Constitutional forum constitutionnel

Emergence of Contemporary Indigenous Restorative Justice in Canada

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Preface

From time to time, I have been asked to write on Indigenous rights in Canada, which poses a challenge because there are many Indigenous Nations in Canada each with their own differing communities, cultures, and histories. This time I was asked to write about Indigenous restorative justice in Canada. I have been personally involved in and followed Indigenous justice issues for many years, both as a lawyer and as a jurist. This piece is my attempt to articulate the emergence of Indigenous restorative justice across Canada from its earliest days beginning in the 1960's to the present date. Indigenous law continues to evolve and grow. This piece should acquaint the reader with an overview with sufficient references to allow one to pick up the threads to continue follow the evolution of Canadian Indigenous restorative justice into the future.

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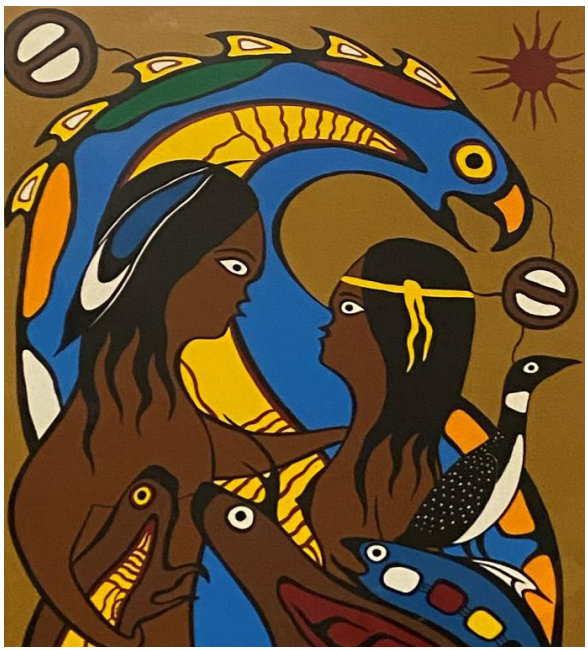
I. Introduction

In addressing Indigenous restorative justice in Canada, I draw on Indigenous storytelling protocols. The storyteller must introduce himself or herself and then inform the listeners of the source of his or her knowledge. I am Anishinaabe from the Wiikwemkoong Unceded Territory. I spent my formative years in Wiikwemkoong, became active in Indigenous causes, eventually became a lawyer and then a judge, first in provincial court and then in federal court, all the while continuing to follow Indigenous justice issues. Subsequently I authored a thesis on Indigenous restorative justice drawing on my knowledge and legal experience. What I now share is some of what I have learned about contemporary Indigenous restorative justice.



The Wiikwemkoong artist, Francis Kagige, represented the Anishinaabe concept of justice in his work titled "Creation." His painting depicts a man and a woman in peaceful harmony with all the other beings of creation.

The objective of any justice system is to maintain a peaceful society in which members may achieve their fullest personal destiny. Indigenous societies had their own justice systems by which to achieve that fundamental objective.

Issues that led to Indigenous restorative justice began with the imposition of colonial notions of justice on Indigenous peoples. These issues have accelerated in recent times. In 1967, the first Indigenous justice study reported that the rate of incarceration of Indians was increasing dramatically.[1] In the 1980s and 1990s, justice report after justice report documented this ever-increasing trend culminating with the 1996 Royal Commission on Aboriginal Peoples Report ("RCAP").[2] The Royal Commission concluded that "the Canadian criminal justice system has failed the Aboriginal peoples of Canada — First Nations, Inuit and Metis people — on-reserve and off-reserve, urban and rural — in all territorial and governmental jurisdictions."[3] Concurrent with this rising incarceration rate was the finding that Indigenous

1 Canadian Corrections Association, *Indians and the Law* (Ottawa: Queen's Printer, 1967).
2 Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Canada Communications Group, 1996).
3 *Ibid* at 309.

communities were experiencing higher levels of crime notwithstanding higher levels of Indigenous incarceration meant to deter crime. The Commission found that the principal reason for the failure of the criminal justice system is the fundamentally different worldviews of Aboriginal and non-Aboriginal people with respect to the content of justice and the process of achieving justice. Indigenous restorative justice originates in the different worldview about justice held by the many diverse Indigenous nations across Canada.

I begin by explaining distinctions between Indigenous restorative justice, Indigenous justice, and restorative justice, since these are often conflated. I then turn to the early imposition of the Canadian criminal justice system in Indigenous communities that had previously functioned under their own Indigenous justice systems. I also introduce ceremony early as it is often the most visible aspect of Indigenous restorative justice. From there, I address Indigenous justice initiatives as they appeared in Indigenous communities before turning to Indigenous restorative justice as it emerged in urban settings. A key factor is the impact of Indigenous participants in the criminal justice system, notably the Indigenous judiciary, and I discuss all the forgoing before turning to governmental policy and programs since the initiative and impetus for Indigenous restorative justice has originated from within the Indigenous community rather than government. Finally, I draw on what I have learned over the years both as an observer and a participant in the development of Indigenous restorative justice in Canada.

