Naadamaagewin: Indigenous Restorative Justice

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Abstract

Indigenous restorative justice has emerged in response to the failure of the criminal justice system to engender peace and security in Indigenous communities in Canada. The Royal Commission on Aboriginal Peoples' principal finding for the failure of the Canadian criminal justice system was the fundamentally differing world views of Aboriginal and non-Aboriginal people on the substantive content of justice and the process of achieving justice. After reviewing colonial imposition of criminal justice, differences between retributive justice, restorative justice, and Indigenous justice, as well as Indigenous justice reports, case law and academic literature, this thesis advances a view of Indigenous restorative justice drawing from three Alberta Indigenous justice initiatives. It identifies four basic Indigenous restorative justice elements, which are: first, as been devised and delivered by the Indigenous community; second, as being based on the culture and experience of the Indigenous community; third, as engaging Indigenous individuals' social misconduct which is before the criminal justice system; and forth, as addressing the larger issue of social disorder in Indigenous communities including the over-incarceration of Indigenous offenders. It locates the Indigenous restorative justice approach in relation to Indigenous justice principles. Both the interaction of Indigenous restorative justice with criminal justice and challenges in advancing Indigenous restorative justice are also considered with an indication of the way forward.

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Indigenous Restorative Justice

Introduction

I am Anishinaabe from Wiikwemikoong Unceded Indian Reserve on Manitoulin Island, Ontario. When I was growing up, there was little sense of wrongful behaviour. People took collective responsibility for keeping peace with any issues arising being mediated by the Chief and Council. Children's conduct was supervised by the grown-ups present, whether family or not. We were all related and we shared with each other. People helped each other whether providing counsel, helping with harvesting, or joining in housebuilding. The word in my language for this is 'Naadamaagewin'- meaning helping each other.[1] Wiikwemikoong was, for me, a peaceful and safe community. Many of my core values were acquired there while growing up with my grandmother on the Reserve.

During the 1980's and 1990's, I practiced law in Alberta representing First Nations, Indigenous organizations and Treaty Indian and Metis clients, often advocating for Indigenous[2] approaches to criminal justice. Upon being appointed as a Provincial Court Judge in 1999, I assisted in the implementation of the Tsuu T'ina Peacemaking Court and helped with the integration of Siksika Aissimohki traditional mediation with Siksika Family Court procedures. Later, after being appointed as a Federal Court Justice in 2007, I helped develop the Federal Court Aboriginal Litigation Guidelines.[3] As a result, I have a strong interest in the emergence of Indigenous restorative justice, its underpinnings, operations and prospects for the future.

My Anishinaabe upbringing and legal experience situates me well to conduct a meaningful comparative analysis of Indigenous restorative justice initiatives. I expect the identification and recognition of significant common fundamental principles utilized by First Nations will contribute to a successful and enduring integration of Indigenous restorative justice initiatives with the Canadian criminal justice system.

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[1] Patricia M. Ningewance, *Ojibwe Thesaurus,* (Mazinaate Inc. 2020).
[2] I will be using 'Indigenous' unless the context requires the earlier terms that have been in general use being Aboriginal, First Nations, Indian or Native.
[3] Federal Court Indigenous Litigation Guidelines, *https://www.fct-cf.gc.ca/Content/assets/pdf/base/Aboriginal%20Law%20Practice%20Guidelines%20April-2016%20(En).pdf.*

I intend to examine Indigenous restorative justice as delivered by three Alberta Indigenous First Nations with a view to ascertaining essential elements that make up Indigenous restorative justice. I submit these elements are fourfold. First, they must have originated with the Indigenous community; second, they must be rooted in the Indigenous culture; third, they must be directed at restoring harmony between people and, finally, they must intersect with the criminal justice system, that is they arise and intervene in the workings of the criminal justice system.

In order to do conduct this examination, in Chapter One, I will briefly look at early clashes between Indigenous concepts of justice and the Canadian criminal justice system. Then I will review at Canada's criminal justice system and ascertain what space exists for introducing Indigenous restorative justice. In Chapter Two, I will review the different concepts of justice: retributive justice, restorative justice and Indigenous restorative justice. I do this to underscore the distinctions between these three approaches to justice to avoid any unhelpful merging of these concepts. I will also examine legislative and procedural space made for Indigenous restorative justice. In Chapter Three, I will review three Indigenous justice initiatives: the Bigstone Restorative Justice, the Tsuu T'ina Peacemaking Court, and the Siksika Aissimohki Traditional Mediation. In Chapter Four, I will delve more deeply into Indigenous concepts of justice that underlie these initiatives as I argue these Indigenous restorative justice initiatives are pathways back to living life in harmony through Indigenous justice. In Chapter Five, I will review some of the challenges impeding the implementation of Indigenous restorative justice notwithstanding the ever-growing crises in the criminal justice system's treatment of Indigenous offenders. These challenges include the resistance of the criminal justice system to acknowledging a role for Indigenous restorative justice, and the clash between individual Charter rights and Indigenous collective rights. I will also look at an internal challenge arising from power imbalances in Indigenous communities. I leave the question of adequate resourcing to another day. Finally, in Chapter Six, I will conclude my review of Indigenous restorative justice and prospects for coexistence of Indigenous restorative justice initiatives and the criminal justice system.

