

ABORIGINAL PEOPLES, JUSTICE AND THE LAW

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INTRODUCTION

Early in the 1970s, I had the privilege of attending one of the first national conferences of attorneys general of Canada that addressed the issue of Aboriginal Peoples and the justice system. From then to the current work of the Royal Commission on Aboriginal Peoples, several other conferences, studies, task forces, royal commissions and public inquiries have highlighted the fact that the enforcement and administration of law in this country have an adverse impact on Aboriginal people.

It is clear that Aboriginal people are over-represented in the criminal and child welfare branches of the justice system, and that they are involuntarily drawn into the justice system in larger numbers than their proportion of the population. Why that is so is not the focus of this presentation. In this presentation, I want to discuss issues relating to the cultural conflicts inherent within the administration of justice, to answer the question whether Aboriginal people are receiving justice in our system and to suggest that, given the opportunity, Aboriginal societies would likely do things differently.

It is important to understand how our current state of affairs came about and why it is likely to continue. Almost all the studies I referred to earlier have come to the conclusion that the adverse impact of the administration of justice on Aboriginal people has come about because of past misdirected and inappropriate government approaches to the use and enforcement of law throughout our history, combined with a clear unwillingness on the part of Aboriginal people to participate in the justice system in the same way as non-Aboriginal people or as people are expected to. The Commission of Inquiry in Manitoba, of which I was a co-commissioner along with Associate Chief Justice A. C. Hamilton of Manitoba's Court of Queen's Bench, reached several conclusions about this area.¹ Some of them are:

- ♦ Aboriginal people are often overcharged (that is they are charged with more, and/or more serious, offences than they are ultimately convicted of);

- ♦ Aboriginal people are less likely than non-Aboriginal people to plea bargain or to benefit from a negotiated plea;
- ♦ Aboriginal people are less likely than non-Aboriginal people to contest their charges;
- ♦ Aboriginal people are often unrepresented or under-represented in court. They are largely economically impoverished and cannot afford to hire their own counsel. Aboriginal people are also charged more often with summary conviction offences for which our legal aid plans are, for resource reasons, unwilling or unable to provide, or pay for, legal assistance.
- ♦ Even when they do have counsel, Aboriginal people see their lawyers less frequently than non-Aboriginal accused and for shorter periods of time;
- ♦ Aboriginal people are more likely than non-Aboriginal people to plead guilty, even when they are not, or do not believe themselves to be, guilty;
- ♦ Aboriginal people are more likely than non-Aboriginal people to be incarcerated upon conviction (but compared with non-Aboriginal people, they are likely to receive, on average, shorter sentences);
- ♦ Aboriginal people are more likely than non-Aboriginal people to leave the legal process without understanding, and therefore without respecting, what has occurred to them or why.

There is an interesting twist to Aboriginal over-involvement in the criminal justice and child welfare systems. Aboriginal people are under-involved in the civil and family law systems. Aboriginal people apparently do not enter into, or engage, the Canadian justice system voluntarily.

On one level, this may not appear to be a problem. Many people are rightfully critical of a tendency in our society to be excessively litigious. We must all be concerned about a society where we try to pass a law to deal with every social or political problem and where, when we don't like what's happening or the pace at which it's happening, we immediately run off to court to try to get it stopped or to try to get it going again or to try to make it stay the same or to try to change it or to get money for whatever happened to it. I am not one to advocate unnecessary litigation. Our courts do not hold all the answers; I know, for I am one who sometimes gets asked. I also believe it is fair to say that, for cultural reasons, Aboriginal people tend to seek non-adversarial methods of resolving their problems. Going to court just does not fit Aboriginal thinking.

On another level, the unwillingness of Aboriginal people to voluntarily engage the institutions of society designed to resolve serious problems is a sure sign that those problems are going unresolved. All the recent studies into Aboriginal people in today's society, as well as the nature and level of

their involvement in our criminal and child welfare systems, clearly suggest a myriad of problems requiring resolution.

Many times I have heard people ask: "What is it about Aboriginal people that causes them to behave like that?" Such a question suggests the problem lies within the Aboriginal person or with his or her community. That, almost inevitably, leads one to conclude that the answer lies in trying to change the Aboriginal person or his or her community. As a result, almost all our efforts at reform have centred on informing or educating Aboriginal people about the justice system, on finding ways to get them to "connect with" the system or on finding ways to make it easier for them to find their way through it.

