ABORIGINAL CRIMINAL JUSTICE: A COMMENTARY ON COUGHLAN AND DOMAREKI

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Professor Coughlan's paper provides us with knowledgeable insights into many of the problems facing Aboriginal North Americans in their encounters with the Canadian criminal justice system. He has also demonstrated that an objective analysis of those problems does not provide obvious solutions. Chief Judge Domareki offers us an equally valuable perspective with his historical outline of American law on the status of Aboriginal peoples and their legal systems. This paper will reinforce and add another perspective to both papers.

Addressing Presumptions

Many of the presentations during this year's Viscount Bennett Lecture and Seminar challenge the fundamental presumptions taken for granted when examining the criminal justice element of the Canadian legal system. Three of those presumptions come to mind as a result of the present seminar session. First, is our acceptance of the overriding political philosophy of liberalism, which forms the basis of western European civilian legal systems and has become an integral element of our common law. Second, is our belief that Aboriginal peoples do not possess the legal or political legitimacy or background to warrant their own criminal justice system. Third, is our faith in a single criminal legal system as the vehicle to best serve the interests of justice in Canada.

Acceptance of Liberalism

The discussion of this first presumption arises from, and elaborates on, Coughlan's discussion of what he has called the "Historical/Political Argument." Michael McDonald writes that the "philosophy of liberalism," now the primary ideological framework for the constitutional, governmental and political elements of the western world, is "often viewed as being primarily concerned with the relationship between the individual and the state, and with limiting state intrusion on the liberties of the citizen."[1] Indeed, the very pervasiveness of that philosophical

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[1]M. McDonald, "Liberalism, Community and Culture" (1992) 42:1 U.T.L.J. 113 at 115. This article is particularly appropriate for consideration because it questions the thesis set out by W. Klimka in *Liberty, Community and Culture* (Oxford: Clarendon Press, 1989). Most importantly for this commentary, McDonald challenges Klimka's belief that liberalism can incorporate within its parameters "proposals for self-government [by Native Americans] which would limit individual rights

tradition within western culture circumscribes the thought processes of those raised in it to the degree that they automatically reject views founded on other traditions.

McDonald also reminds us that an unquestioning adherence to the liberal perspective fails to account for minorities who do not aspire to integrate themselves into the mainstream of non-Aboriginal society.[2] He notes that one can meet the needs of such groups only by permitting them to assume a "special status" and by recognizing them as "distinct" societies, instead of forcing them to assimilate as equals into the dominant culture.[3] McDonald barbs his comments with an interpretation of the goal of liberalism: he states that it provides those who lack confidence in the immutability of their value system with the right to challenge the state, should the government seek to impose those values after the electorate has abandoned them in favour of others. He indicates that, as a result, liberalism does not work for:

> members of highly stable (say, tradition-bound) societies [which] may be quite confident in their beliefs and so, on reflection, may think it a waste of time and energy to design political and social institutions to protect each individual's freedom 'to revise and reject' received notions of worthwhile tasks and projects.[4]

Carrying this further, I would add that liberalism does not suit persons raised in a cultural milieu which relies heavily upon collective elements of social order to define their respective positions as individuals in society and the progression of their lives.

McDonald's article also reminds us that the political philosophy of liberalism reigns over a relatively small (albeit, very influential) portion of the world community. Having gained a solid foothold primarily in the privileged First World,[5] governments who subscribe to that philosophy constitute a minority faction of the global community. In that respect, this philosophy shares a place with the common law, since the majority of states have made both their rejected choice.[6]

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in the name of collective rights" (at 122-23).

[2]*Ibid.* at 113.

[3]*Ibid.*

[4]*Ibid* at 117.

[5]*Ibid.* at 123.

[6]I say "rejected choice" because, at least until the recent upheavals in Eastern Europe, most states that have exercised the opportunity to choose both liberalism as their political philosophy and the common law as their legal system, have declined so to do. Most governments rejected the common law in favour of the civilian legal system based upon the French *Code Napoleon*. The common law survives primarily because it is a construct of British rule, and has been entrenched as an historic remnant of the motherland in states which evolved from British colonies.

