

## **Equality Rights, Aboriginal Rights, and Cooperative Federalism: Three Salient Aspects of the Canadian Legal System**

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The three facets of the Canadian legal system I wish to discuss here have important constitutional implications, and therefore speak to the values of modern Canada and its people. Canada's constitution is a series of statutes of the British parliament, the first of which was promulgated in 1867, and the most recent in 1982. The latter provided for the "patriation" of the constitution, that is, henceforward, all amendments would be made by the parliament of Canada acting in conjunction with provincial legislatures according to an agreed formula. The 1982 amendment incorporated a human rights document into the constitution, the *Canadian Charter of Rights and Freedoms* ("the *Charter*"). It also provided that the rights of the "aboriginal peoples of Canada" were "hereby guaranteed and affirmed", thus acknowledging their pre-existence.

### **Equality**

The Equality provisions of the *Charter* have had a profound impact on the country. Judicial decisions implementing them have attracted enormous public notice, more possibly than any other aspect of the administration of justice apart from sensational criminal trials. Some have offended certain sections of society, and there have been calls for a curbing of judicial powers, even for the election of judges.

Like the United States, Australia, and New Zealand, Canada is a country comprised overwhelmingly of immigrants, who have long held the reins of power. In Canada, two groups of Europeans have dominated the political scene and the law-making institutions of the country: Anglo-Saxon protestants, and French Catholics. There was a time when both have displayed a pronounced social and economic conservatism, an unquestioning acceptance of the role of religion in everyday life and national affairs, a recognition of traditional patriarchal gender roles and hierarchical class divisions, and a high degree of top-down paternalism in all matters of governance. The major point of divergence between the two groups would have been the Anglo-Saxon assumption of near-absolute economic and political dominance.

But throughout the 19<sup>th</sup> century and continuing to the present day, Canadian society was becoming increasingly multi-faceted. The Scottish Highland Clearances of the late 18<sup>th</sup> century and the Irish Famines of the mid 19<sup>th</sup> brought tens of thousands of settlers to Canada, mostly Catholic, and with no great love for England or things English, including the Canadian Establishment. There were economic migrants from all parts of Europe. Religious persecution brought Jews, Muslims, and a variety of sects such as the Mennonites, Hutterites, Doukabours, and others. Canada's vast spaces were very attractive to those who wished to cut themselves off from mainstream society and live the way their tenets of belief instructed them: they continue to do so today (as of mid-August 2007, the Province of Quebec is insisting that an Amish settlement discontinue the "home-schooling" of their children by anyone other than qualified teachers: the Amish are preparing to move to another province rather than comply).

The most popular destination for the majority of Europeans was Ontario and Quebec. But in the mid-19<sup>th</sup> century, Western Canada started to attract immigrants (and migrant workers) from Asia, especially China, and later Japan and South Asia. Vancouver now has the highest percentage of persons of Asian extraction of any city in North America: more than 50% of the student population of my university is of Asian ancestry. The result of these waves of immigrants is a huge and somewhat under-populated country, marked by extremes of cultural and other diversity, and a certain lack of social coherence. The population has therefore become increasingly estranged from the mores of the specific European cultures upon which the values of the country were supposed to be based.

Until the promulgation of the Charter, the courts reflected a fairly conservative attitude even as Canadian society made advances in the socio-legal sphere. In Quebec, emergent nationalism and the determination to ensure the survival of the French language was to result in legislation that either forbade English signage, or which ensured that French was more prominent. It also promoted French language education in a variety of ways. For its part, the federal government inaugurated the policy of Multiculturalism, a celebration of ethnic and cultural diversity amongst the peoples of Canada. Parliament passed legislation declaring Canada to be bilingual. Among the ten provinces, however, only New Brunswick has followed suit.