Chapter One

Imposition of Colonial Justice

Indigenous - European relationships during the early years of contact in the 17th and 18th centuries reflected the clash between different societal approaches to justice. One example of this clash between the Indigenous approach to resolving conflict and the European approach was recorded in 1650 by the Jesuits reporting about an incident between the Nippissings and the French:

> *A French drummer boy wounded a Nippissing brave.[4] The Nippissings demanded: 'Behold, one of thy people has wounded one of ours; thou knowst our custom well; given us presents for the wound.' The French refused to follow native custom and promised to punish the boy by whipping. The Nippissings were horrified and sought mercy alleging 'that it was only a child, that he had no mind, that he did not know what he was doing.' One Nippissing threw his blanket over the boy saying: 'Strike me, if thou wilt, but not strike him."*[5]

After Confederation, the Canadian criminal justice system was imposed on Indigenous people without regard for Indigenous approaches to justice. An early example was the trial of four Tagish men tried for the killing of a prospector at Marsh Lake in the Yukon in 1889. They were convicted and sentenced to death for what was described as "one of the most cold-blooded crimes since the gold rush began." Later research by Julie Cruikshank uncovered the Tagish perspective about the event. If a death is caused by a member of one Tlingit clan, the aggrieved clan will demand compensation from the offending clan for the death. If compensation is denied,

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[4] I have deciphered the incident as follows. The Nippissing warrior was likely curious about the drummer boy's drum, and the drummer boy reacted by striking the warrior with his drumstick. This would not inflict much of a physical injury but would constitute a serious insult to the aggrieved warrior. (There are various historical accounts of warriors taunting their enemies by striking opponents with a stick rather than a weapon.) The insulted warrior would have demanded justice calling for his clan to take up the matter with the French.

[5] John A Dickinson, Native Sovereignty and French Justice in Early Canada, *Essays in the History of Canadian Law: Crime and Criminal Justice in Canadian History*, ed. Jim Phillips et al., vol. 5, (Toronto, University of Toronto Press, 1994) 17–40. 22 (Original source: The Jesuit Relations and Allied Documents, 1959 New York: Pageant Book).

then members of the aggrieved clan will retaliate by killing a member of the offending clan. In the Marsh Lake case, some members of the Tagish clan died as a result of mistaking a toxic substance[6] at a prospector's cache for flour, which they had used in baking bread. The young Tagish men visited a prospector whom they regarded as a representative of the white clan, but no compensation offer was forthcoming, because there was no shared understanding of Tlingit ways. The Taglish followed through, taking appropriate Tagish action to avenge the deaths of kinsmen.[7] Given the Yukon was in the process of being incorporated as a Canadian territory, there were doubts the trial was legally constituted and could have been held to be a legal nullity. Nevertheless, two Tagish had already died in prison and the remaining two were executed before they too died while imprisoned.

In another case, an Inuit leader, Nuqallaq, was tried for the killing of Robert Janes in 1920 on Baffin Island. Nuqallaq had acted in accordance with Inuit justice in killing a person who had become a danger to the Inuit camp. He was convicted for manslaughter in a show of extending Canadian law to the high artic.[8]

Over the years, the situation in many Indigenous communities began to worsen, fueled by social and economic marginalization, ill health, alcohol, and the challenges of trying to cope with a modern world while handicapped by prejudice and racism.[9] The suppression of Indigenous justice means of maintaining peace and order was integral to the Canadian colonial endeavour. Canadian legislation, federal policies, and judicial decisions contributed to economic displacement and disruption of social order in Indigenous communities.[10] An early Indigenous justice report, *Indians and The Law*, completed in 1967, found increasing numbers of Indigenous

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[6] Arsenic is a by-product of extracting gold from gold bearing rock and arsenic compounds can appear as a white powder. See Arsenic in Historic Gold Mine Tailings *https://www.google.com/search?client=firefox-b-d&q=Arsenic+in+Historic+Gold+Mine+Tailings+%28novascotia.ca%29.*

[7] Tagish traditions called for negotiations for compensation for the death of kin and retaliation if refused. Julie Cruikshank, in collaboration with Angela Sidney, Kitty Smith, and Annie Ned, *Life Lived Like a Story,* (Vancouver: UBC Press. 1990).

[8] Kenn Harper, *Thou Shalt Do No Murder: Inuit, Injustice and the Canadian Artic*. (Iqaluit. Nunavut Artic College Media. 2017).

[9] A Stoney Elder on the Eden Valley Indian Reserve, testifying in his language at a fatality inquiry on deaths in the Eden Valley community, attributed his community's social and economic deterioration as the consequence of the impact of the modern world disrupting the community's traditional ways of maintaining itself. I had presided over that Eden Valley fatality inquiry.