Establishing and funding more and better Aboriginal court worker or Aboriginal paralegal programs, printing more and better aboriginally focused information kits, making more and better audio- and video-tapes in Aboriginal languages about how courts and laws work, establishing Aboriginal law student programs, hiring more Aboriginal court staff with the ability to speak Aboriginal languages and recruiting or appointing more Aboriginal judges—all find their justification in such thinking.

Attempts at reforming the system itself in ways that address other, more significant, issues have not been undertaken. The main reason, I believe, is because the non-Aboriginal people who control the system have not seen the problem as lying within "the system." It is time to question whether at least some of the problem lies in the way we do business within the justice system. Perhaps the question should be restated as: "What is wrong with our justice system that Aboriginal people find it so alienating?"

DIFFERENCES AND SIMILARITIES

The starting point is a difficult one for people raised with the liberal ideals of "civil rights" and "equality"; it requires one to accept the possibility that being Aboriginal and being non-Aboriginal involve being different. It requires one to come to terms with the concept that the Aboriginal Peoples of North America, for the most part, hold world views and life philosophies fundamentally different from those of the dominant Euro-Canadian society, and that these belief systems and approaches to life are so fundamentally different as to be inherently in conflict. It requires one to acknowledge that, given the long history of cultural oppression that has occurred in this country, the fact that Aboriginal cultures are still a vibrant force in so many Aboriginal communities is evidence that those forces are likely to continue and, possibly, to grow.

This is not to say that all Aboriginal Peoples adhere to a single life philosophy, religious belief or moral code. They do not. There are, and have been in the past, within Aboriginal societies, dissenting and noncon-

formist individuals and groups. Variations of belief, fundamental values and ethical systems within the dominant Canadian and American societies are even more abundant. Of necessity, I must generalize in my comments, although not, I believe, inappropriately or unfairly. I am not dealing here with the beliefs and traditions of one particular tribe or culture, although I speak from my own experience and personal knowledge. There are areas of thought and belief that are substantially shared by both Aboriginal and non-Aboriginal peoples. Nevertheless, the differences are broad enough and general enough to make many Euro-Canadian institutions incompatible with the moral and ethical value systems and approaches of Aboriginal Canadians.

At a fundamental cultural level, the difference between Aboriginal and Western traditions lies in the perception of one's relationship with the Creator. I am not a biblical scholar, but as I have come to understand it, in Judaeo-Christian tradition, man occupies a position just below God and the angels but above all other earthly creation. Christian belief and tradition hold that God created mankind last, on the sixth day, as the culmination of creation and gave him dominion over the earth. According to the Genesis account of Creation: "God said, 'Let us make man in our image and likeness to rule the fish in the sea, the birds of heaven, the cattle, all wild animals on earth, and all reptiles that crawl upon the earth.'" Mankind was told to "fill the earth and subdue it, rule over the fish in the sea, the birds of heaven, and every living thing that moves upon the earth."

In sharp contrast, the Aboriginal world view holds that mankind is the least powerful and least important factor in creation. Human beings cannot influence events, and are disrespectful and unrealistic if they try. Mankind's interests are not to be placed above those of any other part of creation. In the matter of the hierarchy, or relative importance, of beings within creation, Aboriginal and Western intellectual traditions are almost diametrically opposed.

It goes without saying that our world view provides the basis for those customs, thoughts and behaviour we consider appropriate. Each person's individual and collective (that is to say, cultural) understanding of humanity's place in creation, and the behaviour appropriate to that place, pervades and shapes all aspects of one's life. To understand that idea, I ask you all to think for a moment about how you learned what it means to be, and how one is, a Canadian. In much the same way, one must try to appreciate that there are many ways that one is "taught" to be Aboriginal in Aboriginal society.

Appropriate conduct in Aboriginal societies was assured through the teaching of proper thought and behaviour from one generation to the next. Moral, ethical and juridical principles were taught by example. Individuals within society who lived according to tribal principles were esteemed and

honoured. They were treated as living role models of fitting conduct. Examples were also drawn from the lives of people no longer living and from the lives of fictitious heroes and heroines whose manners and behaviour were considered worth emulating.