In the absence of constitutional provisions, nothing could be done to accommodate those whose outlook was not aligned to that of the governing elites. The *Charter* changed this forever. Once fully in force, the floodgates of litigation opened. The Big M Drug Mart company decided to open its doors on Sundays, and was duly prosecuted under the *Lord's Day Act*. It is hard to see what conclusion the courts could have come to other than to declare the statute incompatible with the Equality provisions of the *Charter* on the grounds that it exalted the Christian day of rest over those of other faiths whose beliefs required them to refrain from working on other days. It also imposed alien values on non-believers. The issue was to arise again in the context of Ontario labour legislation designed to require employers to grant a "common pause day" for the benefit of workers generally, but the fact that this day was Sunday might have meant that a Muslim, for example, would be absent from work at least for some part of Friday, and all of Sunday, a day of no cultural or religious significance. If Muslims wanted a common pause day, ran the argument against the provincial legislation, would they not prefer it to be Friday?

Social conservatives point to the Supreme Court's decisions to de-criminalise abortion and to legalise same-sex marriage as examples of judicial law-making which threaten the very fabric of society. All one can say is, the skies have not yet fallen in. Arguably, the Sunday shopping cases have had much more impact on Canadian society as a whole than more troublesome decisions (abortion, same-sex marriage), which affect relatively few people directly. There are those who argue that the Equality examples I have touched on here have aided and abetted the forces of secularism in Canadian society, and deplore them on these grounds. On the other hand, the Court might simply be mirroring the sentiments of the majority in determining what the Canadian people think the role of *the state* ought to be in such issues.

It is surely significant that no serious attempt has been made to craft legislation which would avoid challenge on the grounds of violation of the Equality provisions of the Charter and, in effect, reverse some of the decisions touched on above. Arguably, then, the Equality provisions of the Canadian constitution, and the way they have been used by counsel and interpreted by the Courts, are making a contribution to rights-based jurisprudence in Canada and beyond. It is one where the often mis-used word “unique” is perhaps applicable.

### ***Delgamuukw* And The Path Towards Aboriginal Redress**

As is the case with other countries with broadly similar histories, the relationship between the majority settlers and the minority aboriginal population is one of which Canadians have little cause to be proud. The statistics speak for themselves: a disproportionately high rate of suicide among aboriginals (especially young people), ditto the prison population, unemployment, and poverty. The conditions on some First Nations reservations are an affront to even basic notions of civilization. What is worse, the greater part of the native population over the age of forty is struggling with the legacy of the residential school system. Convinced that the “Indians” should be encouraged, if not forced, to assimilate, starting in the 1870s but gathering steam fifty years later, the federal government took steps to remove aboriginal children from their parents, and placed them in boarding schools often run by religious denominations. For some, the experience was largely beneficial, if somewhat alienating—native language and dress was prohibited, and traditional values ignored (or worse). But for thousands, the experience was a nightmare of physical and/or sexual abuse. It is clear that an alarming number of those entrusted with the care and protection of these children regarded their charges as chattels which they could use in any way they chose. Massive claims for damages have been awarded which have effectively bankrupted a number of dioceses, and a number of perpetrators are in the prison cells where they definitely belong.

The point is, the aboriginal people of Canada are aggrieved, and have every right to be so. The somewhat patriarchal Indian Act of 1878 sets them apart from their fellow citizens. What is more galling is the fact that the greater part of their land has been taken from them, and the primary benefits of the principal resources thereof are being reaped by the immigrants, and not those who regard themselves as the lawful sovereigns. The First Nations regard the entire territory of the province of British Columbia as “unceded” – they have not relinquished title to it. They know that they are not going to get it all back, but they want some of it, and appropriate financial compensation for the rest. In British Columbia, this process has been entrusted to a Treaty Commission, because the first agreements between Europeans, particularly the English, and the aboriginal inhabitants were in the form of treaties, concluded on a sovereign to sovereign basis.