[10] Michael Coyle, Indigenous Legal Orders in Canada – a literature review, (Law Publication, 2017), https://ir.lib.uwo.ca/lawpub/92; Also, Wanda D. McCaslin and Denise C. Breton, Justice as Healing: Going Outside the Colonizers' Cage, *Handbook of Critical and Indigenous Methodologies,* (Thousand Oaks, Sage Publications, 2014) 511-530.

people in Canada's jails. The authors wrote that "Underlying all problems associated with Indians and Eskimos in this country are the prejudice and discrimination they meet in the attitude of non-Indians."[11] They concluded that the conflict with the law required a parallel effort to solve Indigenous economic and social problems.[12] The *Indians and the Law* report had little effect.

One further consequence of the ever-increasing intrusion of the criminal justice system into Indigenous communities was that it contributed to the worsening situation by contributing to criminalizing Indigenous youth. In 1989, Chief Judge Heino Lilles of the Yukon Territorial Court was to state:

> The criminal justice system continues to 'criminalize' and label young people at an early age, increasing the likelihood of early incarcerations, repeated incarceration and incarceration for longer periods of time.[13]

In the 1980's and 1990's, there were a series of Indigenous justice inquiries and commissions including the Nova Scotia *Royal Commission on the Wrongful Imprisonment of Donald Marshall Jr.*, the Manitoba *Aboriginal Justice Inquiry* and the Alberta *Justice on Trial* Report. These inquiries and commissions were directed at examining the impact of the criminal justice system on the Indigenous peoples across Canada. The Royal Commission on Aboriginal Peoples [RCAP or the Commission] had the benefit of reviewing these many Indigenous justice reports and assessing Indigenous restorative justice approaches.[14] RCAP concluded that the Canadian criminal justice system failed the Aboriginal peoples of Canada, the First Nations, Inuit, and Metis. This failure was evidenced by the high rates of crime in Indigenous communities and the over-incarceration of Indigenous peoples in Canada's penal institutions. RCAP concluded:

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[11] The Canadian Corrections Association, *Indians and the Law,* (Ottawa: 1967), 55.
[12] The Canadian Corrections Association, *Indians and the Law,* 57.
[13] Heino Lilles, Chief Judge, Some Problems in the Administration of Justice in Remote and Isolated Communities, (Presentation at the C.I.A.J. Conference, Kananaskis, Alberta, October 1989), 25. At the most extreme level, incarceration of Indigenous offenders in federal penitentiaries led to the formation of Indigenous criminal gangs. Joe Friesen, *The Ballad of Danny Wolfe,* (Toronto: Penguin Random House Canada Limited, 2016).
[14] Royal Commission on Aboriginal Peoples. *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*. (Ottawa: Canada Communications Group. 1996).

> The Canadian criminal justice system has failed the Aboriginal peoples of Canada - First Nations, Inuit and Métis people - on-reserve and off-reserve, urban and rural - in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different worldviews of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.[15]

Twenty years later, this disquieting finding was echoed by both the renewed justice recommendations included in the Truth and Reconciliation Commission Report[16] and the further increasing Indigenous over-incarceration.

When the RCAP issued its report on Indigenous justice issues in 1996, I was struck by RCAP's conclusion that the reason for the failure of the criminal justice system to foster peace and security in Indigenous communities was because of the difference in worldviews between Indigenous peoples and non-Indigenous peoples on justice and the process of achieving justice. What is this difference and how does it manifest itself in the workings in criminal justice? In working through these questions for this paper, I had to begin by sorting through different approaches to justice. The first was to look at the differences in retributive justice and restorative justice. Then I had to think about the difference between restorative justice and Indigenous restorative justice. There was also the real-world experience of First Nations that were engaged in delivering Indigenous restorative justice to consider.

I also had to reflect on the differences between Indigenous restorative justice and Indigenous justice. As part of this exercise, I came to consider how Indigenous restorative justice might be characterized in my Anishinaabe culture. The word 'Naadamaagewin' comes to mind in trying to capture the essence of Indigenous restorative justice. It may be translated as the process of helping a person or persons who are in need of assistance. The examination of these questions clarified and deepened my understanding of RCAP's principal conclusion.

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[15] RCAP, *Bridging the Cultural* Divide, 309.

[16] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation of Canada, Volume 1*, (Toronto: James Lorimer & Company Ltd., 2015).

I found it necessary to begin by reviewing the Canadian criminal justice structure and the nature of differing criminal justice approaches which I characterize as retributive justice, restorative justice and Indigenous restorative justice.

The Criminal Justice System

Canada's federal structure, allocating governance powers between the federal and provincial governments is laid out in sections 91 and 92 of the *Constitution Act* 1867.[17] The federal responsibility for criminal law is set out in subsection 91(27) which reads:

> 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

Under this constitutional provision, Parliament has enacted the *Criminal Code* and other criminal laws such as the *Young Offenders Act*, the *Narcotic Control Act,* and others.[18] Of significance is that the *Criminal Code* not only contains enumeration of substantive criminal offences but also criminal procedural rules for the enforcing those criminal offences.