These observations are significant because, "Ultimately, we should be concerned about how we make a case for minority rights in the Second, Third, and, above all, the Fourth World."[7] Some have aptly described indigenous minorities as " 'The Fourth World,' fourth in public consciousness and concern, following the first or developed world, the now disintegrating second or socialist world, and the third or undeveloped (developing) world."[8]

If Aboriginal people in North America stand as the so-called "Fourth World" (and let them judge what, and whom, they are), those of European descent (a minority among the global population) have little justification to dictate to them (or, for that matter, others) the application of a political philosophy which is inherently alien to all but themselves. In other words, the dominant culture has no right to limit the vision of what Aboriginal peoples' governments and legal systems could become.

The Legal and Political Status of Aboriginal Peoples

The general presumption that Aboriginal people in Canada have no right to a legal system any different than the European-based one stems not only from liberalism, but also from the archaic belief that Europeans brought civilization – that is, government and the concept of legal systems – to North America, and that all are the better for it. That belief is changing and, in a recent article, Brian Slattery echoes the developing, contemporary view. He writes that the traditional public international legal notion of the pre-Columbus Americas being *terra nullius* (vacant land) has come "under heavy attack in recent decades."[9] I agree. Otherwise, how does one explain that, in North America, bodies of Aboriginal and European peoples entered into political arrangements (for example, shared jurisdictional understandings and loose military alliances) and negotiated various forms of legal obligations (for example, trading ventures, agreements on rights of passage) with one another. It is, in fact, "difficult to give an account of the treaties that is sensible and informative and yet avoids dealing with the basic issues of their legal status, character and effects."[10]

Groups other than the select "club" of European imperialist states contributed to the development of international law by engaging in international legal relations with other sovereigns. They could so do because they met the test of sovereignty

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[7]*Supra,* note 1 at 123.

[8]*Ibid.* at 114.

[9]B. Slattery, "Aboriginal Sovereignty and Imperial Claims" (1992) 29:4 Osgoode Hall L.J. 681 at 682-83.

[10]*Ibid.* at 684.

(i.e. each group possessed a permanent population, defined territory, government, and the capacity to enter into relations with other states) which the European founders of international law created to justify the status of their countries and the exercise of powers of their own heads of state.[11] Common knowledge now admits that, in the Americas, a variety of governments and legal systems existed long before the first Europeans arrived. Although past generations of white governments sought to destroy the societies and cultures of Aboriginal peoples, many have survived and retain the memory of their traditions of governance and codes of law. As there is no basis for denying the past sovereignty of Aboriginal peoples, the white governments in North America have no ground to deny them the right, if they wish, to establish their own governments and legal systems. These observations tie in with, and add a pronounced slant to, Coughlan's comments about the "Colonization Argument" for respecting the self-determination aspirations of Aboriginal peoples.

A Single Criminal Legal System

Once one recognizes the limited range of the political philosophy of liberalism, and refutes the so-called "Eurocentric" vision of international law, one must also reject the presumption that a unified legal system, based on a European model, is necessarily the most acceptable one for all people. A number of reasons conspire to establish this: the injustice of the present criminal justice system to Aboriginal people, the dual heritage of British "Colonial law" or "Imperial constitutional law," the nature of the Canadian legal system, and the experience of a similar, neighbouring system of government and law.

First, the criminal justice system is neither just nor fair to Aboriginal peoples as a whole. A number of studies suggest that the system contains such a heavily ingrained prejudice against them that nothing short of a separate Aboriginal

[11]The International Court of Justice has added to the jurisprudence in favour of Aboriginal groups by ruling that they qualify as sovereign entities possessing the right to self-determination even if they govern themselves by a system of order which is radically different than European models. See the *Western Sahara Advisory Opinion* [1975] I.C.J. Rep. 12, which deals with two questions: whether the Western Sahara was *terra nullius* when occupied by Spain in 1884, and whether legal ties existed between the territory and two of its neighbours, Mauritania and the Kingdom of Morocco. The Court held that state practice of the period confirmed that the territory was not *terra nullius* because nomadic peoples who inhabited it who had a tribal social and political organization with chiefs to represent them. Further, the Court held that, while legal ties may have existed between the Western Sahara and its neighbouring states, they did not transfer sovereignty from the inhabitants of the territory to either of those countries. The Court ruled that the inhabitants of the territory possessed the sole right to determine the future governance of their land and themselves.