The elders in a tribe, as the vital link with the past, not only played an important role in the teaching of correct conduct to younger generations; they were repositories of the knowledge that told people how to behave suitably and honourably in every situation. They had memories of both the recent past, which they remembered personally, and the more distant past, which they had learned from their teaching. Elders were and are the unwritten source of knowledge of fitting behaviour and conduct. Their memories constituted the unwritten precedents for Aboriginal customary law, and the means for interpreting customary law in a manner suitable to a particular occasion. Aboriginal elders are still revered for their role in this area.

While I was growing up, I attended the Catholic church and public schools at the request (and direction) of my Catholic grandmother. Many people of my generation and of my parents' generation attended these institutions because our families had been required to do so by law since the nineteenth century. Although those laws have been changed, old habits are hard to break. With the repeal of those prohibitions by the 1950s, more and more of us were exposed, some for the first time, to the teachings of more traditional elders, who were able to explain why even our, apparently Christian, parents and grandparents still somehow viewed things differently from other members of Canadian society.

We were able, through attendance at traditional gatherings such as sun dances, feasts, giveaways, namings, weddings, fastings and at Midewiwin lodge meetings to learn from the elders of our tribe what the underlying values and approaches of the people actually were. We were taught, among other things, that the values of the people are taught not only in direct ways, such as through the correcting of children, but in even more subtle ways, such as through the language itself.

Those elders taught me that the seven traditional values of my people are bravery, honesty, humility, love, respect, truth and wisdom. I am told that the cultural values of the Dakota people include conformity with the group and harmony within it; taking responsibility for the here and now; the development of one's ability to make personal decisions; control over one's emotions; reverence for nature even while using it, and constant awareness of the Creator. The four great virtues taught in the Dakota sun dance are bravery, generosity, fortitude and integrity.

Apache beliefs and values have been stated as respect for the autonomy of the individual; non-interference; desire for harmony in interpersonal re-

lations; respect for individual freedom; co-operation and sharing. The basic values of the Cheyenne people include respect for the spirit world; desire for harmony and wellbeing in interpersonal relationships; desire for harmony and balance with nature; bravery and mastery of self; generosity, sharing and co-operation; individual freedom and autonomy consistent with co-operation and collective wellbeing, and humility and respect in all relationships.

None of these values would be found inadequate or inappropriate by the dominant Canadian society. The same or similar values exist within most of the world's cultural traditions; however, Euro-Canadian society has developed conventions that allow such ethical and moral values to be separated, at least temporarily, from everyday life. Aboriginal North American cultures have not done so.

An example is the ease with which a member of the dominant society can plead "not guilty" to a charge for which he is, in fact, responsible. In Western tradition, the plea is not seen as dishonest; it is understood as a conventional response to an accusation, based on the doctrine that people are innocent until proven guilty, on the principle that accused are not required to incriminate themselves, and on the practice of requiring the prosecution to prove guilt beyond a reasonable doubt in open court. In Aboriginal cultures, to deny a true allegation is seen as dishonest and such a denial would be a repudiation of fundamental, highly valued, though silent, standards of behaviour.

THE MEANING OF JUSTICE

At a basic level, justice is perceived differently by Aboriginal societies. In the dominant society, deviant behaviour that is potentially or actually harmful to society, to individuals or to perpetrators, is considered a wrong that must be controlled by interdiction, enforcement and correction designed to punish and deter harmful deviant behaviour. The emphasis is on punishment of the deviant to make him or her conform to socially acceptable forms of behaviour or to protect other members of society.

The primary meaning of "justice" in an Aboriginal society would be that of restoring peace and equilibrium to the community through reconciling the accused with his or her own conscience and with the individual or family that is wronged. This is a fundamental difference. It is a difference that significantly challenges the appropriateness of many of the ways in which the present legal and justice systems deal with Aboriginal people in the resolution of their conflicts, in the reconciliation of accused with their communities and in maintaining community harmony and good order.

