THE THIRD SOLITUDE: 
MAKING A PLACE FOR ABORIGINAL JUSTICE

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Abstract / Resume

The Royal Commission on Aboriginal People made sweeping recommendations to neutralize the devastating impact of criminal law on Aboriginal peoples in Canada. This paper outlines some of the cultural assumptions at the root of Canadian criminal justice. It contrasts many of the fundamental premises of the system with some Aboriginal conceptions of justice. The author argues strongly that Canada must implement the recommendations of the Royal Commission.

Une Commission Royale a proposé des recommandations de grande envergure pour neutraliser l'impact dévastateur du code criminel sur les peuples autochtones. Mon analyse dégage les présupposés culturel sur lesquels se fonde le code criminel canadien. Je contraste le plus fondamental de ces présupposés, celui de la liberté, avec la conception autochtone de la justice. Je soutiens que les Canadiens reconnaîtront le besoin urgent de mettre en œuvre les recommandations de la Commission Royale dès qu'ils comprendront à quel point le code criminel canadien suppose une notion de justice incommensurable avec celle des cultures autochtones.

The term “Two Solitudes” is often borrowed from the title of a novel to describe the cultural and linguistic differences between Quebec and the rest of Canada (MacLennan, 1969). But as the recent Royal Commission on Aboriginal Peoples so eloquently documents, we must recognize that there is a third solitude inhabiting our vast land. That portion of the Commission’s work that deals with Aboriginal peoples and criminal justice in Canada has the apt heading *Bridging the Cultural Divide* (1966). It offers innovative recommendations to restructure the way the criminal justice system operates among Aboriginal peoples. Should these recommendations be implemented, Canada could go a long way to breaking down the barriers that isolate the First Nations from the rest of the country.

A dialogue must begin before it will be possible to achieve this goal. Otherwise, Canadians will never fully appreciate why the Canadian legal system is so alien to Aboriginal peoples. I suggest that the opening remarks in such a conversation should reformulate the broad generalizations of the Royal Commission’s Report. If we are to make genuine efforts to change the present state of affairs we must clearly articulate the conceptual framework that animates our common law system of adjudication. Such an exploration will help us see more clearly why it is that the culture of Aboriginal peoples has estranged them from criminal justice in Canada. Change can only take place when we see the need for it and that can only occur with understanding.

I suspect that meaningful dialogue will only commence if we start by delineating the basic cultural beliefs that provide the foundation for the Canadian system of criminal justice. The vast majority of Canadians will only listen if they first appreciate why our system has created a third solitude. This paper seeks to participate in the initiation of that conversation by providing an explanatory restatement of the Royal Commission’s Report, *Bridging the Cultural Divide* (1966). First, I try to show the extent to which a liberty premise, with its emphasis on autonomy, profoundly influences the structuring of the criminal justice system in Canada. Second, I draw on key remarks made in the Report to contrast an Aboriginal conception of justice. Once this contrast is more fully articulated (and we shall need many efforts beside mine) we will then be in a position to appreciate fully the urgent need to adopt the Commission’s recommendations for changes to the Canadian system of justice.

The Liberty Premise

Liberal democracies are based on two premises, at least one of which is foreign to Aboriginal peoples. The more benign of the two is what the leading American theorist, Ronald Dworkin calls the majoritarian premise.
This stipulates the procedure whereby we decide on who will govern us. The process of voting is used to determine our government on the basis of who has the most votes. Each citizen has one vote and for that reason, Dworkin insists that the foundation of democracy is a commitment to equality. The majoritarian premise serves this equality by allowing each of us to have the same say through our vote. It is the other premise of liberal democracies, the emphasis on individuality, that is incommensurable with Aboriginal culture. I shall call this assumption the liberty premise. By this I mean a basic conception of humans as autonomous agents who exist apart from, and receive their identity independent of, the communities they inhabit. Not surprisingly, a detailed examination of the conceptual framework that structures our legal system reveals just how deeply this emphasis on individuality animates it. Common law adjudication is organized as a mode of dispute resolution that derives its appeal (and therefore legitimacy) from the way it isolates and focuses on the individual as an autonomous agent. Consequently, criminal justice in Canada is permeated with the liberty premise.