criminal legal system will correct the problem.[12] For example, the *Royal Commission on the Donald Marshall, Jr. Prosecution*[13] conducted an exhaustive investigation, which concluded that the police (both local and RCMP), the legal profession (both prosecutor and defence counsel), the judiciary (the trial and appeal courts) and politicians (federal and provincial) failed in the respective duties they owed Marshall because he was Aboriginal. Similarly, the *Report of the Aboriginal Justice Inquiry of Manitoba*[14] found that elements of the criminal justice system had failed in that they had caused and, later, inadequately investigated the deaths of both Helen Betty Osborne and J.J. Harper because both were Aboriginal people.

Second, Slattery lends strong support to defeat the presumption that our legal system is based solely on European systems, by observing that the very basis of Canadian constitutional law – British colonial, or imperial constitutional law – possesses both a European and an Aboriginal heritage:

> The extensive relations between Aboriginal nations and the English colonies on the Atlantic seaboard in the 17th and 18th centuries gave rise to a distinctive body of inter-societal custom, recognized as binding among the parties. This [amalgam of European and Aboriginal custom] incorporated elements from the legal cultures of all participants. Some of this custom contributed to the development of international law. But other parts were too local and specific for universal application [and] were incorporated in the embryonic constitutional law governing Britain's overseas territories sometimes called "colonial law" or "imperial

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[12]The following are examples of other reports during the past few years, taken from L. McNamara's "The Aboriginal Justice Inquiry of Manitoba: A Fresh Approach to the 'Problem' of Overrepresentation in the Criminal Justice System" (1992) 21:1 Man. L.J. 47; Osnaburgh/Windigo Tribal Council Justice Review Committee, *Tay Bway Win: Truth, Justice and First Nations* (Report prepared for the Ontario Attorney-General and Solicitor General, 1990); J.-P. Brodeur, C. La Prairie & R. McDonnell, *Justice for the Cree: Final Report* (Nemaska: Grand Council of the Crees/Cree Regional Authority, 1991) [previous 3 volumes: *Communities, Crime and Order*; *Policing and Alternative Dispute Resolution, Customary Practices*]; E. Johnston, *Royal Commission into Aboriginal Deaths in Custody National Report* (Canberra: Australian Government Publishing Service, 1991); Saskatchewan Indian Justice Review Committee, *Report of the Saskatchewan Indian Justice Review Committee* (1992); Saskatchewan Metis Justice Review Committee, *Report of the Saskatchewan Metis Justice Review Committee* (1992); Task Force on Criminal Justice and its Impact on the Indian and Metis People of Alberta, *Justice on Trial*, Vol. I: Main Report (Edmonton: Province of Alberta, 1991); Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: The Commission, 1991). Note, as well, the following report to the United Nations Commission on Human Rights, which caused considerable reaction and debate when discussed at a panel session of the 1992 annual meeting of the American Society of International Law: Grand Council of the Crees (of Quebec), *Submission to the 48th Session of the Commission on Human Rights: Status of the James Bay Crees in the Context of Quebec's Secession from Canada* (Montreal: Grand Council of the Crees, 1992).

[13]Halifax: The Commission, 1989.

[14]A.C. Hamilton & C.M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991).

> constitutional law." This law was inherited by the US and Canada upon independence, although it assumed variant forms in the two countries due to differences in constitutional structure.[15]

As the foundation of Canadian constitutional law incorporates Aboriginal law, it can accommodate an Aboriginal legal system. Late 20th century political leaders have confirmed this by specifically entrenching Aboriginal rights in the Canadian *Constitution* in 1982.[16] Moreover, they moved a step further in 1992 and demonstrated their conviction that Aboriginal self-government would compliment the *Constitution*, when the First Ministers granted Aboriginal leaders the right to sit at the constitutional bargaining table. As a result, the rights of Aboriginal self-government were included in the *Charlottetown Accord*. In short, theory, history and present practice demonstrate that the Canadian constitutional heritage can accept far more than an independent Aboriginal criminal legal system. Why, then, do the many detractors of that system, who stand immune from its direct effects, continue to block its implementation?

