who have treaties agreed to a different distribution of powers between the First Nations and the Crown, which the federal and provincial governments implement for the Crown in Canada. Federal and provincial leaders should not presume more power over Aboriginal Peoples than the First Nations delegated to the Crown in the treaties, especially not in the criminal justice system. None of the Conference participants could find any express consent by the Aboriginal Peoples of Saskatchewan to be subject to the *Criminal Code* or to a

system of delegated responsible government for the immigrants. They could only point to federal responsibility for "Indians" and lands they reserved for Indians, pursuant to the terms of the treaties and prerogative acts. The irony of this situation was not lost to most participants—this colonial domination mentality in the criminal justice system is the same mentality that inspired the Canadian colonists themselves to demand responsible government from the Crown. Moreover, the delegated scheme of governmental powers in Canada in the *Constitution Act, 1876* is similar to the powers the imperial Crown affirmed to the chiefs in the treaties. This deep structural constitutional issue cannot be resolved by tinkering with its details. The relationship between the treaties and provincial federalism remains the central unresolved enigma implicit in the present dispute.

Most participants recognized that Aboriginal Peoples are not, and have never been, part of Canadian government—which remains a mechanism for immigrants. Treaties with the imperial Crown, not imperial legislation, fixed the political boundaries of the Aboriginal Peoples and established a shared territory. Aboriginal people at the Conference asserted that these treaty boundaries—for example, those laid out in Treaties 4, 6 and 8—should establish Aboriginal representation in an integrated Canadian federalism, as well as self-government. The expanded constitutional law in the 1982 Act and the judicial construction of Aboriginal and treaty rights in recent court judgements combine to give existing treaty areas a status parallel to that of provinces in Canadian federalism. Representation of these treaty areas in other governments is essential to maintain peace and good order.

Similar principles ought to apply to Aboriginal rights for Métis under their Crown promises. The sanctity of the Crown's promises constructed the concept of British North America. The first principle of the rule of law in the United Kingdom has always been that all peoples, despite race or ethnicity, are to be secure in what the Crown has recognized as their liberties and entitlements. This principle establishes predictability and certainty in British law, but not in the colonial law of Canada. Both the federal and provincial governments have long neglected Aboriginal and treaty rights. Before 1982, the *Criminal Code* was applied unfairly to Aboriginal Peoples; since then, it has been applied as a violation of their constitutional rights. Section 35 of the *Constitution Act, 1982* establishes, for Aboriginal Peoples, the division between colonial law and post-colonial law in Canada. It establishes a remedial point to begin to establish justice and equity for Aboriginal Peoples, which most admit are long overdue. As a part of the supreme law of Canada, it specifically directs and mandates recognition and affirmation of existing Aboriginal and treaty rights at every level of Canadian society. It establishes a constitutional home for these rights,

informing the legal profession to look beyond the older constitutional order to derive a new constitutional order.

To discover the new constitutional balance of Canada, after the *Constitution Act, 1982*, the courts have confronted the customary law and written treaties of the Aboriginal Peoples. In its judgement in *R. v. Sparrow*,[1] the Supreme Court of Canada stated:

> The context of 1982 is surely enough to tell us that this is not just a codification of the case law on Aboriginal rights that had accumulated by 1982. Section 35 . . . renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.

As to the meaning of section 35(1), the Court held:

> There is no explicit language in the provision that authorizes this court or any court to assess the legitimacy of any government legislation that restricts Aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraints on the exercise of sovereign power. . . . We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justifications. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of Aboriginal Peoples on behalf of the government, courts and indeed all Canadians.[2]

Clearly, a post-colonial assessment of the continuing legitimacy of case law and legislation is required. The old rules of the colonial criminal system have to be changed. Aboriginal Peoples can challenge the criminal system under the new rules, especially under Aboriginal and treaty rights. How difficult will it be to assess the colonial context of the relation of the criminal system to the constitutional rights of Aboriginal Peoples? Some Conference participants acknowledged that the criminal system is in a midst of a paradigm shift, ordained by the new constitutional order; others merely relied on the actual experience of the court system with Aboriginal people to conclude that a change was necessary. All agreed there are no easy answers; however, transformations often begin by recognizing that a process or practice is unjust and that something must be done about it.

