Considerations for Achieving "Aboriginal Justice" in Canada[1]

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Abstract. The language inherent in "justice" talk poses constraints which may preclude resolutions that are satisfactory to First Nations and their people. Although "justice" in Euro-Canadian nomenclature may be a meaningful concept (albeit too infrequently achieved), Aboriginal languages have no similar concept that can be disentangled from the broader concept of "the way we live." Thus, while dominant governmental and criminological perspectives allow separation of "justice" issues from other aspects of life, or in talking about "justice systems," many First Nations would prefer to speak in terms of concepts such as social harmony, dispute resolution, peacemaking, and healing. These concepts imply concerns with broader social relations, and yield implications for the general nature of Aboriginal/non-Aboriginal relations that must be addressed as the terms of self-government are negotiated. The federal government thus far has shown itself to be responsive to "Aboriginal justice" initiatives which take the dominant Euro-Canadian system as its departure point, but appear unwilling and bureaucratically unable to respond to initiatives which attempt to incorporate justice into broader self-determinative strategies of responsibility and governance. Examples of particular "aboriginal justice" projects are cited, some of which have been implemented and others not, as a vehicle for discussing these issues.

I'm not aboriginal; nor do I purport to speak for aboriginal peoples in terms of what their preferred futures might entail. Nonetheless, I do believe it **is** reasonable for me to comment on the other side of the equation, i.e., on the kinds of considerations that the non-aboriginal community, and particularly our governments, should keep in mind as they negotiate both broad framework agreements, and consider whether to fund particular projects, involving aboriginal peoples and their individual First Nations. The area on which I will focus concerns "aboriginal justice" initiatives, though it is extremely difficult to divorce justice in the narrow sense from its broader meanings.

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I assume you know much about our mixed history of aboriginal-governmental relations. In the early years of the New World colony, when the European explorers depended heavily on this continent's indigenous peoples for survival from the elements, and protection from other European powers, the sovereignty of indigenous First Nations was acknowledged, and a process of treaty-making enacted. With their foot in the door, however, and particularly by the 1800s, once colonists were here aplenty, the British and French had established an equilibrium, and the danger of hostility from the new United States had passed, Native peoples were seen as more of an impediment to progress than anything else, and were treated as such. Beliefs that Natives were "the vanishing race" proliferated; treaty-making rapidly became a more one-sided process; and soon, as was the case here in British Columbia, there was no treaty-making at all.

So Canada took shape, and those who governed took it upon themselves to decide what was best for "their" Indians. The official policy was one of **assimilation**, and its vehicle was the *Indian Act*, which gave the government, through its network of Indian Agents, the power to regulate virtually every element of Indian life. That policy, as you probably all know, continued for many years, and was certainly evident as recently as 1969, when the Trudeau-Chretien White Paper proposed the desiderata of terminating the *Indian Act*, terminating the Department of Indian Affairs, terminating any sort of Indian special status, and releasing aboriginal Canadians into the mainstream of society with all of the **individual** rights and responsibilities that all of us share, but with no recognition of the **collective** rights that are a part of aboriginal culture, nor of their unique past and prospective contributions to Canadian culture (e.g., see Weaver 1981).

But Native peoples were incensed at yet another example of decisions about "what was best for Indians" being made by somebody else, and the 1969 White Paper is now identified by many as one of several key factors that forged the beginnings of a pan-aboriginal coalescence, and helped give root to contemporary Native Power (e.g., see Tennant 1990).

Much has changed since 1969. Aboriginal peoples and their leaders have asserted themselves in the Courts, have seen to it that "aboriginal rights" have been written into the *Constitution*, have had impact on the broader political scene despite their continued absence from the institutional structures of the country, and have re-activated a process of cultural renewal.

One would hope that the same would be true of the other side of the renegotiating equation, i.e., particularly the Federal government: That they would have come to see the importance of recognizing the inherent aboriginal right to self-determination; to acknowledge the special contributions that aboriginal peoples have made to the birth of this country; and to appreciate the unique contributions that a healthy and respected aboriginal community can bring to the future of this country. And, to some extent, that is so, at least in theory. The Federal Government, through its Department of Indian Affairs and Northern Development (DIAND) has formally abandoned its explicitly assimilative objectives, and entered into a period of "devolution" of powers to aboriginal peoples.