Third, one should recall that arguments favouring a single, unified criminal justice system contradict the wider Canadian legal experience. Justice Stevensen put it succinctly in a recent judgment when he said:

> ... this court has the benefit of being the final court of appeal in a country that has two legal traditions: the English common law and the French civil law. Our two legal traditions are independent and should not be confused. Concepts and solutions found in one tradition should not be imposed on the other tradition. But this does not mean that there is no place for comparative law in this court. The case at bar is a good example of how useful comparative law can be.[17]

Moreover, Canadians are also prone to forget that the separate provincial legal systems operate in tandem with the federal one. Most significantly, each province in Canada exercises legislative powers to make quasi-criminal laws which add considerably to the list of punishable offences. Further, provincial powers also govern much of the procedure in criminal courts. Hence, Canada, in theory and in practice, already possesses more than a dual legal system. It is, by its very nature and by the *Constitution*'s division of powers, a decentralized legal system.

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[15]*Supra*, note 9 at 702.

[16]*Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution*].

[17]*Canadian National Railway* v. *Norsk Pacific Steamship* (1992), 11 C.C.L.T. (2d) 1 at 42 (S.C.C.). While the case deals with the "extent to which damages for pure economic loss may be recovered in tort" (at 16), its reflection on Canada's two (that is, non-unified) legal systems commands notice well beyond the subject of torts law. The judgment of Justice Stevenson concurred with the majority judgment delivered by Justice McLachlin, which also recognized that Canada does not possess a unified legal system. She stipulated that the judgment directed "the approach which should be adopted in the common law provinces of Canada" (at 16).

That decentralization includes the criminal legal branch in its widest and most frequently practised sense.

Finally, the Viscount Bennett Seminar has revealed that Aboriginal legal systems can operate in association with a governmental and legal regime similar to the Canadian one. Domareki has drawn attention to one of the historic milestones of American law which enhanced the constitutional foundation for Aboriginal legal systems in the U.S.A., the judgments of the Marshall court in *Worcester* v. *Georgia*.[18] In providing a description of the workings and extensive jurisdiction of the tribal court system with which he is affiliated, Domareki has reinforced the viability of the concept. One should note, as well, that a number of different tribal legal systems operate throughout the United States. This provides a variety of operational models upon which Aboriginal peoples in Canada might choose to pattern their system.[19] It should also allay fears that mitigate against the establishment of a diversity of Aboriginal legal systems to meet the needs and cultures of different Aboriginal groups.

Conclusions

Some Aboriginal peoples consider the Canadian criminal justice system to be:

> ... explicitly linked with a pattern of non-Aboriginal domination in which the *Indian Act* and the criminal justice system were, and continue to be, two of the most powerful and intrusive legal mechanisms. [Hence, they link Aboriginal justice] with broader Aboriginal autonomy aspirations and political activity, than with criminology's critiques of the operation of criminal laws and the way justice is administered in this and other similarly structured countries.[20]

This broad, political agenda should not cause white Canadians great concern. History justifies it, Canadian governments have moved toward embracing it,[21] and

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[18](1832), 31 U.S. (6 Pet.) 515.

[19]McNamara, *supra*, note 12 at 61, quoting from the *Report of The Aboriginal Justice Inquiry of Manitoba*, *supra*, note 14, vol. 1 at 642:

> Aboriginal justice systems should be established in Aboriginal communities, beginning with the establishment of Aboriginal courts. We recommend that Aboriginal communities consider doing so on a regional basis, patterned on such systems as the Northwest Intertribal Court System [in Washington, USA] ... We suggest that Aboriginal courts assume jurisdiction on a gradual basis, starting with summary conviction criminal cases, small claims and child welfare matters. Ultimately, there is no reason why Aboriginal courts and their justice systems cannot assume full jurisdiction over all matters at their own pace.

[20]McNamera, *supra*, note 12 at 51.