II. Distinctions between Indigenous Justice, Criminal Justice, Restorative Justice, and Indigenous Restorative Justice

Indigenous justice is rooted in Indigenous approaches to maintaining peace in Indigenous societies prior to European contact. An essential element of Indigenous justice was the notion of restoring harmony in the community.

The Canadian criminal justice system may be categorized as retributive justice. Crime is viewed as an offence committed against the state and the state responds by imposing sanctions on the offender for committing the crime. The express purpose of sentencing offenders is to contribute to respect for the law and maintenance of a just, peaceful, and safe society.[4] The criminal justice system relies on punitive sanctions to deter or correct criminal behaviour.

Restorative justice, by contrast, may be described as a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.[5] Addressing underlying causes of harmful behaviour is part of the dynamic in restorative justice outcomes.

Indigenous restorative justice involves measures utilizing Indigenous worldviews on the approach to justice. Central to the Indigenous perspective is healing and restoration of harmony in the community. Prominent Indigenous legal academics have pointed out that Indigenous restorative justice measures taken by Indigenous communities to respond to harmful

4 *Criminal Code*, RSC 1985, c C-46, s 718 [*Criminal Code*].

5 John Braithwaite, *Restorative Justice and Responsive Regulation* (New York: Oxford University Press, 2002).

conduct by individuals is not to be conflated with the more complete Indigenous legal orders founded on Indigenous justice.[6]

III. Indigenous Justice

Early records and legal academics document the existence of Indigenous justice practices.[7] Use of contemporary Indigenous approaches to maintaining or restoring harmony within an Indigenous community are little recorded in academic literature, however. In several communities, judges left matters, mostly Indigenous youth misbehavior, to community forums rather than proceeding in youth criminal court. When matters were left to the Indigenous community, this was done through the exercise of discretion by the police, or prosecutors, or judges.

The difficulty in establishing independent Indigenous community measures for maintaining peace in the community is the interference by the Canadian criminal justice system in asserting its authority in matters it defines as criminal conduct. A historic example of this intrusion occurred in the Yukon where four Taglish men were convicted for murder of a Yukon prospector in 1889. The court was mystified why the Taglish acted as they did in coming to its verdict. A Taglish family had died from mistakenly taking a prospector's toxic gold testing powder as flour. Clan law called for compensation by the offending clan or retaliation if no compensation was possible. The Taglish men had acted in accordance with clan law when no compensation was forthcoming from another prospector.[8] Another example occurred in 1920 when an Inuk leader killed a non-Indigenous trader who was terrorizing the isolated Baffin Island Inuit community. He was tried and convicted under Canadian criminal law without regard to Inuit custom that obligates Inuit leadership to act in the face of threats to community survival.[9]

IV. Ceremony

The many Indigenous approaches to justice involve ceremony. Ceremony serves real world functions. Beginning with an Elder's prayer reminds participants of the solemn nature of the proceeding. Sweetgrass or sage smudges help one clear the mind of extraneous thoughts in preparation to address the matter at hand. Holding an eagle feather directs a person to speak honestly. Having an Elder present to provide guidance, whether in ceremony or in wisdom, is another key component in the Indigenous restorative justice process. These ceremonies are as important as conventional court protocols such as rising to stand when the judge enters, swearing to tell the truth on a holy book, and wearing robes in court.

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6 Michael Coyle, "Indigenous Legal Orders in Canada: A Literature Review" (2017) Law Publications 92, online: <https://core.ac.uk/download/pdf/129547302.pdf>.

7 Jim Phillips, Tina Loo & Susan Lewthwaite, eds, *Essays in the History of Canadian Law* (Toronto: University of Toronto Press, 1994) at 17–40; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

8 Julie Cruikshank, *Life Lived Like a Story: Life Stories of Three Yukon Native Elders* (Vancouver: University of British Columbia Press, 1990).

9 Kenn Harper, *Thou Shalt Do No Murder: Inuit, Injustice, and the Canadian Arctic* (Iqaluit: Nunavut Arctic College Media, 2017). See also Leonard S Mandamin, *Naadamaagewin: Indigenous Restorative Justice* (MA Dissertation, University of Alberta, 2021) [unpublished] at 3–4 [*Mandamin Dissertation*].

Circles are a fundamental ceremonial method utilized by many Indigenous communities. A circle places all participants on an equal level and facilitates all in the circle to directly address the others in the circle. The circle fosters fuller participation by those involved. It also symbolizes holistic and cultural aspects of Indigenous belief.