To appreciate the way the individual becomes segregated from the community in our legal system, we must first elucidate the basic structure of Canadian criminal justice. The most abstract characterization of the system can be achieved through a study of Lon Fuller’s illuminating essay *The Forms and Limits of Adjudication* (1978). This provides a generic account of adjudication as a mode of dispute resolution. Once a study of Fuller is completed we can then build on it through Paul Weiler’s *Two Models of Judicial Decision Making* (1968). Taken together these two essays provide a powerful demonstration of the role of the liberty premise in the Canadian system of criminal justice.

Lon Fuller insists that the key to adjudication generally, and therefore common law adjudication in particular, is that the participants in the process are expected to contribute to the resolution of the dispute by presenting reasoned argument. For a criminal trial, the partisan advocacy of the Crown Attorney and lawyer for the defendant are essential. It is the complete separation of the role of the prosecutor and that of the defence attorney, coupled with the passive role of the court, that constitutes the hallmark of the common law criminal trial. Both prosecutor, acting on behalf of the state, and defence counsel, acting on behalf of the accused, are required to argue for the propriety of the respective claims of the crown and defendant. On questions of law, the judge ideally reaches a decision by accepting the arguments of one of the two disputants. On questions of fact, either the judge or the jury (when so authorized and elected by the defendant) again make the decision on the basis of the proofs and argu-
ments of the respective counsel in the proceedings. Herein lies the justifi-
cation of adjudication as a mode of dispute resolution. Each of the dispu-
tants has the responsibility to present arguments.

Adjudication can only take place with the institutional guarantee that
rational argument will occur. Accordingly, for the system to function effec-
tively, all of the participants must collaborate in the adversarial cut and thrust
of argument. The system assumes that the truth will emerge out of the
process and it is both expected and required that the defendant will invoke
all of the procedural advantages at his disposal. This involves the all too
familiar panoply of legal requirements. The Crown must prove its case
“beyond a reasonable doubt” and the defendant is “innocent until proven
guilty”.

However, what is key to the system and the reason that it is emblematic
of the liberty premise, is that the defendant has the responsibility to make
his own case. If he does not vigorously defend his interests, then, the
credibility of the process is undermined. We cannot hope to achieve
satisfactory results if the counter balancing of the crown and defence is not
functioning within the criminal trial. All of this requires the defendant to
envisage himself as an autonomous agent who has been brought under
suspicion. Further, he is expected to deal with the charges while segregated
from his social group.

Of course, the cultural assumption operative in this scenario is that one
formulates and sustains one’s sense of personal identity apart from one’s
community. On this basis, one can find the resources to participate in the
adversarial process with a lack of sensitivity to concerns that go beyond
one’s personal horizon. Put another way, it is the assertion and recognition
of an isolated self-interest that is absolutely essential for common law
criminal adjudication to function as a credible mode of dispute resolution.
This is the very large footprint of the liberty premise.

I have just noted Fuller’s claim that it is the way that the disputants are
expected to participate in the process that is the key to adjudication.

Adjudication is, then, a device which gives formal and institu-
tional expression to the influence of reasoned argument in
human affairs. As such it assumes a burden of rationality not
borne by any other form of social ordering. A decision which is
the product of reasoned argument must be prepared itself to
meet the test of reason. We demand of an adjudicative decision
a kind of rationality we do not expect of the results of contract
or of voting. This higher responsibility toward rationality is at
once the strength and the weakness of adjudication as a form
of social ordering (Fuller, 1978:366-367)
Weiler's view complements this claim with arguments to show how the self-interest of the disputants actually serves the rationality of the process. Thus, it is possible to elaborate on the role of the liberty premise in Canadian criminal adjudication by turning to Paul Weiler's work (1968).