Discussions of the criminal system at the Conference raised the issue of self-government. In the formal presentations, the context of this issue was ignored, but this issue dominated some of the informal talking circles and discussions. Discussions revolved around the exclusion of treaty delegates or self-government representatives from Canadian government, the

significance of this exclusion for democracy and how this exclusion affects the validity of criminal laws and the criminal justice system over Aboriginal Peoples and their quest for a separate justice system. It was pointed out that, unlike the courts, political consciousness in Canada still neglects the treaty order and the Crown's promises to the Métis. Systemic racism and colonialism still dominate political consciousness because the tyranny of the majority has not been decolonized through confrontations with the colonial legacy as has been the case in the courts. Most Canadian politicians do not understand either the new vision of Canada or the necessity of merging Aboriginal and treaty order with provincial federalism.

When representatives of political parties talk about Aboriginal Peoples, they give the impression that Aboriginal Peoples are a "minority"—a racial minority, an ethnic minority, a poor minority. In most of the non-Aboriginal presentations, there were only vague references to prerogative treaties and the Crown's promises of autonomous jurisdiction reserved for the First Nations and Métis. Little of substance was said about the role of the First Nations and Métis in shaping the political structure of Canada. All too often, treaties were seen as unique tricks of diplomacy. Most politicians regarded the treaties as similar to pie crusts: things that are intended to be broken. Constitutional principles and Crown promises evaporated into overstated discussions of violence and power. In contrast, the Aboriginal participants talked about the treaties.

Most participants agreed that constitutionally protected rights should have supremacy over existing governments or bureaucracies. In reality, however, these rights are subjected to continuing political domination. Federal and provincial bureaucracies manipulate public funds—supposedly for the benefit of Aboriginal Peoples—while the Aboriginal Peoples' organizations have to lobby these bureaucracies for compromises and reform. This inequality is a continuing form of political, legal and economic domination. Nowhere is this clearer than in those situations of Aboriginal Peoples without treaty relations with the Crown, but with consitutional aboriginal rights. Aboriginal Peoples are denied political equality in the Canadian federation and control over their criminal justice system because of colonial prejudices and race, not because of their legal rights. Nonetheless, for some of the participants, the idea that the Canadian Parliament's extension of criminal authority over Aboriginal Peoples is illegitimate in the constitutional sense was a difficult thought, surrounded with considerable complexity. Surely, someone had a theory or an answer? Most admitted that when it comes to government, Canada has always been a paradox, a place that confounds wisdom. Although the assembled consciousness reverberated with the search of justification and apology, no compelling theory or answer came to light.

The Aboriginal participants argued that the time has come to incorporate treaties with national federalism into a new multicultured Canada. The sad reality of Aboriginal life is that, when creating Canadian society, the immigrants and their governments violated our legally protected Aboriginal and treaty rights by choosing self-interest and expediency over imperial obligations. They unjustly bestowed power, wealth and privilege onto themselves, ignoring the Crown's promises in treaties, instructions and proclamations to our ancestors. In so doing, they victimized Aboriginal Peoples, their language and their cultural values.

From an Aboriginal perspective, the idea of responsible government in Canada, now arbitrarily called democracy, reveals that the immigrants have never allowed the participation of treaty delegates in their political processes. While the excuses have changed over time, the facts have not. Originally, it was because the treaty created a separate jurisdiction between the immigrants and the First Nations. Then it shifted to the racial and cultural inferiority of the Aboriginal Peoples. Currently, it is the lamentable fact that Aboriginal Peoples are racial minorities on small reserves and settlements. Despite the excuses for the exclusion of treaty concerns from the federal government, these brute facts show a violation of the essential core of modern democratic thought. All democratic ideals follow the principle that governments must never fall permanently into the hands of a faction, however broadly defined, in any society. Democracy in Canada has been totally controlled by the immigrants at every level, a fact all participants acknowledged. Thus, if it does not merge Aboriginal and treaty order with provincial federalism, Canadian democracy is more a fiction than a reality, more hypocritical than humanistic, more harmful than helpful.

