
Is the Government of Canada Living Up to its Responsibilities Regarding Indigenous Justice Systems Under the UN Declaration?: A Report to UN Special Rapporteur James Anaya

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That the Canadian justice system has failed Aboriginal peoples at every turn is by now well known. As a recent report from the federal Department of Justice acknowledged,

The relationship between Canada's Aboriginal people and the Canadian justice system has been an enduring and comprehensively documented problem, the complex product of disadvantaged socio-economic conditions, culturally insensitive approaches to justice, and systemic racism. Over the years, numerous public inquiries, task forces and commissions have concluded that Canada's justice system has failed Aboriginal people at every stage. Aboriginal people have expressed a deep alienation from a system of justice that appears to them foreign and inaccessible.²

Indeed, the same conclusion has been reached so many times by so many Reports, Commissions and Inquiries in so many different jurisdictions that it has become an accepted truism.³

In part in recognition of that dismal state of affairs, in 1991 the federal Department of Justice initiated an Aboriginal Justice Directorate (AJD) within the federal Department of Justice, whose mandate was to develop an Aboriginal Justice Strategy (AJS) that would afford Aboriginal communities a greater role in the provision of justice to their own people and thereby presumably provide justice more effectively and appropriately in parallel with the Canadian justice system (CJS).

In some ways one can see the AJS as having been a positive step toward the creation of real "Aboriginal justice" through community-generated programming designed to create parallel Aboriginal justice systems that reflect community values and traditions. The advent of this support created a positive alternative to simply processing Aboriginal people through the CJS, and every indication is that Aboriginal-designed and -driven programming creates far more positive outcomes for Aboriginal people

¹ This brief report was prepared on the occasion of the Special Rapporteur's visit to Canada in October, 2013. Any correspondence regarding this submission should be directed to me at palys@sfu.ca

² See <http://www.justice.gc.ca/eng/rp-pr/aj-ja/0205/rep-rap.pdf>

³ The Department of Justice web page cites the following: Michael Jackson, *Locking Up Natives in Canada* (Ottawa: Canadian Bar Association, 1989); Nova Scotia, *Royal Commission on the Donald Marshall, Jr., Prosecution* (Halifax: Royal Commission, 1989); Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991); Government of Canada, *Aboriginal People and Justice Administration: A Discussion Paper* (Ottawa: Department of Justice Canada, 1991); Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, 1991); Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services Canada, 1996); Saskatchewan Commission on First Nations and Métis Peoples and Justice Reform, *Legacy of Hope: An Agenda For Change* (Saskatoon: Commission on First Nations and Métis Peoples and Justice Reform, 2004). The Royal Commission on Aboriginal Peoples's report on justice – *Bridging the Cultural Divide* – cites more than 30 commissions and inquiries that came to the same conclusion.

and communities at far less cost than is the case with the CJS,⁴ while simultaneously helping to build healthy communities.⁵ At last count 275 programs serving more than 600 communities⁶ were being funded by the AJS.

But does the AJS in and of itself fulfill Canada's responsibilities towards the Indigenous peoples that reside within its borders? A benchmark comparison is provided by the UN *Declaration on the Rights of Indigenous Peoples*, which makes clear that Indigenous peoples have the right to develop and maintain systems of justice guided by their own customs and traditions:

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.⁷

There are two main ways that Canada's approach has failed to meet those aspirational statements. First is that Canada's early promise to limit Aboriginal justice programming jurisdiction only temporarily, while capacity was being built,⁸ has not been realized. In Vancouver, for example, Vancouver Aboriginal Transformative Justice Services (VATJS) came into existence in 2000 with the promise that the range of offenses that could be referred to VATJS by Crown within the CJS would broaden as capacity grew. As I observed when describing the original constraints placed on the program by joint agreement of the federal and provincial governments and the Aboriginal justice community just as the program was being launched,

Over the long haul, this protocol is problematic for at least two reasons: (1) placing eligibility criteria completely in the hands of the Crown diminishes the very community authority required for a project of this sort to succeed; and (2) it requires Aboriginal leaders to be accountable to the authorities whose justice system has failed Aboriginal people, rather than to their own communities.

All participants in the [program] seem aware of this weakness, and recognize it as such. Accordingly, attention by all parties has been directed to ensuring that any constraints imposed

⁴ For example, see the evaluation of AJS-funded programs conducted after the 5-year funding cycle that ended in 2007 at <http://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/07/ajs-sja/ajs.pdf>

⁵ See Palys, T., Isaac, R., & Nuszdorfer, J. (2012). *Taking Indigenous Justice Seriously: Fostering a Mutually Respectful Coexistence of Aboriginal and Canadian Justice*. Research report prepared for Vancouver's Downtown Community Court and Vancouver Aboriginal Transformative Justice Services. Online at <http://www.sfu.ca/~palys/PalysEtAl-2012-Aboriginal&CanadianJustice-final.pdf>

⁶ <http://www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/cf-pc/index.html>

⁷ See <http://www.un.org/esa/socdev/unpfii/en/declaration.html>

⁸ The Indigenous community in Vancouver agreed to the initial program limitations because they acknowledged they were moving into new territory and needed to walk before they could run. However, the community consultations and especially the Elders who participated were adamant that jurisdiction should expand as experience grew and community confidence in the program was built.

on the program at its inception are not carved in stone. The Crown is committed to being “flexible” in designing a protocol that reflects the vision of the program. The negotiated agreement anticipates a time when referrals may emanate from several sources, and when the program’s jurisdiction will include a broader array of offenders and crime categories than is possible at present.