Aboriginal cultures approach problems of deviance and nonconformity in a non-judgmental manner, with strong preferences for non-interfer-

ence, reconciliation and restitution. The principle of non-interference is consistent with the importance Aboriginal Peoples place on the autonomy and freedom of the individual, and the avoidance of relationship-destroying confrontation.)

In the past, smaller populations and larger areas of uninhabited land made it possible for nonconformists, either voluntarily or under pressure from the community, to leave the community where their deviance was unacceptable or dangerous to the collective. The Canadian justice system frequently deals with people who misbehave by removing them from society for a period of time. We call this incarceration. To this extent banishment and incarceration appear to have the same objective. However, there is an underlying value of punishment attached to the principle of incarceration that is not associated with the concept of banishment.

While during either a period of incarceration or banishment, the accused cannot repeat his or her offences in the community and may, at some point, be allowed back, reconciliation and atonement are issues that still apply when the Aboriginal community banishes someone and decides to let him or her return. The established principle surrounding incarceration, on the other hand, is that after completing his or her sentence, the accused has "paid the price" and should be seen as having atoned to society for what he or she has done. The principles of restitution to the victim and reconciliation with the community do not mark the manner in which the accused is dealt with at any point in the process. While they may be referred to, such principles are not accorded the importance they receive in Aboriginal societies.

Rehabilitation is not a primary aim of the Euro-Canadian justice system when dealing with an offender, with the possible exception of very young offenders. It is only one of several factors taken into account by sentencing judges, and it is often undermined by lack of public support. Institutionalized support is rarely and only minimally offered to victims. Restitution is ordered generally as a form of financial compensation and usually only if the offender has the financial resources to do so. Thus, retribution is often the primary thrust of action taken against deviants.

Most Aboriginal societies value the interrelated principles of individual autonomy and freedom consistent with the preservation of relationships and community harmony, respect for other human (and non-human) beings, reluctance to criticize or interfere with others, and avoidance of confrontation and adversarial positions. When the dominant society's justice system is applied to Aboriginal individuals and communities, many of its principles are clearly at odds with the life philosophies that govern the behaviour of the people.

For example, as the least important creature in the universe, according

to his or her world view, an Aboriginal person would necessarily be unwilling or unable to insist that his or her version of events is the complete and only true version. According to the Aboriginal world view, truth is relative and always incomplete. When taken literally, therefore, the standard courtroom oath—to tell the truth, the whole truth and nothing but the truth—is illogical and meaningless, not only to Aboriginal persons but, from the Aboriginal perspective, to all people. The Aboriginal viewpoint would require the individual to speak the truth “as you know it” and not to dispute the validity of another viewpoint of the same event or issue. No one can claim to know the whole truth of any situation; every witness or believer will have perceived an event or understood a situation differently. It would be rare for an Aboriginal witness to assert that another witness is lying or has gotten his facts wrong.

Our justice system frowns upon an individual who appears uncertain about his or her evidence, and failing to assert the superiority of one's own evidence over that of another is often seen as uncertainty. Given the Aboriginal world view, where the relativity of truth is well understood, one can readily perceive that it would be virtually impossible for an Aboriginal witness to comply with the strictures of the court in the matter of truth-telling. In a system where one's credibility is determined to a large extent by how well one's testimony stands up to cross-examination, the Aboriginal view of the relativity of truth can give the erroneous perception that the witness is changing his or her testimony, when in reality all that may be happening is that the witness is recognizing or acknowledging that another view of the events, no matter how far-fetched or different from his or her reality, may be just as valid as his or hers.

Differences in world views, as you can see, can result in differences in each side's philosophies and sense of purpose about “truth,” “law” and “justice.” This will almost inevitably lead to differences in viewpoints about what a legal system should try to achieve, and how it should go about achieving its objectives. The truth determination process is a case in point.

In Aboriginal societies “truth determination” would, in my view, be very different from “truth determination” in Western society. Methods and processes for solving disputes in Aboriginal societies have, of course, developed out of the basic value systems of the people. Belief in the inherent decency and wisdom of each individual implies that any person might have useful opinions on any given situation and, if they wish to express them, should be listened to respectfully. Aboriginal methods of dispute-resolution, therefore, would allow for any person to volunteer an opinion or make a comment. The “truth” of an incident would be arrived at through hearing many descriptions of the event. Because it is impossible to arrive at “the whole truth” in any circumstances, Aboriginal Peoples would believe

that more of the truth can be determined when everyone is free to contribute information. In such a system, the silence of an accused in the face of a mounting consensus as to what occurred would be taken as an acknowledgment that the consensus is correct.