The provincial responsibility for the administration of justice is set out in subsection 92(14) which reads:

> 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

[17] Constitution Acts 1867-1982, https://laws-lois.justice.gc.ca/eng/const/page-4.html.
[18] A. Pringle, Criminal Law, *The Canadian Encyclopedia*, (Hurtig Publishers Ltd. 1998), *https://www.thecanadianencyclopedia.ca/en/article/criminal-law.*

Policing, criminal investigations, prosecutions, the court system, and corrections all compromise part of the 'administration of justice'.[19]

A further division of federal and provincial criminal powers is found in the *Constitution Act*, section 91(28): The Establishment, Maintenance, and Management of Penitentiaries. and section 92(6): The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.[20] Individuals sentenced to a term of incarceration less than two years serve their time in provincial prisons while those serving sentences of two years or more do so in federal penitentiaries.

In addition, in the exercise of their respective responsibilities, the justice system parties, notably the prosecutors and judges, may use their discretion in deciding how to proceed in criminal matters. The importance of this discretionary power was explained by Chief Justice Lilles:

> The term 'criminal justice system' includes many more players and institutions than judges and courts. It is in fact a 'decision network' which includes the complainant, police, Crown prosecutors, defence counsel, probation officers and youth workers, judges and correctional agencies. The treatment of a defendant, including the sentence imposed by the judge, depends on the decisions made by all persons within the system. It is important to note that people, not institutions, make these critical decisions. Moreover, most of these decisions are not automatic, but involve the interpretation and application of imprecise rules or procedures and the exercise of considerable discretion.[21]

It is within this discretionary space that restorative justice operates.

The result of this constitutional division of powers is that the federal government enacts the *Criminal Code* which includes criminal procedure, for example s. 718.2(e), while the

[19] 'administration of justice', Dukelow, Daphne, *The Dictionary of Canadian Law* 3rd ed., (Thompson & Carswell. 2004).
[20] *Constitution Act,* 1867, ss. 91(28) and 92(6).
[21] Lilles, Some Problems in the Administration of Justice in Remote and Isolated Communities, 10.

provincial governments establish the provincial criminal courts of first instance[22] as well providing for the police, prosecutors and judges who are involved in the operation of these courts.

In 1993, Parliament considered Bill C 90: An Act to Amend the Sentencing Provisions of the *Criminal Code.*[23] The Indigenous Bar Association [IBA] made a submission to the parliamentary committee during the second reading of the bill.[24] The IBA supported the reference to Aboriginal people in the sentencing amendment but expressed concern that the section lacked the requisite clarity to give meaning and effect to the remedial objective of that provision. The IBA was referring to s. 718.2(e) which reads:

> 718.2 a court that imposes a sentence shall also take into consideration the following principles:
> …
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, <u>with particular attention to the circumstances of Aboriginal offenders</u>. [emphasis added][25]

The IBA considered Indigenous community involvement as a necessary component in determining what is reasonable in the sentencing of Indigenous offenders. This IBA emphasis on the need for Indigenous community participation followed on the heels of the early circle sentencings decisions,[26] preceded the release of the Royal Commission on Aboriginal Peoples 1996 report Bridging the Cultural Divide[27], the eventual enactment of Criminal Code s. 718.2(e)

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[22] A criminal charge begins with the accused appearing in provincial court and, for more serious charges, could proceed to the superior court in the province or territory.
[23] The sentencing amendments, including s. 718.2(e), to the *Criminal Code*, R.S.C. 1985, c. C-46, were not made under Bill C-90 due to the intervening federal election. The amendments were reintroduced by Bill C-41 and subsequently enacted by Parliament in 1996.
[24] Indigenous Bar Association, *Aboriginal Considerations: Submission to the Parliamentary Committee on Bill C-90: An Act to Amend the Sentencing Provisions of the Criminal Code*, May 25, 1993.
[25] The reference to 'Aboriginal' offenders in s. 718.2(e) was controversial in that it is the only provision in the *Criminal Code* that refers to specific population group in Canada.
[26] *R. v Moses* 71 C.C.C. (3d) 347(1992).
[27] RCAP, *Bridging the Cultural Divide,* 1996.

and the subsequent 1999 Supreme Court of Canada's interpretation of that provision in *R. v Gladue*.[28]

Finally, one should be aware of Indigenous legal traditions with respect to justice. Indigenous approaches to justice operated as the means of maintaining peaceful relationships within Indigenous societies long before European contact and are a necessary consideration in unpacking what RCAP was meant by its reference to the different worldview held by Indigenous peoples to justice and the process for achieving justice.

Indigenous Justice

In *Calder v British Columbia,* the Supreme Court of Canada acknowledged Indigenous Nations lived in organized societies prior to the British assertion of sovereignty in Canada.[29] Implicit in that fact, that is having organized societies, is that Indigenous people had their own means of maintaining order in their societies. The imposition of the Canadian system of justice did not acknowledge any Indigenous system of justice. Even so, an example of partial recognition of that reality may be found in the numbered Indian treaties in western Canada which all contain a justice clause enjoining the Indigenous nations to maintain order amongst themselves.