It is hoped that [program] participants will address the challenges of diversity, ownership, and control as soon as possible. “Traditions” are established quickly and, as the administrative status quo, can be difficult to change. The necessary tradition to be established here is one of ongoing project evolution – in the direction of ever-greater community responsibility.⁹

Now, thirteen years later, that promise has not been realized. Despite becoming a highly successful flagship Aboriginal justice program within BC that does far more than simply process offenders referred to the program by the CJS,¹⁰ federal/provincial budgetary support is less now than it was 13 years ago, and the range of offenses formally being referred by the CJS has not expanded at all.¹¹

A second major problem with the AJS is that instead of creating the space for an expanded community role in the design and provision of justice services, the AJS has become little more than the newest way for the federal government to retain control over an area that is legitimately within First Nation jurisdiction. When I attended the annual meetings of the former Working Group on Indigenous Populations in Geneva in 2004, one of the agenda items was “Indigenous Peoples and Conflict Resolution.” Part of my intervention focussed on how governmental involvement can be a double-edged sword. While a preliminary ingestion of funds can foster Indigenous involvement in an area, it also can become a straitjacket that thwarts further development and any realization of self-determination:

[A]fter 15 years of supposedly supporting “Aboriginal justice” through programme initiatives and special events, the federal government still holds all the money, still sets all the priorities, and still effectively tells Canada’s Indigenous peoples what their justice systems can look like. Any funds that do come are “soft” funds that may or may not be there next year. No mainstream system can develop with such uncertainty. How can Indigenous justice systems be expected to do so? And how can it be “Indigenous justice” without Indigenous direction and control?

The situation today is the same, with the caveat that the situation has become even worse under the Harper government that now sits in Ottawa. The ongoing practice of the Aboriginal Justice Directorate within the Department of Justice was to renew the AJD and its programs for five years at a time, but when the fund came up for renewal in 2013, it was to be terminated by the Conservatives without any consultation or even any notice or justification. The 2013 fiscal year arrived with Aboriginal Justice programs across the country still not knowing whether they would be renewed. Staff of the Vancouver program were told they shouldn’t come in because there was no guarantee they could be paid. In the

⁹ See Palys, T. (1999). Vancouver’s Aboriginal Restorative Justice Program: The Challenges Ahead. *Aboriginal Justice Bulletin*, 3(1), 2-3. Online at <http://www.sfu.ca/~palys/VATJS1999.pdf>

¹⁰ See Palys, T., Isaac, R., & Nuzsdorfer, J. (2012). *Taking Indigenous Justice Seriously: Fostering a Mutually Respectful Coexistence of Aboriginal and Canadian Justice*. Research report prepared for Vancouver’s Downtown Community Court and Vancouver Aboriginal Transformative Justice Services. Online at <http://www.sfu.ca/~palys/PalysEtAl-2012-Aboriginal&CanadianJustice-final.pdf>

¹¹ However, community referrals – where members of the community get in touch with the program instead of calling CJS authorities – have become more frequent, which I take as an indicator of community confidence in and support for the program.

end, after some pressure by the NDP Justice critic in the House of Commons, and a month into the new fiscal year, the Aboriginal Justice Strategy was renewed for just one year, and there is no indication thus far as to what will happen in 2014 when that short-term renewal expires.

These practices on the part of the federal government show tremendous disrespect for Indigenous peoples generally, and for the employees of the various programs in particular. How can a community continue developing infrastructure when it has no idea whether it will exist a year down the road? And why would the best and brightest of a younger generation commit themselves to a career in justice systems when there is no commitment on the part of government to encourage the continuing development of Aboriginal justice systems?

I concluded my brief intervention in Geneva in 2004 by noting,

The United Nations system is by no means perfect, but it has created institutional structures such as the Working Group on Indigenous Populations; during the first Decade of Indigenous Peoples has created new structures such as the Permanent Forum and the Office of the Special Rapporteur; and in the future should be creating *more*, not fewer, of these. Canada, if its commitment to Indigenous peoples is real and long-term, should start negotiating with Indigenous organizations to do the same.

Almost a decade later, we still await Canada's action. Where is Canada's plan to implement the *Declaration*? Where is the indication of a serious dialogue with Indigenous peoples to support and promote the creation of parallel Indigenous structures through which Indigenous peoples can establish their own priorities for justice and other areas in a way that is defined by and meaningful to Indigenous peoples? As Ovide Mercredi, former Head Chief of the Assembly of First Nations opined some years ago in relation to justice,

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. (1991, p.13).

Cultural imperialism exists in Canada in the realm of justice, and under the current federal government, it is getting worse. Unfortunately, everything I see outside the justice realm suggests that what I have been seeing in my own professional life is not unique to the justice area. I encourage the Special Rapporteur to tell Canada in no uncertain terms that its current strategies with respect to Indigenous peoples in this country are counter-productive, disrespectful, and in conflict with emerging international standards as expressed in the UN *Declaration on the Rights of Indigenous Peoples*.