Circles have become an important change to a criminal court's physical arrangement. The first reported decision on circle sentencing in court involved a young Yukon Indigenous man guilty of several offences while intoxicated.[10] He had a severe problem with alcohol and had a horrendous and repeating criminal record. At the sentencing hearing, the court configuration was changed to a circle format. Those participating sat in an inner circle with the community members and public in the outside circle. The judge sat in the circle instead of on the bench. The young man, his family, and counsel were to one side and the Crown prosecutors on the other side. The circle included other participants such as community leaders and Elders. The hearing began with introductions and opening statements by the judge, Crown prosecutor, and defence counsel, after which the circle engaged in an informal but intense and thorough discussion about what should be done. The dialogue provided a more complete picture of the young man's troubled life and enabled participants to contribute ideas and resources as to what should be done. At the end of this process, the judge imposed a probationary sentence which required the offender to attend a residential substance abuse counselling program, live with a family member on the trapline, take upgrading and life skills training, and participate in court reviews. Similar sentencing circles led by a judge were adopted elsewhere, notably in Saskatchewan.[11]

Another variation, also originating in the Yukon, involved community panels, usually comprised of Elders sitting with the judge, where the Elders interacted with the offender and made recommendations to the judge on sentencing dispositions.[12] This approach was replicated in Alberta and in the Northwest Territories.[13]

V. Emergence of Indigenous Restorative Justice

Indigenous restorative justice initiatives emerged during the era of the many criminal justice reviews about the damaging impact of the Canadian criminal justice system on Indigenous people. These reports began with the 1989 Royal Commission on the Donald Marshall Jr, Prosecution[14] and concluded with the 2015 report by the Truth and Reconciliation Commission of Canada ("TRC").[15] The TRC has 94 Calls for Action including five concerning justice.[16]

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10 *R v Moses* (1992), 71 CCC (3d) 347, 1992 CanLII 12804 (YK TC).

11 *R v Joseyounen*, 1995 CanLII 10830 (SK PC).

12 Judge Heino Lilles, "Tribal Justice: A New Beginning" (paper delivered at a conference entitled *Achieving Justice: Today and Tomorrow*, Whitehorse, Yukon, 3–7 September 1991) [unpublished].

13 Personal observation of Alberta Grande Cache Native Court proceedings in 1990s as well as conversation with an NWT Fort Resolution Indigenous Justice of the Peace in early 2000s.

14 *Royal Commission on the Donald Marshall, Jr, Prosecution: Digest of Findings and Recommendations* (Halifax: Province of Nova Scotia, 1989).

15 Truth and Reconciliation Commission of Canada, *Final Report of the Truth and Reconciliation Commission of Canada*, vols 1–6 (Montreal: McGill-Queen's University Press, 2015).

16 Truth and Reconciliation Commission of Canada, Calls to Action (Winnipeg: The Truth and Reconciliation Commission of Canada, 2015), online (pdf): <https://www2.gov.bc.ca/assets/gov/british-columbians-our-

In addition, one should understand that the criminal justice system includes the exercise of discretion by many players in the system: police, prosecutors, defense council, judges, and probation officers. It is in this discretionary area that Indigenous restorative justice operates.[17]

The result of the many Indigenous justice reviews led to the realization that the criminal justice system approach was not creating more law-abiding offenders or peaceful communities. This led to Indigenous communities taking steps to involve themselves in the working of the criminal justice system.[18] At around the same time, participants in the criminal justice system, judges, prosecutors, police, and probation officers began to explore alternative ways of responding to Indigenous offenders by collaborating with Indigenous communities to address misconduct.

Justice approaches that originated with the Indigenous community which respond to the criminal justice system are characterized as Indigenous restorative justice. Justice approaches that originated within the criminal justice system that reach out to the Indigenous communities have also emerged. The strength of Indigenous participation is crucial. As the strength of Indigenous interaction and collaboration grows, criminal justice approaches a treaty-like partnership, which is the core of Indigenous relationship building.

VI. Indigenous Restorative Justice in Indigenous Communities

A. Early Indigenous Restorative Justice Initiatives

In the late 1980s, the Cree, Chipewyan, and Metis in the remote northeastern Alberta Indigenous community of Fort Chipewyan had become concerned with increasing incarceration of community youth who they found to be more out of control after they returned from the southern youth detention centre. They formed a Native youth justice committee that met with the youth and parent or guardian, asking the youth "what is going on in your life?" and the parent "how can we help you with your child?" An Elder always participated in the committee, which then made recommendations to the judge that were usually followed. An Elder described this process as making an agreement with the youth on what should be done rather than a sentencing process. This early Indigenous restorative justice initiative spread to other First Nations and even to non-Indigenous communities in Alberta.[19]

The Piikani of southern Alberta had traditionally resolved disputes utilizing circles held in teepees. The genius of the contemporary Piikani peacemaking process was to realize their traditional circle procedures could be used in resolving modern conflicts in criminal cases. This led to prosecutors referring cases to the Piikani peacemaking circles to address issues arising from criminal offences. The Piikani peacemaking circles were developed by two Elders, the Piikani Cultural Director and a Piikani RCMP constable. Their peacemaking drew on community Elders and leaders to create a justice forum. This Indigenous alternative commenced

governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf> [https://perma.cc/95Z7-J4RF] [*Calls to Action*].