At first glance, therefore, Canada looks progressive and positive. But in practice, my paper will suggest that something else is the case. Perhaps the most appropriate reference here is to Noam Chomsky, whose most recent book — *Year 501* (1993) — makes the case that, in the world of both domestic politics and international law, the conquest that formally began in 1492, and the imperialist attitudes that guided it, still continue. One intention of this paper is to discuss the extent to which this can be said of Canada, in terms of its relations with indigenous peoples.

In the realm of "aboriginal justice", for example, the question to be asked is to what extent the rhetoric of self-determination has been matched by the reality of its promotion. Can we take talk about "devolution" and "self-governance" at face value, or are the strings attached to its realization really little more than a continuation of the assimilation policy in a subtler guise?

Let me state from the start a few "givens" from which I can depart. First, I am a believer in aboriginal self-determination, period. I accept that, as the indigenous peoples of this country,

aboriginal peoples have a very special right, which they exercised for thousands of years and have never rescinded, to govern themselves. I also accept that First Nations are a unit unto themselves, such that individual First Nations have the right to choose what is right for them, and that no single solution need be accepted by all First Nations in order to become adopted. A corollary is that any resolution that might be negotiated between the federal government and any individual First Nation must be freely consented to by that First Nation, and by the federal government, before it can take effect.

These assertions were important for me to state, not only to set them out for you as an audience of uncertain makeup, but also insofar as I can now offer them as a set of criteria by which we can consider the extent to which they are met by given projects in the realm of aboriginal justice. Let us consider a range of projects, therefore, to see just how self-determining contemporary options can be.

When those of us who are non-Aboriginal consider issues of justice, the usual place we look, if only as a reference point, is to the contemporary justice system, both civil and criminal. A key concept for us, and particularly for those of us who are in Departments of Criminology, is that of the "crime". We may disagree radically in terms of what should or should not be considered "criminal", and we may vary in our opinions about what it is that should be done with the people who commit particular actions we consider "criminal", but the criminal justice system is our reference point, and the Criminal Code one of our key scorecards.

One alternative that is open to individual First Nations is to join us in that model, and, much to the pleasure of the federal government, many of them do. There are many First Nations in the country where the community is simply pleased as punch with the service they get from the RCMP and the courts, and would like to continue that way for at least the foreseeable future.

The main problem with that model is that the criminal justice practitioners who keep it in motion are still numerically overwhelmingly non-Aboriginal, however, and there are many First Nations who feel great aggravation about that. Certainly some of the Commissions and Inquiries of the last decade — like the Donald Marshall Commission in Nova Scotia, and the Manitoba Aboriginal Justice Inquiry, just to mention two — have shown that aboriginal misgivings about the quality of formal justice they have received, has considerable basis in fact, and have demonstrated in elaborate detail the racist attitudes and cultural insensitivities that have characterized much of the aboriginal experience.

For many, the response to such revelations has been to argue for the greater **indigenization** of the justice system — if only we had more aboriginal police officers, and translators, and judges, and probation officers, then all would be better because aboriginal people would be arresting and convicting and imprisoning their own, and in all likelihood showing greater cultural sensitivity in the process. Some First Nations have liked that idea, and have indeed signed on to Native policing programmes, or have even pushed hard for Tribal Courts along the lines of that run by the Navajo in New Mexico-Arizona. And the federal government has no problem with that alternative either. Tribal courts may take a bit of doing to accomplish, but the federal government, at least as recently as when Kim Campbell was its Minister of Justice, could live with that reality.

There are also several variants of that theme, all of which involve some greater degree of participation by Native communities in the resolution of criminal actions committed by their members. Two examples are of particular interest here. The first is occurring in the Yukon Territory, and involves the use of what the presiding judges — who are regular, non-Aboriginal, legally-trained judges of the Yukon Territorial Court — have called "Sentencing Circles". First tried and written up at length in the decision of *Phillip Moses* v. *The Queen* (Stuart 1992), the use of the circle to attempt to actively engage the members of the community, and particularly to solicit input from the community elders in the sentencing decision-making process, has met with

some success, at least in terms of apparent acceptance by both the local aboriginal and criminal justice communities. Indeed, when I last spoke with the judge who initiated the practice in Moses several weeks ago, he indicated that he had now employed "sentencing circles" in more than 200 cases, and that one of his two colleague judges had also commenced the practice.