Frustrated by the incredibly slow pace of negotiations, a number of native groups have resorted to litigation in an attempt to persuade the courts to define what exactly their rights might be. It is all very well to know that rights are guaranteed and affirmed, but what rights? In substantive terms, what is the constitution talking about?

Many difficulties arise here. To many, it seemed that the First Nations were following a course that any plaintiff might where a question of establishing a legal right was

concerned. But the Canadian courts have their own way of conducting business. Rules of procedure and evidence dictate the manner in which issues of fact or law can be submitted and challenged. The difficulty is, arguments relating to First Nations title are seldom available in a form which a court would recognize readily. This issue came before the courts in what was to prove a landmark decision, *Delgamuukw v. Attorney General of British Columbia*. The plaintiffs were thirty-five chiefs of the Gitksan and thirteen from the Wet'suwet'en bands, who, acting on behalf of their families and their people, were seeking a declaration of title over lands which they maintained had been theirs from time immemorial. Their submissions were based largely on the traditional way in which the position of the chief and the territory over which he or she had jurisdiction was evidenced, that is, by crests, totems, and similar devices. Detailed presentations were made in court to explain the meaning of all this, and indeed its wider significance, including that which might be said to be within the spiritual realm. At trial, the presiding judge was the Chief Justice of British Columbia (now retired and Chancellor of the University of British Columbia). His reasons for judgment were very elaborate, but basically, the Chief Justice was uninterested in the Plaintiffs' submissions. So far as he was concerned, the plaintiffs could not make out a clear and unmistakable title to the land in question, and therefore he dismissed the action. It will be noted that he did not feel the need to determine the substance of the claim to jurisdiction because of his finding in matters of evidence.

The plaintiffs appealed to the Supreme Court of Canada, which decided unanimously to overturn the decision. Put simply, the Supreme Court declared that Canadian courts had to adopt a different way of dealing with aboriginal submissions based on First Nations culture than would be the case where the parties were non-native. Accordingly, the oral histories of the various bands and their chiefly families could be used in evidence in litigation. Artifacts, such as crests, carved boxes, totem poles, and regalia, which show the lineage of individuals and their position in their bands could also be conclusive not only as to the position of individuals, but the areas over which they claimed rights.

It is not too much to say that the *Delgamuukw* case revolutionized the concept of First Nations rights litigation. For the first time, the Canadian establishment was prepared to accept what had hitherto been regarded as interesting collectibles (some of which of immense value and eagerly sought after in the international art market), and oral histories were something other than mere legends, akin to fairy stories. They were vital aspects of the identity of the aboriginal inhabitants of Canada, and continue to have a powerful resonance and significance in contemporary society, not least with respect to the question of land rights.

The Supreme Court's decision in *Delgamuukw* might be taken as signalling a decisive end to the marginalization of the First Nations, and the trivialization of their culture. There have of course been other decisions which, inter alia, upheld native fishing rights both for commercial and non-commercial purposes (something bitterly resented by non-native commercial fishers), required meaningful consultation with First Nations groups, as opposed to the appearance thereof, where development projects are being proposed on native land, and required the federal government to pay millions of dollars in damages because of a breach of a fiduciary duty when it agreed to lease native land for a peppercorn rent for use as a golf course.

This is not to say that everything is going smoothly. My university was recently involved in another land controversy when it appeared to be on the point of selling land used for yet another golf course for development—an act of almost unbelievable insensitivity, apart from anything else. The Musqueam First Nation objected and the sale was halted, but the result among the non-native community in the vicinity of the course was bitterly hostile to any notion that “our” golf course might be seized by “them” (the Musqueam). It is disappointing to reflect that the percentage of the non-Canadian native population might be in favour of aboriginal rights, provided that no inconvenience to them is caused. One could point to a number of other contemporary examples of this phenomenon: land claim settlements are fine so long as the area in question is remote wilderness that nobody else wants, but not otherwise. These are issues that Canadian political and First Nations leaders will have to deal with. But, arguably, the legal system has laid the foundations for recognizing and defining the rights of people who continue to maintain that Canada’s status as one of the wealthiest countries in the world was built on land stolen from them.