From an Aboriginal perspective any rotation in public offices is a sham. Such rotation is only among immigrants and represents their political quibbles. This is not to deny that members of Parliament or representatives in legislative assemblies are from diverse backgrounds, but the common denominator is that they have been and remain immigrants or represent the interests of the majority. This history of politics illustrates that the continuing competition for public office belongs exclusively to the immigrants. They permitted Indians to vote in the 1960s, but only as individuals. Since 1982, the composition of Parliament, legislative assemblies and the imported ridings systems has not affirmed Aboriginal and treaty rights. Political institutions in Canada still reflect the needs and biases of British colonialism.

Because of the exclusion of the treaty order and of representatives of Aboriginal rights, from an Aboriginal perspective, neither the *Criminal Code* nor the justice system can be perceived as impersonal or neutral. The

political tradition belongs exclusively to the immigrants. Aboriginal Peoples have never formally represented their constitutional rights in the political arena; if they had any role in legislation, it was as lobbyists. There are a few Aboriginal people in the political system, but they represent general ridings and not existing constitutional rights. This situation creates a serious problem for Canadian governments, one that lies behind the call for self-government and for Aboriginal justice systems: public laws, especially criminal laws, are seen as embodying only the goals and values of the immigrants.

Any legislation that represents the interests of a single class of persons, no matter how broadly that class is defined, has usually been viewed as domination of one interest over others. Yet these laws penetrate every area of Aboriginal life, both on and off reserve. Unless Aboriginal and treaty interests are integrated with federal and provincial interests in a dignified and respectable process, political apartheid will continue to erode the principle of neutral public laws. The exclusion of any constitutional interest in the legislative process erodes the democratic justification of and support for national laws. The inherent right of self-government will not resolve this systemic discrimination. In fact, such a right may ultimately affirm political segregation, unless there is some connection between Canadian politics and Aboriginal politics. Where there is no such relationship or connection, there is domination by the immigrants—Aboriginal Peoples have seldom loved such an alienated existence.

How long should the Aboriginal Peoples wait for the immigrants to reconcile the democratic principles they preach with the extravagant immigrant powers they unjustly perpetuate? This is the burning issue of post-colonial Canada. The contradiction between Aboriginal Peoples' constitutional guarantees and immigrant privileges is apparent. Most Aboriginal people realize that the immigrant political elite has perverted the immigrants' constitutional rights on a grand scale. Systemic racism, greed and preferential rights have prevented Aboriginal Peoples from becoming equal partners in Canada. Still, the Supreme Court of Canada has not codified such perversions.

The Aboriginal participants at the Conference maintained that they have to take control of their affairs and of their destiny. It is consistent with their constitutional right to think and freely express their views about Aboriginal relations with both the imperial Crown and Canada. Aboriginal and treaty rights are not racial, ethnic, religious or linguistic issues, they are constitutional issues. Rather than discussing the fate of being born into a particular race or culture, Aboriginal participants focused on Crown promises in imperial treaties and proclamations and how these can be included in the creation of a post-colonial Canada. Uniting the treaty promises and

aboriginal rights with the imperial acts that created Canadian federalism is essential if we are to eliminate the adverse effects of colonialism and systemic racism from the modern constitutional debate about the meaning of Canada.

Within the shared decision of Aboriginal Peoples to take over their affairs, a larger, more troubling, dilemma emerged. The dilemma is between constructing a new man-made system of government or affirming traditional teachings and values. Many argued that creating a man-made government is destructive of their culture. In the last two centuries, they stated, immigrants have attempted to mould Aboriginal Peoples into a Christian vision, and currently the immigrants are attempting to impose Eurocentric government on them. Aboriginal Peoples are being asked to copy the Eurocentric script of imagining and making governments united by force. This is the same theme that created the rise and decline of Eurocentric absolutism, liberalism, socialism and communism. Many Aboriginal participants see following this option is a way of accepting a new form of domination or imposed script. Other Aboriginal participants, who accept the new versions of self-government expressed, are worried because these man-made societies have become incoherent and ever less credible through the break-up of the USSR and modern deficits. They are perplexed about the alternatives in self-government. With this common awareness, most Aboriginal participants insisted on the preservation of Aboriginal teaching of ecological awareness, self-discipline and interconnectedness behind traditional values in any Aboriginal self-government and justice systems. Faced with this dilemma, most Aboriginal participants concluded that any attempt to destroy ancient teaching or create man-made societies must be approached cautiously.