Indigenous restorative justice is consistent with the treaty relationship between the First Nations and the Crown. The first appearance of a treaty justice clause occurred in Treaty No. 1 in 1871.[30] However, since I will examine Indigenous justice initiatives in Alberta, I will focus on the relevant Alberta treaties. The Tsuu T'ina Nation and the Siksika Nation are parties to Treaty No. 7 entered into 1877. It provides:

> **Treaty No. 7**: *And the undersigned Blackfoot,* Blood, Piegan *and Sarcee head Chiefs and minor Chiefs*, and Stony Chiefs and Counsellors, on their own behalf and on behalf of all other Indians inhabiting the tract within ceded do hereby

[28] *R. v Gladue* [1999] 1 S.C.R. 688.
[29] *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 31. The SCC decision was specific to the Nisga'a in northern British Columbia but, by inference, also held true for Indigenous Nations all across Canada.
[30] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories including the Negotiations on which they were based*, Appendix 313 (Saskatoon: Fifth House Publishers, 1991, Facsimile reprint, Toronto: Belfords, Clarke 1880).

solemnly promise and engage to strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen. *They promise in engage that they will, in all respects, obey and abide by the law, that they will maintain peace and good order between each other and between themselves and the other tribes of Indians, and between themselves and others of Her Majesty's subjects*, whether Indians, Half breeds or whites, now inhabiting, or thereafter or hereafter to inhabit, any part of the said ceded tract; and that they will not molest the person or property of any inhabitant of such seated tract or the property of Her Majesty the Queen, or interfere with or trouble any person passing or travelling truly said tract or any part *thereof and that they will assist the officers of her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded*.[31] [Emphasis added]

The Bigstone Cree Nation is party to Treaty No. 8 entered into in 1899. It also provides:

> **Treaty No. 8**: *And the undersigned Cree*, Beaver, Chipewyan and other Indian Chiefs and Headmen on their own behalf and on behalf of all the Indians whom they represent, do hereby solemnly promise and engage to strictly observe this Treaty, and also to conduct and behave themselves as good and loyal \subjects of her Majesty the Queen. *They promise and engage that they will, in all respects, obey and abide by the law; that they will maintain peace between each other, and between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects*, whether Indians, half-breeds or whites, this year inhabiting and hereafter to inhabit any part of the said ceded territory; and that they will not molest the person or property of any inhabitant of such ceded tract, or of any other district or country, or interfere with or trouble any person passing or travelling through the said tract or any part thereof, *and that they will assist the*

[31] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories including the Negotiations on which they were based*, (Saskatoon: Fifth House Publishers, 1991, Facsimile reprint, Toronto: Belfords, Clarke 1880).

> *officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this Treaty or infringing the law in force in the country so ceded.*[32] [Emphasis added]

Of note is the language of the treaty justice provision requiring the treaty First Nations to "maintain peace and good order between each other" and "assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this Treaty or infringing the laws in force" I would submit this means the Treaty First Nations have a responsibility to be actively involved in justice matters. They are not just to be passively involved by obeying the law. They are enjoined to "maintain peace and good order" and "assist in bringing to justice and punishment any member offending against this Treaty or infringing the law in force." Moreover, the language of the Treaty is not limited in time or space. It represents an ongoing undertaking and obligation by First Nations to participate in maintaining the peace.

The Treaty justice provisions are significant when considering section 35(1) of the *Constitution Act 1982* which provides:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.[33]

The effect of s. 35(1) is that the First Nations have a constitutionally acknowledged treaty right, with its commensurate obligation, to participate in maintaining the peace.

Canada has also signed the United Declaration on the Rights of Indigenous Peoples [UNDRIP] in May 2016. Relevant provisions in UNDRIP include:

> Article 4 Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

[32] Treaty Texts: Treaty No. 8, *https://www.rcaanc-cirnac.gc.ca/eng/1100100028813/1581293624572*.
[33] s.35(1) *Constitution Act*, 1982.

> Article 5 Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.[34]

Generally speaking, United Nations' declarations require states to sign onto the declaration first. Then, in order to implement the declaration, Parliament must enact legislation giving the declaration legal effect domestically. This has not occurred as of yet in Canada. Nevertheless, Canada's recognition of UNDRIP does allow for consideration of the Declaration, especially since the current federal government policy position is that Canada recognizes that Indigenous peoples have an inherent right of self government guaranteed in section 35 of the *Constitution Act 1982*.

Having set out the background context, I will now turn to consideration of retributive justice, restorative justice, and Indigenous restorative justice.