The issues become a bit more complex for me in this instance. On the one hand, I can only admire the judges' receptivity to community input and community involvement. But on the other, I cannot help but note that "elder" is a term reserved for those who have gained authority by demonstrating their wisdom in some area of life, and that one impact of the presiding judge continuing to retain the role of final decision-maker, albeit after a process of community consultation, is that it serves at least in part to reaffirm the subservience of elders' views to those of the agent of the Crown. My worry is thus that instead of helping to *regenerate* community structures, the implementation of "sentencing circles" may actually serve to further *undermine* them, by denying elders the opportunity to actually control that process. Ultimately, that is indeed the crucial issue — what will the judge do when and if the community elders perceive him or her as an irrelevant element in the process? My hope is that s/he would have both the wisdom and the courage to defer.

A second variant of the community input theme, but still within the confines of the Euro-Canadian justice process, is evident in the diversionary scheme developed by the South Island Tribal Council in conjunction with the federal government and the Provincial Court (e.g., see Tennant 1992). This is a programme you may well be familiar with, since it has received considerable press coverage in both the *Globe & Mail* and the BC papers. I do not have the time today to discuss the South Island project in great detail, but it may be considered a step beyond "sentencing circles" insofar as any aboriginal person who met criteria set by the elders for diversion, was dealt with entirely by members of the First Nation, and never by a Provincial Court judge.

Whether the project was enjoying success or not depends on whom you ask, but an interesting element of this project is that it is now on indefinite hold, having been de-railed by members of the community who were concerned about the way certain cases were being resolved. I have no problem with that insofar as the decision to de-rail was undertaken by members of the community who felt that their perspective was not being addressed in the project. Instead, my concern is that the power to proceed or not has been returned to the federal government — who had funded the scheme — rather than being left for the community to determine its own resolution.

In any event, all the projects I have noted to this point are projects that focus on "crime" as defined by the Criminal Code and its officers, albeit with varying amounts of aboriginal involvement and responsibility for key decisions about process and outcome, and it is noteworthy that all have received support from the federal government, whether directly in the form of funding, or indirectly in the form of apparent consent with the practices being engaged. My main point is that the government has found funding to support these initiatives, none of which poses any immediate threat to its decision-making supremacy, or calls into question its authority.

The true test of governmental amenability to the reality of aboriginal self-determination will come the day the elders in the Yukon ask to hold their own circle, probably without a "trial" in the Euro-Canadian sense, and indicate that the judge need not attend. At South Island, assuming the project ever gets back on track, the issue will arise when the Tribal Council declares its readiness to handle all cases involving aboriginals without any governmental intervention or blessing required.

The day has already arrived for one proposal that more adequately tests governmental tolerance, from the Gitksan and Wet'suwet'en of British Columbia, aptly titled *Unlocking Aboriginal Justice* (Gitksan-Wet'suwet'en Education Society *et al* 1989). A more detailed account is precluded by the brief time we have here today, but suffice it to say that their proposal

takes the traditional stance of arguing that "justice" is **not** a domain apart from everyday life, but very much integral to it.

> For a Gitksan and Wet'suwet'en there is no such thing as a purely legal transaction or a purely legal institution. All events in both day-to-day and formal life have social, political, spiritual, economic as well as legal aspects. (p.15).

Similarly, "crime" does not exist as a specialized category that can somehow be demarcated away from other types of behaviour, and "specialists" (such as lawyers and police and judges) are not necessary because all disputes are to be resolved among the families of those affected.

Like most other First Nations, family structures were the basic control institution, and most interaction and resolution occurred on a face-to-face basis. The elders played a significant role in this regard.

> Authority rather than power governs decision-making and authority is based on personal respect. In this context, political and economic decisions are by consensus, with greater weight given to the thoughts of those with proven ability, experience and wisdom. ... Decisions and laws are not policed. Instead, there is a withdrawal of support from the person or group making the unpopular decision. Those who offend established laws and morals lose authority in the community. (pp.13-14).