17 Heino Lilles, "Some Problems in the Administration of Justice in Remote and Isolated Communities" (1990) 15:2 Queen's LJ 327.

18 Nishnawbe-Aski Legal Services Corporation, "Restorative Justice", online: <https://nanlegal.on.ca/restorative-justice/> [https://perma.cc/KWT9-AL6Q].

19 *Mandamin Dissertation*, *supra* note 9.

in 1995 drawing on the Piikani First Nation RCMP and community justice forum to re-implement their traditional healing circles.[20]

These various Indigenous restorative justice initiatives were not restricted to minor offences as shown by the Hollow Water Healing Circles ("HWHC") in Manitoba, which addressed serious cases involving sexual and incest assaults within families. HWHC began in 1985 as an innovative healing approach, which is quite different from the approach of the punitive mainstream justice system. The process holds offenders accountable to their communities, and fosters healing for all — those victimized, their victimizers, and the community.[21]

B. First Nations' Community Courts

In the 1990s the Tsuut'ina in Alberta proposed an Indigenous peacemaking court for their Nation. The Tsuut'ina objective was to achieve a more peaceful community by blending peacemaking with the criminal justice system. I was appointed as a provincial court judge to sit in their community with Indigenous court clerks, the Crown prosecutor, duty counsel, and the Tsuu T'ina peacemaker coordinator.

When an offender chose peacemaking, the court proceeding was adjourned to allow the peacemaking process to be completed. Because their objective was to achieve a more peaceful community, Tsuut'ina peacemaking sought to have any person harmed also voluntarily participate. They held circles led by a community peacemaker. The first circle was an acknowledgement of what happened, the second recognized how people were affected by the harmful event, the third was a discussion of what should be done, and the fourth was an agreement between the offender and the circle about what would be done. The tasks ranged from making restitution, taking treatment for substance abuse or psychological counselling, participating in ceremonies, or undertaking community service. At the end of this process, a fifth circle was held acknowledging successful completion of peacemaking. The matter was then returned to court where the charges were withdrawn, or sentencing proceeded with consideration of the peacemaking outcome.[22]

In the Maritimes, the notion of a court-centric Indigenous justice process has come to full expression. The Elsipogtog Healing and Wellness Court in New Brunswick is the outcome of years of Indigenous community restorative justice development.[23] Beginning with a focus on community youth, the project evolved into comprehensive court proceedings established through an agreement between the Elsipogtog Nation and the New Brunswick government. Situated in the community, Elder participation and Gladue reports (addressed later) are consistently available, with the opportunity for an Indigenous accused to enter a rigorous healing and wellness approach with periodic court reviews. Sentencing is deferred and withdrawn or reduced on successful completion, with dedicated support for victims made readily available.

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20 The Turtle Lodge, "Elder Morris Little Wolf", online: <https://www.turtlelodge.org/knowledge-keeper-maurice-little-wolf/> [https://perma.cc/NG6B-X5ZZ].

21 Solicitor General Canada, *The Four Circles of Hollow Water* (1997), online: <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/fr-crcls-hllw-wtr/index-en.aspx#sum3> [https://perma.cc/3VKU-Z8GZ].

22 *Mandamin Dissertation*, *supra* note 9.

23 Government of New Brunswick, "Health to wellness court pilot project to begin on Elsipogtog First Nation" (20 August 2010), online: <https://www2.gnb.ca/content/gnb/en/news/news_release.2010.08.1476.html> [https://perma.cc/X59A-6PBD].

All participate in the holistic process: police, prosecutors, community justice coordinators, the judge, probation officers, and community service providers. The entire process rests on the Indigenous accused's willingness to participate. Where the accused contests the charges, the matter proceeds in criminal court at the nearest urban centre, rather than in the Elsipogtog court.

This comprehensive Indigenous restorative justice approach is also utilized in Nova Scotia Wagmatcook Court on Cape Breton Island. In response to the closing of the local area court, the Wagmatcook First Nation modified its community centre to accommodate a full-fledged Indigenous restorative justice facility. The Wagmatcook First Nation had been familiar with Indigenous restorative justice measures such as preparation of Gladue reports, circle sentencing, periodic healing, and wellness reviews, and they designed and built their facility to facilitate provision of all those elements. In addition to court related facilities such as judge and Crown prosecutor's offices, defense counsel meeting areas, and holding facilities, there are also Indigenous restorative justice facilities such as a circle court, an Elders' room, and a place for smudging and ceremonies.