[34] United Nations Declaration on the Rights of Indigenous Peoples, *https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html.*

Chapter Two

Retributive Justice

In the Canadian criminal justice system, 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 criminal justice system relies on punitive sanctions to deter or correct criminal behaviour. Section 718 of the *Criminal Code*[35] states the purpose of sentencing offenders is to contribute, along with crime prevention initiatives, to respect for the law and maintenance of a just, peaceful and safe society. Incarceration is reserved for more serious offences while lesser sanctions involve fines and probation. The latter are still viewed as forms of punishment. Incapacitation of the offender, namely incarceration, is justified as being necessary to keep society safe from an offender's unlawful conduct.[36] Included, but oft neglected, is the further objective of rehabilitating the offender which is ordinarily left to the corrections system.[37]

Canada's sentencing provisions stop short of the 'just deserts' theory of criminal justice which postulates that an offender who commits a crime has inflicted harm upon another person so pain must be inflicted on the offender in proportion to the moral gravity of his or her crime. The popularity of the 'just desserts' movement in the 1970s and 1980s meant it was not necessary to consider rehabilitation when justifying incarceration. Arguably s. 718.1 of the Criminal Code limits the just desserts approach by requiring that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. However, the latter consideration is treated somewhat simplistically.[38]

To offset harsh penalties that may be imposed, the criminal justice system has built in safeguards such as a right to a lawyer, proof of guilt beyond a reasonable doubt, and trial by jury, all exercised in adversarial procedural and truth finding processes between the state and the individual offender.[39] Yet these safeguards can exacerbate the adverse impact of the criminal

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[35] *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.
[36] David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights,* (Vancouver: UBC Press. 2012), 9
[37] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 718(d) to assist in rehabilitating offenders; also, the notion of rehabilitation of offenders is reflected in the word 'penitentiary' which relates to reformatory treatment of criminals, Canadian Oxford English Dictionary.
[38] Milward, *Aboriginal Justice and the Charter*, 8-9; Denis-Boileau, Marie-Andree and Marie-Eve Sylvestre, Ipeelee and The Duty to Resist, *UBC Law Review* Vol 51:2 (2018), 565-577.
[39] Milward, Milward, *Aboriginal Justice and the Charter*, 62.

justice system. The high standard of proof required for a conviction offers a way for an offender to avoid consequences for his or her criminal conduct; the adversarial approach can antagonize relations between the victim and offender; and the needs of the victim and community harmed may be minimized for having been subsumed into the state's interests.

Finally, use of imprisonment as a deterrent has yet to produce any meaningful correlation between the increasing use of imprisonment and the reduction of crime rates. A number of reasons have been offered for this contradiction. Marginalized people, the most frequent offenders, are likely to react differently to the prospect of criminal offence sanctions than people in the mainstream of society. Offenders committing crimes in the throes of inflamed passion or intoxication would not be deterred by the prospect of incarceration. The harsh environment of prison also has the potential to make an offender worse such that the community becomes more at risk upon the release of the inmate at the end of the period of imprisonment. Increasingly, the most common criticism is that imprisonment fails to address the underlying conditions that lead to the offender's commission of the criminal behaviour.

Restorative Justice

When summarizing restorative justice papers presented at a 1999 conference, Kent Roach noted that there was an emerging theme of a paradigm shift from reliance on retributive justice to greater use of restorative justice.[40] The latter was used in victim offender mediation, family group conferences and circle sentencing. Roach submitted restorative justice had a comprehensive and coherent theory of justice that focuses on bringing together offenders, victims and communities to recognize a harm has been done and decide what should be done. Its approach brings parties together in a less hierarchical and more informal setting with a common concern for the welfare of both the offender and the victim. Roach noted that John Braithwaite, a prominent legal scholar, had defined the core values of restorative justice as healing with community participation and directing respectful dialogue to responsibility, apology, forgiveness, and making amends. Roach also pointed out that restorative justice can serve the need for deterrence since an offender who heals is less likely to offend again.

[40] Kent Roach, Changing Punishment at the Turn of the Century: Restorative Justice on the Rise, *Canadian Journal of Criminology*, July 2000: 251-252.

Restorative justice has been the subject of much discussion and debate including in international forums. Paul McCord convened a Delphi process[41] to see if consensus might be reached on a definition of restorative justice. Although not agreed to by all, a working definition offered was "Restorative justice is 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 offense and its implications for the future."[42]

In 2000, the United Nations Crime Congress also considered standards for restorative justice.[43] However, standards usually call for relevant data upon which they are to be based. A common difficulty is that there is limited research on the effectiveness of restorative justice in changing individuals for the better. Much of what exists is anecdotal. Megan Stephens, who researched restorative justice as practiced by courts in Toronto,[44] agreed with the need for standards. From her review of judges' work in the Toronto area, she concluded that restorative justice has found a niche in Toronto, but she pointed out there was a failure to collect measurable data on what progress had been made. She concludes that data needs to be collected on what was working and what was not.[45] The difficulty with such data collection is that it tends to be limited to recidivism of offenders and not favourable outcomes.