The Gitksan-Wet'suwet'en had considered other alternatives, and had even tried alternative legal systems earlier this century, but found them wanting. The authors of the proposal state:

> ...[T]he setting up of parallel justice systems for native communities — with native police, native courts and native jails — will not work unless the society already has equivalent institutions of its own. The decentralized Gitksan and Wet'suwet'en societies cannot accommodate the hierarchical court system and specialized enforcement powers of the police. (p.25).

This leads the authors to conclude that

> If, as we suggest, the content of indigenous justice, that is its principles, laws and precedents, is to be used in a meaningful way, it must function within the structure of indigenous justice. Attempts to fit the content of one system into the structure of another are bound to fail. (p.25).

This view of "justice" as synonymous with "a way of living", and the attendant need to have structures of justice mirror structures of authority and responsibility within the community, are not unique to the Gitksan and Wet'suwet'en. But to make a long story shorter, it is noteworthy that the Gitksan-Wet'suwet'en proposal has never been funded, in large part precisely because their proposal talks about justice as a part of everyday living, and, unfortunately, there is no "Department of the Way We Live" in either Ottawa or Victoria. Their proposal did not "fit" neatly into any particular bureaucratic niche. As the authors recounted in a supplementary report (Gitksan-Wet'suwet'en Education Society *et al* 1990),

> We anticipated, correctly as it turned out, that the proposal would not fit within existing guidelines for government funding programs. The provincial government response has been coordinated by the Ministry of the Attorney General. Three meetings have been held

> with ministry committees but their mandate has been more to ease delivery bottlenecks within the existing justice system than to facilitate structural solutions.
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> For their part, federal ministries referred the proposal to the Department of Indian Affairs which declared justice to be a self-government issue that could not be acted upon until the current self-government negotiations with the Gitksan and Wet'suwet'en Chiefs have been concluded.
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> Government institutions find it difficult to comprehend and interact with decentralized societies. Two different traditions with two different ways of righting wrongs are attempting to deal with the same problems. Both perspectives have their strengths but require detailed work to integrate and apply them. (p.3).

According to my criteria, therefore, the government has once again failed the test, and pursued assimilation instead of self-determination. Indeed, although the Minister of Indian Affairs indicated that he and the Prime Minister were "committed" to finding "...practical ways to ensure that aboriginal communities can exercise greater control over the administration of justice" (p.160), he added immediately thereafter that: "However, we must keep in mind that there will clearly be some limitations on this control. ... Indians must respect the laws of this country and the rights of its non-native citizens." (Siddon 1991: 160). Siddon's comments would seem to suggest that the shape of aboriginal justice must conform to non-aboriginal conceptions of it. But as Donna Greschner (1992) notes:

> It is almost oxymoronic to talk of non-aboriginal conceptions of aboriginal rights; if aboriginal rights are not given their meaning by aboriginal peoples, they are not truly Aboriginal. (p.344).

Ovide Mercredi, Head Chief of the Assembly of First Nations, expresses a similar view. He is quoted in the Law Reform Commission's (1991) report to have eschewed the idea that small-scale "fixing" might solve the current situation, or that limits should be declared *a priori*. Putting these matters in the context of broader relations, he stated:

> The real issue is what some people have called cultural imperialism, where one group of people who are distinct make a decision for all other people. ... Our experiences are such that, [even] if you make [the current system] more representative, it's still your law that would apply, it would still be your police forces that would enforce the laws, it would still be your courts that would interpret them, and it would still be your corrections system that houses the people that go through the court system. It would not be our language that is used in the system. It would not be our laws. It would not be our traditions, our customs or our values that decide what happens in the system. That is what I mean by cultural imperialism. (p.13).

Part of our role as researchers, and as policy analysts, and practitioners, is to listen to aboriginal communities as they tell us their wants, and their needs, and their aspirations. Aboriginal peoples, as the indigenous inhabitants of this land, have a unique collective right to be self-determining, and have the right to expect Canada to walk its talk when we say that we want and hope for aboriginal peoples to once again flourish. But they cannot do so unless we are responsive to their cultural requirements, which includes the right to exist as they wish, and to have their conceptions and structures of justice mirror their preferred structures of authority and governance. Until that is an institutionalized reality, then, to paraphrase Chomsky (1993), the conquest continues.

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