The common element is that the Tsuut'ina, Elsipogtog, and Wagmatcook Courts take place in the Indigenous community and are comprehensive in their approach to Indigenous offenders' misconduct. More recently, this approach was also initiated for the Mi'kmaq in Prince Edward Island. The Mi'kmaq Tribal Council was established in 2002 to provide support to its member First Nations of Lennox Island and Abeeqweit. It delivers justice programming drawing on the Mi'kmaq worldview, which includes conflict resolution circles, early pre-charge intervention, healing, sentencing, and reintegration circles.[24]

VII. Indigenous Restorative Justice in Urban Settings

A debate arose as to whether Indigenous restorative justice initiatives would work in cities as opposed to Indigenous communities. Criminal justice officials reasoned that Indigenous offenders in an urban setting did not have a sufficient Indigenous community social structure that could provide community pressure to change their harmful conduct. Indigenous justice advocates held otherwise.

I was aware of this debate as it was unfolding, and was familiar with Aboriginal Legal Services, which operated out of the Toronto Native Friendship Centre and offered a way of providing Indigenous restorative justice within the city. In 1990, Aboriginal Legal Services began to take cases that were diverted by prosecutors out of the criminal justice court system. Once a case was diverted, an Indigenous individual charged with offenses would appear before an Indigenous community council, which would require the individual to undertake remedial measures — such as taking treatment or providing community service — and to report back upon completion of the required measures. The process of participating in the

24 Department of Justice Canada, News Release, "Government of Canada supports Indigenous community-based justice" (12 February 2018), online: <https://www.canada.ca/en/department-justice/news/2018/02/government_of_canadasupportsindigenouscommunity-basedjustice.html> [https://perma.cc/UZ93-5CWM]; The Mi'kmaq Confederacy of PEI, "Community. Collaboration. Culture", online: <https://mcpei.ca/> [https://perma.cc/35A5-2G7B].

circle and agreeing to take responsibility would motivate the individual to follow through with the obligations undertaken.[25]

As president of the Edmonton Native Friendship Centre and chair of the city police commission in1994, I joined with the Native Counselling Services to persuade the Alberta Attorney General and Alberta Provincial Youth Court judges to agree to a Native youth justice committee in the city operated by Native Counselling and the Elders of the Native Friendship Centre. We also found that the Indigenous circles provided the social connection that gave Native young offenders motivation to respond to the help offered.

These early Indigenous justice measures in cities demonstrated the relevance of Indigenous restorative justice measures in urban centres. Sharing circles, dialogue, counselling, and support are potent tools for motivating change and better conduct by those caught in the criminal justice system.

A. Urban Indigenous Courts

The Gladue Court was established in Toronto with a core of provincial court judges specially assigned to hear cases requiring consideration of section 718.2(e) of the *Criminal Code* (discussed below).[26] These would be cases where the Indigenous offender was pleading guilty and agreed to participate in the Gladue process. The Crown prosecutors, usually Indigenous, served the Gladue Court, which was supported by Aboriginal Legal Services (formerly Aboriginal Legal Services of Toronto) through provision of Indigenous court workers and the necessary Gladue reports.[27] Elsewhere throughout Canada, judges applied the Gladue process in varying degrees.

A further refinement and extension of Indigenous restorative justice is development of full featured urban Indigenous courts in major cities. An example of this development was the Indigenous Court in Calgary. Indigenous accused persons appearing in that court have the option of voluntarily entering an Indigenous restorative justice stream or choosing the conventional criminal justice courts. The Calgary Indigenous Court was established in 2021 by the Alberta Provincial Court,[28] and features a dedicated courtroom, set up in a circle format, usually but not necessarily presided over by an Indigenous judge with an Indigenous court worker and prosecutor, with support organizations available.

In Kenora, Ontario, a Justice Centre has opened to address issues of repeat Indigenous offenders who struggle with poverty, mental health issues, and addiction, as well as a lack of secure housing and unemployment. This Justice Centre is the outcome of collaboration by the Ontario government, the Ontario Court of Justice, and the Grand Council of Treaty No. 3. Located in a building owned by the Treaty Chiefs, the Justice Centre is to include a courtroom configured to support rehabilitation and encourage dialogue between individuals, judges, Elders, prosecutors, duty and defence counsel, victims, police, and members of the community.

25 Aboriginal Legal Services, "Home", online: <https://www.aboriginallegal.ca/> [https://perma.cc/77KQ-HVKR].

26 *Criminal Code*, *supra* note 4 at 718.2(e).