David Milward pointed out restorative justice can include a wider circle of participants, since it may include persons indirectly involved in the conflict when reaching for a consensus on resolving the conflict.[46] Moreover, in this process, the victim is given a direct and more prominent role. Since the emphasis is less on deterrence or retribution and more on repairing relationships, restorative justice contemplates noncustodial outcomes rather than incarceration. This includes reintegration of the offender into the community as he or she corrects his or her

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[41] A Delphi process solicits expert opinion, here on the definition of restorative justice for the Working Party on Restorative Justice of the Alliance of NGOs on Crime prevention and Criminal Justice. John Braithwaite, *Restorative Justice and Responsive Regulation,* (Oxford: Oxford University Press, 2002), 11.
[42] Braithwaite, *Restorative Justice and Responsive Regulation*, 11.
[43] Barbara Gray and Pat Lauderdale, The Great Circle of Justice: North American Indigenous Justice and Contemporary Restoration Programs, *Contemporary Justice Review,* Vol. 10, No. 2 (2007), 215.
[44]Stephens, Megan, Lessons From the Front Lines in Canada's Restorative Justice Experiment: The Experience of Sentencing Judges, Queen's Law Journal, 33 (2007) 22. Stephens points out restorative justice was once the dominant approach in many western and non-western legal traditions prior to centralized state power in matters of criminal justice. Admittedly, in some cases, a long time ago, since for example, the sovereign assumed state control of justice in England shortly after the Norman Conquest in 1066.
[45] Stephens, Lessons From the Front Lines in Canada's Restorative Justice Experiment, 70.
[46] David Milward, Making the Circle Stronger: An Effort to Buttress Aboriginal Use of Restorative Justice in Canada Against Recent Criticisms, *International Journal of Punishment and Sentencing*, Vol. 4 Issue 3 (2008), 126.

behaviour. Reintegration may include community service, making restitution to the victim and entering into counselling for substance abuse or anger management.

In contrast to retributive justice that focuses on the actions of the offender, restorative justice uses a more holistic perspective considering not only the offender's actions but also the harmful impacts on the victim and community. An essential component of this holistic approach is looking at the underlying reasons for the offender's criminal behaviour, such as childhood trauma, untoward peer pressures, substance addictions, or community problems. The participants in the restorative justice process explore ways to address these underlying problems as part of the restorative process.[47] The concept of restorative justice involves defining crime as an action by one individual against another individual that is a violation of relationships which must be restored.

Cristin Popa agreed with McCord's view that restorative justice is a process to involve those who have a stake in a specific offence to collectively identify and address harms, needs and obligations in order to heal and make things right.[48] Popa notes an accepted definition of restorative justice is every action that is primarily oriented toward doing justice, that being repairing the harm that has been caused by a crime.[49] However, Paul McCord considered it essential to define restorative justice as a process that could generate a resolution and not the resolution itself.[50] McCord differentiated restorative justice from community justice, describing restorative justice as addressing a violation of relationships while community justice involved the criminal justice system in partnership with the community. Examples of the latter would be community policing and problem solving courts. Restorative justice, as seen by McCord, should not be conflated with community justice as that lessens the thrust and promise of restorative justice.[51]

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[47] Milward, Making the Circle Stronger, 126.
[48] Cristin N. Popa, Restorative justice: a critical analysis, International Journal of Law and Jurisprudence, Volume X, Issuer 2 (2020), http://www.internationallawreview.eu/article/restorative-justice-a-critical-analysis. 1-2.
[49] Popa, Restorative justice: A Critical Analysis, 2.
[50] Paul McCold, (2004) Paradigm Muddle: The Threat to Restorative Justice Poised by its Merger with Community Justice. Contemporary Justice Review, 7(1) (2004): 13-35; also, Paul McCold, Paradigm Muddle: A Rejoinder, November 29, 2019; Paul McCold, Beyond The Journey, Not Much Else Matters: Avoiding the Expert Model with Explicit Restorative Practice, Paper, (Massy University International Conference on Restorative Justice, Auckland, New Zealand, December 2-5, 2005).
[51] Joanne Belknap and Courtney MacDonald, Judges' Attitudes about and Experiences with Sentencing Cases in Intimate-Partner Abuse Cases, Canadian Journal of Criminology and Criminal Justice, Vol. 52, No. 4 (2010), 370-371.

Joanne Belknap and Courtney MacDonald conducted interviews with judges intending to focus in on how restorative justice played out in gender violence cases. They began with an observation that "Restorative justice (RJ) is a 'domestic social reform' movement developed simultaneously in numerous countries, including Canada, Australia, New Zealand the United States (Medel-Meadow 2007)." This definition offered an approach to sentencing in criminal offences where there is victim input, victims and offenders meet face to face in a community instead of a court, and where restitution and reconciliation could occur between the victim and offender. The writers observe that the addition of the two additional purposes in sentencing in s. 718 was significant because it opened the door for restorative justice purposes. These two sentencing principles were "reparation for harm done" and "promoting a sense of responsibility in offenders".[52]

Belknap and Macdonald noted growing support for restorative justice in intimate gender violence cases because the conventional approach, including incarceration, was proving ineffective in preventing recidivism. However, they said there remained reservations about relying on restorative justice in such cases unless there were strict guidelines for ensuring voluntary and safe victim participation. The writers cautiously concluded restorative justice may provide a more effective response in some family violence cases and a broader benefit of the public outing of family violence in the community.[53]

The only current example of provincial restorative justice legislation is *The Restorative Justice Act*[54] introduced in 2014. The Manitoba government stated: "the *Restorative Justice Act* would provide a framework to further develop restorative justice programs and increase their use for adult and youth offenders across the province." The legislation provides:

> 2(1) For the purpose of this Act, restorative justice is an approach to addressing unlawful conduct outside the traditional criminal prosecution process that involves one or both of the following:

[52] *Criminal Code*, R.S.C. 1985 c. C-46, Subsections 718(e) & (d).
[53] Belknap and MacDonald, Judges' Attitudes about and Experiences with Sentencing Cases in Intimate-Partner Abuse Cases, 387.
[54] *The Restorative Justice Act*, SM, 2014, c. 26.