To make the case, I begin with an observation of Fuller's that has not yet been mentioned. Fuller points out that if the court, not the Crown, initiated the proceeding, this would undermine the impartiality of the process; it would appear that the court was acting on the Crown's behalf. Weiler builds on this observation by pointing out that partisan advocacy also contributes to the impartiality of the proceedings, thereby augmenting the attempt to have reasoned argument carry the day. It does so in two ways. First, because the disputants present the arguments, the judge can suspend her judgement and avoid the tendency to let the familiar influence the unknown. Second, by institutionalizing vigorous argument on both sides, the decision maker can be confident that her decision rests on a thorough airing of the competing alternatives. This increases the likelihood that the correct decision has been reached.

Weiler thus further exposes the need for the liberty premise in common law criminal proceedings by deepening our understanding of the adversarial process. He does so by reminding us why adjudication was created in the first place, namely to resolve actual disputes in concrete cases arising out of a clash of competing interests. It is a retrospective, not forward looking activity.

The disputes which are necessary to set the process of adjudication in motion involve “controversies” arising out of a particular line of conduct which causes a collision of specific interests (Weiler, 1968:410).

Structuring criminal procedure so that the Crown and defendant plead on their own behalf balances the interests of the individual and the state by the way both are brought into the process. In this way we have good reason to believe the process serves both the interest of the state as well as the citizen. In addition, it is the defendant acting in his own self-interest, who will likely see the necessary points to argue in the case.

Moreover, the model of adjudication permits a clarification of the dispute as the adversaries undergo trial preparations. This clarification is a realistic presumption because legal disputes must be concrete rather than hypothetical and it is only the actual disputants who are allowed to participate.

We have now come full circle in the analysis. It is evident that Canadian criminal procedure would be incomprehensible without the animating cultural assumption embodied in the liberty premise. For those of us steeped in the liberal democratic traditions, the premise is both obvious and com-
monplace. Admittedly, we may need to perform a fair amount of intellectual labour to expose its place in our basic institutions.

But, and this is the crux, Canadians of European origins are comfortable enough with the demands of the liberty premise as it operates in Canadian institutional life to navigate successfully. This even includes confrontations with the criminal justice system.

However, what is familiar to one culture (or group of cultures) can be strange and even threatening to others. What are we to say to those for whom the liberty premise has no place? Can we require, or even expect, them to adapt to the Canadian criminal justice system as it now stands? Or, should we make a place in Canada for their own modes of dispute resolution?

The Royal Commission on Aboriginal Peoples invites us to listen to Aboriginal peoples and accommodate their needs. The invitation is phrased with a simple eloquence but we must first appreciate the alternative conception of justice that operates within Aboriginal cultures before we are capable of seriously entertaining it. I now propose to provide a brief analysis of this. It may well be the case that the recommendations in the report will be even more enticing when they are characterized as a cultural counter point to the liberty premise.

First Nations Justice

We find very different conceptions of dispute resolution among Aboriginal peoples. The basic stance of the liberty premise is to isolate and place the citizen in an adversarial relationship with the state. This confrontational stance requires the accused to consider his own interests as completely separate from the concerns of the community at large. The formal procedure of adjudication is restricted exclusively to the assignment of responsibility for a crime to an individual. If the accused is found guilty, the matter ends with sentencing and punishment. If a verdict of innocence is delivered, justice is equally served. In sum, the principle focus of the attention is on the individual as an autonomous agent who may have committed a prohibited act. For Aboriginal societies, on the other hand, the preservation of the harmony of the community, rather than the determination of the guilt of an individual, is the primary focus. To achieve this harmony, reconciliation for the wrongdoing is sought by having the accused deal with his conscience and with the aggrieved party. The report quotes Justice Sinclair approvingly on this point.

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 (Royal Commission on Aboriginal Peoples, 1996:59).