27 Shauna Kelly, "Toronto's Gladue Courts" (December 5, 2016), online: *Hicks Adams* <https://hicksadams.ca/gladue-courts/> [https://perma.cc/AV6J-C2WJ].

28 Alberta Court of Justice, "Calgary Indigenous Court", online: <https://albertacourts.ca/cj/areas-of-law/criminal/calgary-indigenous-court> [https://perma.cc/V3HU-GM6V].

Indigenous artwork setting the context abounds throughout the facility, and the Centre has an Elder and cultural liaison room, integrated social services for individuals and families, primary health care treatment, and technology services to aid Indigenous participants with court appearances, tribunal hearings, or medical appointments.[29] The programs and services at the Justice Centre address root causes of crime and support healing for at-risk youth and young adults.

Throughout these restorative justice processes is the inclusion of Indigenous cultural practices, including smudging and ceremonial protocols. Nevertheless, court infrastructure remains an issue for Indigenous communities, given the need for suitable facilities. Under Canada's Constitution the federal government is responsible for Indians and Indian lands while the provincial governments have jurisdiction for the administration of justice (including the operation of courts).[30] Neither level of government is prepared to assume responsibility for providing court infrastructure on Indian reserves, which leaves First Nations to self-finance building courts in their reserve communities.

B. Indigenous Jurists

A significant development that furthered Indigenous restorative justice was the appointment of Indigenous judges who expanded opportunities for Indigenous restorative justice. They make space for Indigenous justice in criminal court proceedings.

The first Indigenous judge appointed in a provincial court was Judge Scow in British Columbia in 1971. He was followed by further Indigenous judicial appointments who led the development of the BC First Nations courts in 2006. Marion Buller Bennett, an Indigenous provincial court judge in New Westminster, began the first of a series of BC Indigenous courts. The courts are open to Indigenous offenders who have pleaded guilty to their charges; following their pleas, judges order "a variety of reports" to create a healing plan for the offender. Healing plans may include attending sweats, going to treatment, and making reparations to the victim or victim's family; the offender must also regularly check in with the court to ensure the plan is being followed and working. Such courts now operate in several BC communities.[31]

These First Nations courts are sentencing courts that provide an Indigenous perspective, based on a holistic and restorative approach to sentencing Indigenous persons who have acknowledged responsibility for their wrongdoing. Local Indigenous Elders and knowledge keepers who have completed a program of orientation give advice on a healing plan. The healing plan may then be incorporated as part of a fit sentence for the Indigenous person who has pleaded guilty.[32]

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29 Attorney General of Ontario, News Release, "Ontario Justice Centre Opens in Kenora" (6 February 2023), online: <https://news.ontario.ca/en/release/1002690/ontario-justice-centre-opens-in-kenora> [https://perma.cc/4YFX-8HM8].

30 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, ss 91(24), 92(14).

31 Jackie Hong, "Canadian Justice System can Benefit from Indigenous Practices, MMIWG Chief Commissioner Says" (28 February 2020), online: *Yukon News* <https://www.yukon-news.com/news/canadian-justice-system-can-benefit-from-indigenous-practices-mmiwg-chief-commissioner-says-6999002> [https://perma.cc/T7UH-AMQ2].

32 See "Shaping the Future of First Nations Courts", online: Tracking Justice <https://trackingjustice.bcfnjc.com/strategy/shaping-the-future-of-first-nations-courts/> [https://perma.cc/5LAN-4VJA].

The appointment of Gerald Morin, a Cree speaking lawyer, as a judge for Cree First Nations in 2001 led to the establishment of the Cree Court for the Indigenous First Nation communities of northeastern Saskatchewan. With a fluent Cree speaking judge, accused persons and other participants may speak Cree in court proceedings without the need for translation. This process allowed Cree justice concepts contained in the Cree language to emerge in cases in court.[33]

Still another development followed the 2016 appointment of Ivan Ladouceur, an Indigenous lawyer, as an Alberta provincial court judge. The area First Nation had developed a justice proposal which languished for years despite efforts to get it underway. Judge Ladouceur facilitated collaboration between the court and the Indigenous restorative justice group, which led to circle sessions for appropriate cases to guide Indigenous offenders onto a healing path.