[21]Again, I refer to the Aboriginal rights provisions of the *Charlottetown Accord*. Two more events should be noted: (1) the Federal government's agreement with the Tungavik Federation of Nunavut to hold a referendum vote on the establishment of a new territory, Nunavut, in the central Northwest

one can see from the American experience that it poses no danger to the integrity of the state. Therefore, Canadians should be more forthcoming in permitting, at least, the establishment of an Aboriginal criminal legal system or systems.

Considering the criticisms of the Canada's criminal justice system contained in a number of the 1992 Viscount Bennett presentations, and the writings of other observers, I suggest that Aboriginal criminal legal systems, left free to develop according to the traditions of Aboriginal peoples, could provide the existing Canadian system with valuable insights. They might even offer fresh, experimental models which will inspire federal legislators to initiate long-awaited changes to overcome many of the fundamental weaknesses and archaisms plaguing the present *Criminal Code*.[22]

Two such changes come to mind. First, consider the potential benefits of replacing the adversarial process, in appropriate circumstances, with a more communal one. In another instance, where a trial court openly admitted that "the criminal justice system had miserably failed [the Aboriginal] community [in this case, the Na-cho Ny'ak Dun First Nation] of Mayo [in the Yukon],"[23] the judge reacted in a novel and creative way. He abandoned the European-inspired judicial process in favour of an Aboriginal one. Upon the conviction of a chronic offender/substance abuser for multiple offences, Judge Stuart utilized a talking circle to replace the normal sentence hearing process.[24]

Second, the experience derived from an alternate, criminal, legal system might encourage us to question seriously the purpose of substantive offences. Accepting Coughlan's comment that relatively few differences exist in the minds of Aboriginal and European peoples on what constitutes substantive offences, imagine a criminal justice system abandoning punishment and retribution[25] in favour of

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Territories and the eastern Arctic, and (2) the recently formed Royal Commission on Aboriginal People, headed by G. Erasmus, former National Chief of the Assembly of First Nations, and R. Dussault, Justice of the Quebec Court of Appeal, "to examine a broad range of Aboriginal issues, *including Aboriginal self-government*, land claims, the status of the Metis and off-reserve Indians, the special difficulties encountered by northern communities, and the social, economic, cultural, educational *and justice issues concerning Aboriginal people*." [From McNamara, *supra* note 12 at 49, emphasis added.]

[22]R.S.C. 1985, c. C-46.

[23]*R. v. Moses* (1992), 71 C.C.C. 347 (Yukon Terr. Ct) at 354. Judge Graydon Nicholas, Chair of the session, kindly drew the attention of the audience and panel to this judgment which, itself, deserves a separate study and comment.

[24]*Ibid.* at 355-67 and 370-71.

[25]These were enacted by the state because of the medieval legal fiction that all crime threatens the safety and security of the Crown. Recall the development of the old writ of *Trespass vie et armis contra regem pacem*, which fostered the expansion of the jurisdiction of the King's courts.

a process which focuses on compensation to the victims of crime and reintegration of the wrongdoer into the community. Domareki's description of the tribal court's order in the *Crow Dog Case*[26] provides grounds for strong reflection on this point.

Finally, and most importantly, Canadians must abandon the application of their justice system to Aboriginal people because of the great degree to which it has failed them. The documented cases and studies, particularly within the last few years, confirming that sad fact are far too numerous to discount and too thoroughly investigated to dismiss. Nor should Canadians fail to recognize that the history of their treatment of Aboriginal groups, and the vast cultural gulf between Aboriginal people and those of European origin, have contributed substantially to that failure. So too should Canadians accept that the continued imposition of their foreign political systems and criminal legal systems will replicate that failure and increase the divide.