Ross (1996:16-28) endorses the observation that Aboriginal communities hold a concept of justice based on healing. Ross has interacted with Aboriginal communities from across Canada. Further, his research on the Aboriginal peoples of the American Southwest and New Zealand corroborates the finding that a shared conception of justice based on healing is a ubiquitous phenomenon. Thus, Ross provides empirical evidence for the strategic assumption in the Report that there is a generic conception of Aboriginal justice that is antithetical to the Canadian criminal code.

The rich cultural complexity of any particular Aboriginal community gives expression to this overall commitment to healing in myriad ways that are as diverse as the cultures themselves. For instance, one example of the way Aboriginal justice functions within this very different framework is the Ojibway principle of restitution (Royal Commission on Aboriginal Peoples, 1996:64). When a wrong is done, the wrongdoer must compensate the aggrieved party thereby restoring the harmony of the community. Punishment of the offender in place of restitution would simply be inconceivable. Aboriginal societies see an exclusive focus on punishment as a preoccupation with the past. They prefer emphasizing the maintenance of the community into the future. There is thus far greater possibilities within Aboriginal justice for the individual to be reintegrated into society. Not only does punishment stigmatize, it also isolates.

Virtually all aspects of dispute resolution within Aboriginal communities equally depart from the Canadian criminal justice system. Honesty and integrity, rather than the manipulation of rules of procedure, are always emphasized. Further, the often caustic exchanges between disputants in a criminal trial would be considered an anathema. A commitment to a foundational notion of justice as healing requires that confrontation and criticism are to be avoided at all costs. Accordingly, the lifeblood of Canadian criminal justice would horrify participants in Aboriginal dispute resolution. It is a recurring theme among Aboriginal peoples that justice can only be achieved if individuals are integrated into the constellation of human relationships in the community. They must be made to feel part of a culture that has both a rich history and a promising future. Further, they must come to realize that each individual has a responsibility to both honour and nurture that culture. In addition, to resolve specific disputes, great effort is expended to achieve a consensus among the entire community. To that end, as the Royal Commission notes, it is quite common for Aboriginal women to play a pivotal role. They both facilitate the forging of the consensus in the resolution of the dispute and reaffirm the importance of the "large web of
relationships” (Ibid.:69) that sustain the vibrancy of the community. Further, as the Report also notes, modern expressions of Aboriginal justice uniquely define the participants in the process. Heavy reliance is placed on those who can protect and restore the health of the community. Thus, the key players will be very different from a Canadian criminal trial: “people like alcohol and family violence workers, traditional healers, mental health workers, sexual abuse counsellors and the like” (Ibid.:67).

It is almost impossible to exaggerate the scope of the alienation of Aboriginal peoples from the Canadian mosaic. Removing the yoke of the criminal justice system constitutes the single most important step towards resolving this crisis. This is because the Aboriginal conception of justice based on healing simply is not compatible with the administration of the Canadian criminal code. As already noted, the Canadian legal system isolates victims and offenders thereby making mediation between the two virtually impossible. We insist upon a hierarchy in dispute resolution that undermines the ability of Aboriginal peoples to resolve a legal crisis in a way that is in accord with their conception of justice. As Ross notes, healing circles, where all interested parties come together to engage in a dialogue of reconciliation, contradict the basic structure of the Canadian justice system. We impose a judge based mode of resolution on cultures that traditionally configured social organization in a radically different way. Inevitably, then, Canadian criminal justice crushes the commitment to healing that is the shared base of justice for our Aboriginal peoples.

The dynamics of mediation and adjudication are different. Adjudication uses power and authority in a hierarchical system. A powerful figure (the judge) makes decisions for others on the basis of “facts”...

In contrast, mediation is based on an essential equality of the disputants... It is a horizontal system which relies on equality, the preservation of continuing relationships...