A further example of Indigenous judicial involvement may be seen in the Federal Court practice guidelines. Indigenous justices participated in the development of practice guidelines making the Federal Court more accessible for Indigenous litigants. Receiving Elder testimony in court was controversial because Crown lawyers insisted on being able to cross examine Elders while Indigenous advocates insisted Indigenous protocols did not allow disrespecting Elders by questioning their accounts. Similarly, Crown lawyers maintained oral stories had little weight because the stories were hearsay and inadmissible while Indigenous advocates maintained oral stories were valid evidence that could be received in court. In response to these controversies, the Federal Court guidelines set out the process for reception of Elder testimony and oral history. More recently, the Federal Court accepted Elders' advice that the Indigenous approach to conflict was to favour agreement over adjudication leading to guidelines offering an Indigenous inspired dispute resolution alternative to litigation.[34]

VIII. Governmental Support for Indigenous Restorative Justice

A. Federal Government Legislation

During the stream of Indigenous justice reports and emerging Indigenous restorative justice initiatives in the 1980s and 1990s, Parliament amended the sentencing provisions of the *Criminal Code*. Section 718.2(e) directs that a judge imposing a sentence must consider all available sanctions other than imprisonment and take into consideration all relevant circumstances of offenders "with particular attention to the circumstances of Aboriginal offenders."[35]

In *R v Gladue*, the Supreme Court of Canada held that section 718.2(e) applies to all Aboriginal offenders whether on-reserve or off-reserve and whether in rural or urban settings,[36] and that it would be an error for a judge to fail to consider these factors. The Supreme Court emphasized that section 718.2(e) was drafted in response to the over-incarceration of Indig-

33 Wîcihtowin, "Honourable Gerald Morin", online: <https://wicihitowin.ca/speaker/honourable-gerald-morin/> [https://perma.cc/L48F-NLHW].

34 Federal Court, Aboriginal Law Bar Liaison Committee, "Practice Guidelines for Aboriginal Law Proceedings" (April 2016), online <https://www.fct-cf.ca/content/assets/pdf/base/Aboriginal%20Law%20Practice%20Guidelines%20April-2016%20(En).pdf> [https://perma.cc/TQ6V-D2ZC].

35 *Criminal Code*, *supra* note 4 at 718.2(e).

36 *R v Gladue*, 1999 CanLII 679 (SCC).

enous persons and the provision was remedial in nature, a measure of restorative justice by requiring "a sensitivity to Aboriginal community justice initiatives."[37] Courts began to apply section 718.2(e) to varying degrees, with one direct result being the production of *Gladue* reports detailing the specific circumstances of Indigenous offenders facing sentencing as opposed to the usual probationary reports.

Over a decade later, the Supreme Court again revisited the issue in *R v Ipeelee* and re-emphasized the remedial nature of section 718.2(e), stressing that the provision imposed a statutory duty on sentencing judges to consider the unique circumstances of Aboriginal offenders,[38] and that failure to apply *Gladue* principles would constitute an error justifying appellate intervention. However, a 2000 decision, *R v Wells*, held that section 718.2(*e*) does not mean that Aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice and less weight to goals such as deterrence, denunciation, and separation.[39] A 2018 article on *Gladue* principles suggests compliance remains at approximately 30% because of its apparent clash with the conventional retributive justice deterrence principle.[40]

B. Federal Government Policy Initiatives

Central to Indigenous worldviews is the concept of relationships. This perspective is articulated in many Indigenous languages, one being Cree. *Wahkohtowin*, a Cree word, directly translates to English as kinship or being related to each other. The concept encompasses ideas about how things are related within Cree worldviews. It includes the obligations and responsibilities people have in maintaining good relationships.[41]

Establishing relationships underpins the Indigenous preference for agreements. The early historical treaties reflect this preference,[42] and the Indigenous justice reports of the 1990s accordingly recommended establishment of an Indigenous justice system through agreements between Indigenous Nations and the federal government.[43]

Indigenous restorative justice measures require adequate reliable resourcing. An Alberta Native court worker program had been operated by the Native Friendship Centre with funding from two Indigenous organizations. When that funding faltered, the program coordinator sought funding from the federal Department of Justice, which resulted in a 1970 agreement providing funding for the program, delivered by Native Counselling Services. This led to the development of the federal Department of Justice Indigenous justice strategy, which provides

37 *Ibid* at para 48. "Indigenous" has become the accepted general term over "Native," "Indian," or "Aboriginal," although the latter two terms persist in legislation.

38 *R v Ipeelee*, 2012 SCC 13.

39 *R v Wells*, 2000 SCC 10.

40 Marie-Andrée Denis-Boileau & Marie-Eve Sylvestre, "*Ipeelee* and the Duty to Resist" (2018) 51:2 UBC L Rev 548.

41 Matt Wildcat, "Wahkohtowin in Action" (2018) 27:1 Const Forum Const 13.

42 Karl S Hele, "Treaty of Niagara, 1764" (11 January 2021), online: <https://www.thecanadianencyclopedia.ca/en/article/treaty-of-niagara-1764> [https://perma.cc/4LPC-AG9Y].

43 The Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, *Justice on Trial* (Edmonton, 1991); Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: The Inquiry, 1991); *RCAP*, *supra* note 2.

financial support for Indigenous restorative justice programming.[44] This support falls well short of the recommendations of Indigenous justice reports calling for substantive agreements for Indigenous justice systems, because current policy states the federal government will only complement Indigenous-led engagement already underway through funding for a specified period. Based on policy rather than legislation or substantive justice agreements, the federal Indigenous justice strategy may be subject to change as the governments change or their fiscal objectives change.