Commensurate with their capacity for wonder, the Conference participants did not understand the Aboriginal vision of Canadian justice and the limitations of their choices, yet they understood the failure of the existing system. Personally and then collectively, the participants on Aboriginal Law, Diversion and Sentencing, and Law Enforcement described the failure of the system and the search for a remedy. Convinced that prescription rests on diagnosis, they listened to current experiences of First Nations, urban and northern communities as they scrambled to come up with solutions. Yet, it became apparent that the question was whether the solution will come before additional violence, crimes and punishment become the experience that will inform Aboriginal youth and Aboriginal organizations, rather than traditional values. If the failure of the existing system is not confronted today, new criminal organizations, not Aboriginal Peoples, will be the future source of criminal problems in Canada.

It also became clear that deterrence, sentencing, punishment and pre-

ventive strategies have to build on empowering Aboriginal languages and values; these strategies are total theories of sustainable transformation in justice. They require a return to what has been ignored and a transformation of Canadian society into something new. Aboriginal Peoples cannot wait for modern scholars to find the underlying cause of crime. Ultimate causes are not valid policy objectives, since there are many theories but no explanations. Aboriginal Peoples must establish a system built not on theory, but on Aboriginal values of dignity, respect and doing right instead of avoiding wrongs.

Hearing some of the Aboriginal approaches to justice as healing and empowering values, most participants reached beyond the imported passion for labelling people criminals and making them suffer. They questioned why they had not thought much about why the Crown punishes people instead of attempting to heal them. The old biblical approach and nineteenth-century theories of intolerable wrongs and punishment have proven inadequate. Retribution and deterrence have not put an end to crime, rather they have led to an expansion of criminal conduct and to society's concern with making individuals suffer physically for their mistakes and conduct, no matter how large or small the crime. The modern system displays the elite's intolerance of humanity's predicaments, enflaming a culture of cruelty and inhumanity to all peoples. Maybe the contrived code of conduct of another time cannot be imported to other peoples and places? Why, in British legal thought, does punishment seem so necessary in response to a wrong? Can passionate awareness of injustice be reconciled with the idea that justice is to be thought about and not merely felt? Among Conference participants, these individual doubts created incoherence and a framework for transformation, and inspired their capacity to wonder about justice.

Realizing that a new tradition of justice might present a partial solution to a national tragedy, most participants saw the Aboriginal idea of justice as healing, as a national hope and as a dream of a new beginning. In this respect, the Conference was a defining moment in Canadian post-colonial law. It enfolded Dean MacKinnon's idea of the role of the university in society, Dr. Gosse's sense of urgency about a crisis in criminal law, Saskatchewan Justice Minister Bob Mitchell's vision of blazing the trail and Professor Little Bear's plea that participants travel this trail.

A wise man once told Don Worme to "lead, follow or get out of the way!" His advice seems eminently sensible. It appears that the federal and provincial justice ministers agree. After a hard winter, at the spring meeting of the ministers responsible for justice, on March 23–24, 1994, the justice ministers conceded that "the justice system has failed and is failing Aboriginal Peoples and agree that a holistic approach including the healing

process is essential to Aboriginal justice reform." They also pledged to work together and with Aboriginal community leaders in support of these priorities. These new thoughts are animated by the conference, by the shift in perspectives it brought about and by the findings of every commission that has studied the problem.

So, the difficult part begins. Speaking to audiences, getting agreements, establishing policies and putting words on paper are part of the new struggle. Dreaming that justice systems will save Aboriginal Peoples, solve all our problems or provide security will only keep us stuck in wishful fantasy. For justice to flourish it must be practised daily as a way to become more fully alive, and to bring forth the goodness and kindness already present within us. Empowering justice as healing can put us on a new trail.

Such concepts commit Canadian society to movement and change; they provide future direction by using adversity as an opportunity to develop greater awareness, discover deep truths and become more fully healed. Under this beacon of hope for an integral Canada with an equitable justice system, these questions await answers: Without funding and action, what is any policy's value? Who will soothe the fears of a terrorized society, both Aboriginal and colonial, during the transformation? Will Aboriginal community efforts collapse under the weight of their own successes or failures or funding problems? The future will be filled with finding the answers.

NOTES

1 *R. v. Sparrow* [1990] 1 S.C.R. 1075, p. 1106.
2 Ibid., pp. 1109, 1119.