Another important dimension to various modes of Aboriginal dispute resolution is that they share a unique way to categorize and quantify human behaviour. As already noted, the criminal code ties justice to the assessment of specific acts. A peacemaking system pursues a very different justice goal. Thus, it has the potential to evaluate an incident of drunkenness or cursing as a transgression that is on par with a stabbing. In certain circumstances, the commission of these acts may be perceived by the community to be the product of a common disorder that needs to be rectified.

While the man who stabbed the other and the young man found drunk at midnight may not have committed the same “crime”
within an act-centered legal order, in the eyes of the elders, those dissimilar acts seem to have demonstrated a very similar need for both teaching and healing (Ross, 1996:95).

The way Aboriginal cultures schematize behaviour reflects epistemological commitments that are very different from a Euro-Canadian perspective. Within western civilization, the hallmark of the period we call the Enlightenment is a shared conviction as to one correct conceptual picture of reality. Of course, this is not the only epistemological view developed within western philosophy and science, but it is the prevailing view that has shaped the languages and the cultures. In contrast to that epistemology, there is a universal acceptance among Canadian Aboriginal communities from coast to coast that there is not one univocal truth but a multiplicity of perspectives.

Once this fundamentally different conception is appreciated, one can understand the absolute centrality of dialogue among equals in First Nations justice. Harmony can only be restored within a community when a transgression has occurred if the differing points of view of all the members are taken into account. Thus, regardless of the specific way an Aboriginal community resolves disputes, its conception of justice will reflect a commitment to healing based on an epistemological vision quite foreign to the typical Euro-Canadian conception. Correlatively, the belief that the truth will emerge through the adversarial process of common law adjudication is a declaration of faith quite incompatible with Aboriginal cultures.

Traditional teachings seem to carry a suggestion that people will always have different perceptions of what has taken place between them. The issue, then, is not so much the search for “truth” but the search for—and the honouring of—the different perspectives we all maintain.”

Perhaps nothing better signifies the need to change the interaction of Canadian criminal justice with Aboriginal peoples than eliminating the impediments to the traditional role of the Elders. In many cases, Elders have been co-opted into playing a quasi-judicial function thereby integrating them into the hierarchy of western justice.

Such a tactic undermines the contribution that Elders historically made within schemes of Aboriginal justice (Ibid.:223). As Ponting points out (1997:457) the traditional knowledge possessed by Elders is an essential resource for the preservation of Aboriginal cultures. It should not be surprising, then, that the Elders are also pivotal for the preservation of Aboriginal justice. Thus, as the Royal Commission astutely observes, Elders must not be assimilated into western justice but must be left free to contribute to the nurturing of Aboriginal justice (Royal Commission on
Elders symbolize the ethos of the community and exemplify in their lives and comments the value of its history. As a result, their contribution to the community over a long period generates respect from other members. Because of this respect, a sense of shame is experienced by wrongdoers and manifest in their relationship to the Elders. It is in the acting out of this relationship with Elders that the wrongdoer can be both taught and rehabilitated.

It is a necessary and therefore inevitable consequence of the liberty premise that punishment for wrongdoing functions as the primary focus of Canadian criminal justice. Imposing this system on Aboriginal communities totally preempts the pursuit of justice as healing. Thus, the clash between the two rival conceptions of justice has been catastrophic for Aboriginal peoples. To conclude this section, I shall briefly describe the tragedy that has befallen Native peoples because of the subordination of their conception of justice to that of the Canadian criminal justice system. We must face the fact that the present situation constitutes a national disgrace that is a blight on the good name of Canada in the world community.

In the first section of this paper I noted the way in which “the innocent until proven guilty” dictum was intimately linked to the liberty premise. Accused within the Canadian legal system who are of Aboriginal origin may well be completely oblivious to the import of this premise. Coming out of a tradition of justice that emphasizes healing rather than punishment may well encourage them to freely admit wrongdoing. Further, Aboriginal accused sometimes confess to crimes of which they are not technically guilty because they are not preoccupied with formal rules of procedure and argument.