The publication history and subject matter of *In the Spirit of Crazy Horse*,[27] an investigative book by Peter Matthiessen, the noted novelist and investgative writer, chronicles the extent of the cultural gulf existing between whites and Aboriginals and the injustice to which European-inspired laws have subjected Aboriginal peoples. It depicts how whites utilize their control of governmental and legal systems to frustrate and override the interests of Aboriginal people. For example, shortly after the publication of Matthiessen's book, former South Dakota Governor William Janklow, the Federal Bureau of Investigation and an FBI Special Agent, David Price, engaged in a protracted series of libel suits blocking the sale of the book because it reveals the extent to which the self-serving promotion of white America's interests trampled over the fundamental legal rights of Aboriginal peoples. Those libel actions, all of them ultimately futile, partially served their intended purpose, in that they delayed the distribution of Matthiessen's work for seven years.[28]

In the Spirit of Crazy Horse reports the events leading up to, and beyond, a shoot-out, in June 1975, at an isolated spot on the Oglala Reserve, near Wounded Knee, in South Dakota. It resulted in the deaths of two FBI agents and a Native American, and the incident led to the indictment, on murder charges, of four members of the American Indian Movement (AIM).

Several connections link Canada with that U.S. incident, and reflect the belief of many Native Americans that they stand immune from the political borders

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[26](1882), 109 U.S. 556.

[27]Originally published: New York: Viking Press, 1983; present publication: Toronto: Penguin Books, 1992.

[28]M. Garbus, "Afterword," *ibid.* at 593.

which the dominant culture accepts as the boundaries separating the two countries. Most notably, Leonard Peltier, the only person eventually convicted on the murder charges, fought an American extradition request while in Canada. The Supreme Court of Canada turned down his long-delayed appeal, which legal counsel had based on revelations that the American government's request for Peltier's extradition had relied on perjured evidence.[29]

I draw your attention to another, lesser known, Canadian connection – the case of Anna Mae Pictou Aquash, a Nova Scotian Micmac from Shubenacadie, who travelled south, became an active participant in AIM, and fell victim to the aftermath of that Oglala conflict. In death, as in life, Anna Mae's body suffered needless desecration and indignity because of the authorities' highly questionable investigation of her demise and the considerable extent of their disregard for the rights of Aboriginal persons. In finding that she had died of exposure, the first FBI-initiated autopsy of her corpse bypassed two crucial pieces of evidence: a bullet hole in the back of Anna Mae's head from a gun shot at point blank range, and the slug lodged in her temple. The doctor performing a second autopsy, initiated by family and friends who had pressured for an exhumation from where the authorities had buried her, discovered the bullet in the normal course of running his hand over a noticeably bruised portion of the head of the corpse.[30] I end with a quote from Anna Mae Pictou Aquash because it depicts the agony and frustration of a people trapped in a system of rule and law both alien to their own and heedless of their rights and aspirations:

> I am part of this creation as you are, no more and no less than each and every one of you within the sound of my voice. I am the generation of generations before me and the generations to come. ... If I have gone against this Creation – no man on this Universe holds the power to punish me other than the Creator himself ... You are continuing to control my life with your violent, materialistic needs. I do realize *your* need to survive and be part of this Creation – but you do not understand mine. ... I have travelled through this country and I have observed your undisciplined military servants provoke those whose rights are the same as yours.

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[29] *Ibid.* at 338-46. The Canadian case reports contain the Federal Trial Court's decision, *In Re the Extradition Act* and *In Re Peltier*, [1977] 1 F.C. 118 (T.D.) and notice of dismissal of a motion to appeal to the Supreme Court from the Federal Court of Appeal, *Peltier* v. *United States* (1989), 102 N.R. 236 (S.C.C.). The decision of the Federal Court of Appeal is unpublished and its one sentence judgment, dismissing the appeal, adds no information or law to the case (Court No. A-441-76). The *Bulletin of Proceedings* of the Supreme Court of Canada, 16 June 1989, at 1684 and 23 June 1989, at 1755 – long after Peltier had already been extradited to the United States, convicted of murder, and was serving his sentence – confirm that the appeal dealt with "Whether [the] Federal Court of Appeal erred in refusing to admit further evidence establishing that the requesting State had obtained the extradition order by material non-disclosure of relevant evidence and fraud."

[30] *Supra,* note 27 at 255-66.

> ... I am not a citizen of the United States or a ward of the Federal government, neither am I a ward of the Canadian government. I have a right to continue my cycle in this Universe undisturbed.[31]

[31] *Ibid.* at 248.