C. Provincial Initiatives

The Manitoba government enacted restorative justice legislation in 2014.[45] The legislation is promising since it provides an official basis for Indigenous restorative justice programming support. The weakness of this initiative is that implementation of this legislation has been left to the discretion of the government department responsible, making it dependent on whether the provincial government decides to pursue a substantive implementation policy.

More recently, the BC government adopted an Aboriginal Policy and Practice Framework that draws from Indigenous justice principles and applies to Indigenous child and family matters.[46] The policy originated with the 2019 enactment of the federal legislation on Indigenous child and family governance.[47]

The Alberta Court of Justice has adopted an Indigenous Justice Strategy as a key component of the Court's commitment to provide a culturally relevant system of justice for Indigenous individuals appearing in Alberta courts.[48] Developed with contributions by Indigenous justice agencies, it acknowledges the findings and recommendations of various Indigenous justice commissions, particularly the Truth and Reconciliation Commission's Calls to Action.[49]

IX. Summation

Indigenous restorative justice is the process by which Indigenous communities seek to bring Indigenous wrongdoers back into harmony in their own lives and in their communities. It is focused on those Indigenous individuals caught up in the criminal justice system. It draws

44 Department of Justice, News Release, "Engaging with Indigenous Partners to Address Systemic Discrimination and Overrepresentation in the Canadian Justice System" (1 November 2022), online: <https://www.canada.ca/en/department-justice/news/2022/10/engaging-with-indigenous-partners-to-address-systemic-discrimination-and-overrepresentation-in-the-canadian-justice-system.html> [https://perma.cc/VA9U-YCUC].

45 *The Restorative Justice Act*, CCSM c R119.6.

46 British Columbia, Ministry of Children and Family Development, *Aboriginal Policy and Practice Framework in British Columbia* (Victoria: MCFD, 2015), online: <https://www2.gov.bc.ca/assets/gov/family-and-social-supports/indigenous-cfd/abframework.pdf> [https://perma.cc/3BXT-AJLD].

47 Department of Justice, News Release, "Bill C-92: *An Act respecting First Nations, Inuit and Métis children, youth and families* receives Royal Assent" (21 June 2019), online: <https://www.canada.ca/en/indigenous-services-canada/news/2019/06/an-act-respecting-first-nations-inuit-and-metis-children-youth-and-families-receives-royal-assent.html> [https://perma.cc/6ZD9-2HQX]. See also *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24.

48 Alberta Court of Justice, "Indigenous Justice Strategy", online: <https://albertacourts.ca/cj/about-the-court/court-of-justice/indigenous-justice-strategy> [https://perma.cc/ZT4E-K3UX].

49 *Calls to Action*, *supra* note 16.

on values, processes, and methods rooted in Indigenous cultures to assist those individuals through addressing the root causes of the misconduct to enable those individuals to heal and live a more healthy and productive life in harmony with others. The ultimate objective of Indigenous restorative justice is to achieve more peaceful communities.

Indigenous restorative justice processes must be rooted in the underlying Indigenous culture. They necessarily interact with the criminal justice system by dealing with individuals caught up in that system, and rmust have considerable influence on the criminal justice process if they are to be meaningful.

In 2023 the negative impact of the criminal justice system on Indigenous communities and individuals still prevails.[50] The gains made by Indigenous restorative justice initiatives demonstrate the need for a much greater role for Indigenous people in achieving peace in their communities. Making room, both through incorporation of Indigenous restorative justice principles in Canada's criminal justice system and through fulsome resourcing of Indigenous restorative justice undertakings by Indigenous peoples themselves, which achieves more peaceful Indigenous communities and thriving individuals, would be a true measure of reconciliation between Canadians and the Indigenous peoples of Canada.

"Indian Law" is a painting by the Anishinaabe artist, Roy Thomas. It depicts a moose standing on a grass-covered rocky knoll with tall pine trees in the background. He explained his painting this way: the tall trees are straight and represent honesty; the rocky knoll is hard and represents strength or courage; the grass is soft representing kindness; and the moose which the Anishinaabe depend on for food represents sharing. These are facets of the Anishinaabe seven sacred teachings. Indigenous restorative justice is how Indigenous communities strive to restore living in accordance with Indigenous law.

50 Office of the Correctional Investigator, "Correctional Investigator Releases Updated Findings on the State of Indigenous Corrections in Canada: National Indigenous Organizations Issue Statements of Support" (2 November 2023), online: <https://oci-bec.gc.ca/en/content/correctional-investigator-releases-updated-findings-state-indigenous-corrections-canada> [https://perma.cc/6G46-UEPG].