As well, Aboriginal cultures emphasize the importance of a person taking responsibility for his or her actions. Thus even if a person charged with a particular offence has a valid legal defence, he or she may nevertheless plead guilty out of a wider, culturally based, sense of responsibility than is recognized in law (Royal Commission on Aboriginal Peoples, 1996:97).

The hostile nature of the adversarial process is further alienating. Finally, the premium placed on a demeanour of reserve when in the presence of authority and strangers compounds the estrangement. Many of the Cree of Northern Ontario, for example, think it disrespectful to look someone in the eye; this is frequently interpreted by non-Natives as a sign of deception (Ibid.).

It should be self-evident that we have here a recipe for disaster born out by the statistical reality. Almost 10% of the people in the federal penitentiary population are Native; in the Prairie region Native people comprise 5% of the total population but 32% of the prison population (Ibid.:29)! For a young person of Aboriginal descent, it would be reasonable
to think of anyone who is part of the administration of criminal justice in Canada as an agent of an occupying army.

Cultural Nexus

The Royal Commission Report is not content merely to document the cultural imperialism that has been perpetrated on Aboriginal peoples by way of the Canadian criminal justice system. The Report makes eighteen innovative recommendations that are designed to rectify the present situation. All of them flow from the foundational assertion made in Recommendation One: namely, that there be a formal legal recognition of the inherent right of self-government of the First Nations within Canada. The first recommendation also links that declaration to the introduction of Aboriginal systems of justice. Taken together, all eighteen proposals dramatically undermine the oppressive imposition of the liberty premise on the dispute resolution process among Aboriginal peoples. Their implementation would empower the First Nations to employ, as a matter of right rather than privilege, the Aboriginal conception of justice as healing in the operation of Indigenous systems of justice. Accepting the recommendations in the Report would make possible the expansion of First Nations policing. This by itself provides a splendid example of the linkage between Aboriginal self-government and any meaningful alteration of the status quo. An ambitious program of Aboriginal policing would contribute to the renewal of Aboriginal justice more than any other single step. Moreover, it would facilitate the development and introduction of the other steps that need to be taken so that the First Nations can have a dignified niche in the Canadian mosaic.

Traditional Canadian modes of policing are an application of the liberty premise in that the primary focus is on controlling crime. The hierarchy of the policing organization is of a quasi-military nature and the emphasis is on law enforcement. For example, when crime rates decrease, the funding agencies are inclined to cut back on police services. This reflects the mentality associated with crime control as the basic purpose of policing (Royal Commission on Aboriginal Peoples, 1996:88).

An Aboriginal conception of policing places a greater emphasis on peacekeeping as opposed to crime prevention. To that end, the police are much more integrated into the community and participate as peacekeepers in community life. They interact as members of the community and not as agents of government supervision. This very different approach much more easily accommodates the place of the Elders and the crucial role which the Elders play in preserving Aboriginal justice. Aboriginal police are part of the community leadership through which the ongoing peacekeeping process is administered.
To implement effectively an Aboriginal mode of policing, it is necessary that Aboriginal peoples have the requisite self-government. There have been attempts over the past twenty years to establish First Nations constable programs under the auspices of provincial and federal governments. However, these programs have suffered the same culture shock that Aboriginal peoples experience when they encounter the Canadian criminal justice system. There is a clash in policing philosophies that reflects a clash in social philosophies and this has seriously undermined the viability of those programs.

Yet First Nations Constables must meet the expectations of the community while reporting to the local detachment. The present rigid hierarchial police system puts at risk Constables wanting to support a First Nations perspective on policing matters (Royal Commission on Aboriginal People, 1996:87). Accordingly, the Royal Commission's insistence on the acceptance of Aboriginal self-government as the point of departure for its recommendations cannot be evaded. If Canadians are going to honestly and sincerely address the problems faced by Aboriginal peoples in their contact with criminal law, the choice is simple. Canada must accommodate Aboriginal self-government or resign itself to the present situation. Otherwise, essential mechanisms of real change, such as First Nations policing, will not be successful.