This differs substantially from a system where the accused not only has the right to remain silent and not to have that silence held against him or her, but where he or she is invariably discouraged by counsel from testifying; where only the victim or a small number of people are called to testify; where the questions to be responded to are carefully chosen by adversarial counsel; where questions can be asked in ways that dictate their answers; where certain topics are considered irrelevant, and where certain very important information about the accused or the accuser or their families is deemed inadmissible.

In separate justice systems, differences would also undoubtedly occur in sentencing. Because "justice" is achieved in Aboriginal societies only when harmony is restored to the community, not only the accused but also other people who have been or might be affected by the offence, particularly the victim, would have to be considered as well. In the Ojibway concept of order, when a person is wronged, it is understood that the wrongdoer must repair the order and disharmony of the community by undoing the wrong done. In most cases, the responsibility is placed on the wrongdoer to compensate the persons wronged. This concept of order makes the individual responsible for the maintenance of harmony within society.

Reparation or restitution to the victim or the community in a way that restored balance and harmony to the people involved would therefore be a primary consideration. The person wronged, whether bereaved or impoverished, would be entitled to some form of restitution. In the eyes of the community, sentencing the offender to incarceration, or worse still, placing him or her on probation, without first addressing the issue of reconciliation, would be tantamount to completely relieving the offender of any responsibility for restitution of the wrong. But such is "justice" in the Western sense—at least from the Aboriginal perspective. Such action is viewed by them as an abdication of responsibility and a total exoneration of the wrongdoer.

Individuals dependent on the accused in some way, such as spouses, children, grandparents, grandchildren, aunts, uncles or cousins are also involved, and from an Aboriginal perspective, care has to be taken that actions to control the offender do not bring hardship to those individuals. "Justice" in Aboriginal societies would be relationship-centred and the consequences of a particular disposition on other individuals and on the community, as well as on the offender, would be considered. This is not to say that punishment of an individual in Aboriginal societies would never

occur, but punishment is likely to occur only if an accused has repeatedly failed to work with the community to restore peace and harmony and to rehabilitate him- or herself. The orientation of Western criminal justice systems toward punishment has a long and entrenched history, and retribution is almost always demanded, even if not always given.

The differences between Aboriginal thought and the processes of the Canadian justice system are profound. The Canadian justice system, like other justice systems in the European tradition, is adversarial. When an accusation has been made against an individual, legal counsel representing plaintiff and defendant confront one another before an impartial judge or jury. Witnesses are called to testify for or against the accused, that is, to criticize the actions of either the accused or another.

In our existing systems, guilt and innocence (concepts that have no equivalent in most Aboriginal societies and therefore no equivalent words) are decided on the basis of only that evidence considered admissible according to established (and, many believe, archaic) rules and on the basis of the argument that takes place between legal representatives.

The fundamental thrust of the Euro-Canadian justice system is the guilt-determination process. The principle of fairness in determining whether the accused is guilty is of the utmost importance to what we do as judges. This arises, one could easily conclude, because our criminal justice system developed from a society where wrongdoers were placed in stocks and chains, or flogged, or whipped, or drawn and quartered, or put to death, all in public, for any one of a large number of offences. This orientation led to concerns over ensuring that only those who were "truly guilty" of the charges brought against them should be subjected to the punishments being imposed, for they were considered so severe. The adage "Better a guilty man go free than an innocent man be convicted" finds its justification in this history.

In Aboriginal cultures, the guilt of the accused would be secondary to the main issue. The issue that arises immediately upon an allegation of wrongdoing is that "something is wrong and it has to be fixed." If the accused, when confronted, admits the allegation, then the focus becomes "What should be done to repair the damage done by the misdeed?" If the accused denies the allegation, there is still a problem and the relationship between the parties must still be repaired. Because punishment is not the ultimate focus of the process, those accused of wrongdoing are more likely to admit having done something wrong. That is why, perhaps, we see so many Aboriginal people pleading guilty. At the same time, to deny an allegation which is "known" by all to be true, and then to go through the "white man's court" is often seen as creating more damage.