### **Cooperative Federalism**

Canada’s constitution was designed to promote a strong central government and relatively weak (but far from impotent) provinces. The lessons of the American civil war were very fresh in the minds of the framers. But it should be remembered that modern Canada is very different from the self-governing dominion established by the original Act of 1867. For one thing, the federation consisted of only four provinces: the rest of the vast territories south of the 60<sup>th</sup> line of latitude lying to the west of Ontario became part of the federation one by one as their economies and political institutions developed and their populations became large enough to warrant the designation of provincial status. The tenth province, Newfoundland and Labrador, entered Confederation in April 1949 (prior to this it had been a dominion of the British empire). North of 60°, the Arctic is divided into three territories: the Yukon, the Northwest Territories, and Nunavut. They enjoy a status somewhere between absolute dependencies of the federal government and that of provinces.

I referred earlier to the diversity of the Canadian population, and the fact that it is spread sometimes rather thinly over enormous areas. Accordingly, the forces of homogeneity are simply absent in the greater part of the country. This has produced sharp socio-political divisions. In Alberta, for example, which enjoys an extraordinary prosperous economy thanks to the current price of oil and gas, provincial governments have always been right of centre (sometimes very much so), with a noticeable evangelical streak appearing from time to time. In addition to the rugged, laissez faire individualism displayed by the majority of Albertans, one also sees a measure of antipathy for the traditional power centres of Toronto and Montreal. Vancouver, on the other hand, is entirely different: extraordinarily non-Judeo/Christian ethnic diversity, and a political orientation more to the centre or centre left, and a high degree of tolerance of practices (same sex marriage, gay and lesbian lifestyles, marijuana use) which would be frowned upon if not heavily condemned on the other side of the Rocky Mountains.

All of this has led to tensions, of which Québec separatism is only the most obvious

manifestation. To many, it seems extraordinary that Canada is willing to submit to such exercises, in effect, allowing a significant percentage of the citizenry to decide whether or not they want to remain part of the country or not. The federal parliament has passed legislation requiring the question posed and any subsequent referendum to be clear (and a number of First Nations living in Northern Québec have made it clear that they will not allow the francophone population of the province to decide their future), there is nothing to stop future nationalist government from holding another referendum and using a favourable result as a basis for declaration of independence. The response to this has been an effort on the part of the other provinces and the federal government to consider how to make the Canadian federation work more efficiently and fairly, so that no part of the country feels disproportionately alienated. This is a Herculean task, but one where the legal system can be of assistance. It does this not only by ensuring that all the players abide by the same set of rules, but also by trying, within the limits of the constitution, to find accommodations for the different sets of interests and priorities of the two levels of government. Ottawa can afford to take the larger view: the provinces have to deal with developments (social, economic, demographic) on the ground.

The courts have gradually developed an approach to constitutional adjudication which is no less rigorous than before, but which takes into account the practicalities and the context in which a decision will have to function. This means that if a government wishes to sustain legislation which is *prima facie* a violation of charter rights, it must adduce convincing arguments (which the courts will evaluate) as to why this should be allowed. To my mind, this suggests that the modern Canadian legal system sees itself as fully involved with the life of the country, promoting and defending rights, but also attempting to ensure that governments, citizens, corporations are aware of their concomitant responsibilities. So far as individuals are concerned, this promotes participatory citizenship which should result in a greater degree of popular involvement in the political process, and hence true democracy. So far as governments are concerned, an increasingly greater effort is being made to ensure that the rights/responsibilities debate is never far from the minds of legislators. By making the Canadian union equitable as well as effective, it also contributes to the survival of the country itself. The next task is surely to do what is required to ensure that all Canadians, not merely the wealthy or (through legal aid) the poor, have equal access to justice.