Aboriginal self-government offers the greatest scope for community involvement in policing... because it promises a coherent and comprehensive foundation for community governmental structure, decision making and law making authority, all of which are prerequisites for the development, implementation and operation of truly autonomous Aboriginal police forces (Ibid.).

In sum, we must accept the fact that half measures simply will not provide a feasible basis for the fair treatment of Aboriginal peoples. Further, as Canada has enshrined a commitment to multiculturalism in the Charter of Rights and Freedoms in the Constitution Act, 1982, there is a constitutional as well as moral responsibility to take reasonable steps to make a place for Aboriginal cultures. The preservation of the Aboriginal conception of justice as healing, through a recognition of Aboriginal self-government, is an integral part of this commitment.

Implementing the recommendations of the Royal Commission will not only facilitate the flourishing of Aboriginal justice but may also lead to a broadening of the moral consciousness of all Canadians. The Aboriginal focus on reconciliation and harmony is formulated within a conceptual scheme that emphasizes how a human should live rather than what a
human should not do (Ross, 1996:255-259). As such it has an eerie similarity to the conception of ethics formulated by the ancient Greeks and influential in western civilization until the Renaissance. Within this tradition we also find a preoccupation with living a good life. For the ancient Greeks, this pursuit was based on the cultivation of excellence in character (translated as “virtue” in English). Whatever differences exist between the conception of the good life of the ancient Greeks and that articulated within Aboriginal cultures, can we but profit from probing this further?

The exploration of new moral horizons is only one of many potential benefits to be enjoyed if we adopt the eighteen recommendations outlined in Bridging the Cultural Divide. The alternative is to continue the cultural oppression of First Nations people. It should be obvious that what we need in Canada is a cultural nexus with Aboriginal peoples, not a cultural pyramid with the Federal criminal code at the top. The First Nations must be allowed to define their own place in Canada and not have an alien conception of justice foisted upon them. It has always been the Canadian way to compromise. In this case, the Canadian way should be to accommodate. Until this is done, we are all impoverished, and Canada will continue to be haunted by a third solitude.

Notes

1. Canada is a common law jurisdiction as opposed to the civil law system found in much of Continental Europe. In what follows, I shall restrict my application of Fuller’s analysis to the common law criminal trial. To avoid confusion, it should be noted that the term common law can be used in two senses. It can describe a particular type of legal system and it can also describe a particular source of law within that system. I shall only use the former sense.

2. The criminal trial variant of the civil law system has the potential for overlapping in the roles of the prosecutor and the court. That is one of the reasons it is labelled an inquisitorial system as opposed to a common law criminal proceeding. The latter is called an adversarial system.

3. As the potential roles of intervenors are irrelevant to my analysis, I shall ignore them.


5. Ross (1996:56) quoting approvingly from a passage of Bluehouse and Zion, “The Navajo Justice and Harmony Ceremony”.

6. The 18 recommendations are summarized on pp. 312-315 of the Report of the Royal Commission on Aboriginal Peoples.
7. Recommendations 2-5 in the Report of the Royal Commission on Aboriginal Peoples outline a procedural framework to achieve this result (1996:232-256). Given the complexities entailed in the proposed changes, the Report has recognized that it is impossible to outline precisely the extent to which Aboriginal systems of justice will modify or supplant the Canadian legal system. Nevertheless, no change can take place without the conceptual revisions advocated by the Report. It should also be noted, as Ponting has pointed out (1997:454-455), that the recognition of the right to self-government has a symbolic value that goes beyond establishing a framework for change. It also honours the status of the First Nations as we embark upon this new path.

8. The single most famous philosophic treatise of recent years that insists upon the merit of the ethical views of the Ancient Greeks is Macintyre (1984, especially 131-164).

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