The concepts of adversarialism, accusation, confrontation, guilt, argu-

ment, criticism and retribution are not in keeping with Aboriginal value systems. Adversarialism and confrontation are antagonistic to the high value placed on harmony and the peaceful co-existence of all living beings, both human and non-human, with one another and with nature. Rupert Ross in his work *Dancing with a Ghost*² points out that criticism of others is at odds with the highly esteemed Aboriginal values of non-interference, individual autonomy and individual freedom. The idea that guilt and innocence can be decided on the basis of argument is incompatible with a firmly rooted belief in honesty and integrity that does not permit lying. Retribution as an end in itself and as an aim of society is a meaningless notion in an Aboriginal value system that emphasizes reconciliation of the offender with the community and restitution for the victim.

The same contradictions between Aboriginal values and the dominant justice system result in a heavy burden being placed on Aboriginal accused and witnesses when they enter the justice system. Accusation and criticism (giving adverse testimony), while required in the Canadian justice system, are antagonistic to an Aboriginal value system that makes every effort to avoid criticism and confrontation.

As Mr. Ross has pointed out, "refusal or reluctance to testify, or when testifying, to give anything but the barest and most emotionless recital of events, appears to be the result of deeply rooted cultural behaviour in which giving testimony face to face with the accused is simply wrong . . . [and] where in fact every effort seems to have been made to avoid such direct confrontation." In Aboriginal societies, it may be "ethically wrong to say hostile, critical, implicitly angry things about someone in their presence, precisely what our adversarial trial rules have required."

Pleading is another area where the mechanics of the Canadian justice system conflict with Aboriginal cultural values. Aboriginal individuals who have committed the deed with which they are charged are often reluctant or unable to plead "not guilty" because that plea is, to them, a denial of the truth, and contrary to a basic tenet of their philosophy.

A final example is the implicit expectation of lawyers, judges and juries that accused will display remorse and a desire for rehabilitation. Because their understanding of courage and their position in the overall scheme of things includes the fortitude to accept, without protest, what comes to them, Aboriginal people may react contrary to the expectations of non-Aboriginal people involved in the justice system. Many years of cultural and social oppression, combined with the high value placed on controlled emotion in the presence of strangers or authority, can result in an accused's conduct in court appearing to be inappropriate to his plea.

In acknowledging their powerlessness before the Creator, Aboriginal children would be taught to affirm their dependence upon the Creator and

upon all of creation; to wait patiently and quietly, in a respectful manner, to receive the mercy of the Creator. Many cultural traditions and ceremonies are imbued with this philosophy. This attitude can easily be carried over into Aboriginal behaviour within the justice system. One of the researchers for the Aboriginal Justice Inquiry of Manitoba told us that in his effort to honour those pleading his case, he tries hard to agree to their requests, to give answers that please, and not to argue or appear adversarial. Judges and juries can therefore easily misinterpret the words, demeanour and body language of Aboriginal individuals before them.

To require people to act in ways contrary to their most basic beliefs is not only a potential infringement of their rights; it is also, potentially, a deeply discriminatory act. Witnesses who do not testify directly, complainants who do not complain vociferously and accused who do not behave "appropriately" or who show little emotion may find that they are "dealt with" differently or achieve different results than those who react in ways expected by the system. Such culturally induced responses can easily be misunderstood. Sometimes they are wrongly treated as contempt for the court. Sometimes they result in a hearing that is less than fair and, far too often, they result in inappropriate sentencing.

Clearly something must be done. Not only must we undertake reforms to the existing system to change the way we "do business" where Aboriginal people are concerned, but it seems clear to me as well—as it became clear to my colleague Associate Chief Justice A. C. Hamilton during the course of the work we did together on the Aboriginal Justice Inquiry of Manitoba—that we must also undertake reforms that allow and empower Aboriginal people to do justice for themselves.

NOTES

- 1 A. C. Hamilton and C. M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba*, 2 vols. (Winnipeg: Queen's Printer, 1991).
- 2 Rupert Ross, *Dancing with a Ghost: Exploring Indian Reality* (Markham, Ont.: Octopus, 1992).