(a) Providing an opportunity for the offender and victim of the unlawful conduct or other community representatives to seek resolution that repairs the harm caused by the unlawful conduct and allows the offender to make amends to the victim or the wider community;

(b) requiring the offender to obtain treatment or counselling to address underlying mental health conditions, addictions or other behavioural issues.[55]

The Act also provides that the department responsible for administration of the Act must develop policies respecting the use of restorative justice programs. It requires provincial justice, if that department becomes responsible for the Act, to develop policies about the use of restorative justice programs.[56] If such policies are not developed or implemented, the question becomes whether the objectives of the Act would be realized or whether the criminal justice system would continue to operate in the usual fashion without regard to restorative justice measures.

Rather than merely characterizing restorative justice as a process, Annalise Buth and Lynn Cohn went further and stated restorative justice was a philosophy and a way of life. At its core, restorative justice is a philosophy that views wrongdoing as a breakdown of relationships in the community rather than a violation of rules or law. Restorative justice is directed to repairing the relationship, understanding the social context surrounding the harm, and empowering those affected so they can address and repair it.[57] The writers say the restorative justice processes can differ, but they need be grounded in common principles like inclusion, empowerment, accountability, reintegration, making amends, healing and self determination. It involves a value-based dialogue approach to conflict in relationships. Voice is given to all with shared values in a safe environment where participants can be their authentic selves.[58]

Renee Warden submits that while restorative justice focuses on releasing the victim from the harm caused by crime, it overlooks a victim's deeper hurt that needs healing. When someone commits a crime, the question is not just why that person did not respect the law and the victim?

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[55] *The Restorative Justice Act*, s. 2(1)
[56] *The Restorative Justice Act*, s. 5(1)
[57] Annalise and Lynn, Looking at Justice Through a Lens of Healing and Reconciliation and Reconnection, Northwestern Journal of Law and Social Policy, Vol. 13 Issue 1 (2017) 3.
[58] Buth, Annalise and Lynn Cohn, Looking at Justice Through a Lens of Healing and Reconciliation and Reconnection, 3.

Warden raises a more fundamental question - why did the offender lack empathy towards the victim. What were the barriers to the offender feeling empathy for those hurt by his or her offence? Warden suggests empathy is an essential component in the offender's makeup needed for respecting the victim and the rights of others. Empathy is about how one feels about another's hurt caused by the harm inflicted by the crime.[59] Remorse is not empathy. Remorse is about one feels about their own actions. The criminal justice system expects signs of remorse while, according to Warden, restorative justice seeks to instill empathy in the offender's contrition.

Individuals can suppress empathy, either because of a narcissistic outlook, their own personal trauma, or the effects of intoxication. This suppression needs to be overcome in the restorative justice process so that not only the offender, but also the victim, can heal. This perspective has been actualized in other countries. In Germany, the offenders undergo empathy training before participating in victim/offender mediation. Directing offenders' attention to why they behaved the way they did helps them choose a different way, thus etching empathy into the restorative process.[60]

The above review of restorative justice theory raises a number of points. First, restorative justice approaches arose in counterpoint to retributive justice since the latter does not easily accommodate reconciliation. Although restorative justice has been characterised as a paradigm shift, it still operates in lockstep with the criminal justice system. The core values of restorative justice include offender, victim, and community participation, dialogue, making amends, reconciliation, and reintegration. The Criminal Code legislative amendments, in particular s. 718.2 (e) & (f) and s. 718.2(e) had a significant impact on the emergence of restorative justice practices while provincial administration of justice legislation such as the *Manitoba Restorative Justice Act* may also have effect although only if accompanied by the will to implement change.

Johannes Wheeldon argued for linking restorative justice with other theories of criminology that sought to control crime through reconciliation rather than retribution. He suggests the lack of relationships in a community could explain why restorative justice better

[59] Renee Warden,Where is the Empathy? Understanding Offenders' Experience of Empathy and Its Impact on Restorative Justice, University of Missouri-Kansas City Law Review 87 (2018-2019) 953, 957.

[60] Warden, Where is the Empathy?, 974.

responds to crime arising from social disorganization, addressing as it does the relationships between people.[61] Cristin Popa wrote conflict resolution may relate to restorative justice where facilitated mediation is used to resolve the conflict and restore relationships between offenders and victims. Poppa identified the main strength of restorative justice as acknowledging a victim's suffering and giving the victim a voice in the justice process.[62] These similar but differing characterizations illustrate the continuing debate over the nature of restorative justice.

Popa concludes that there is need to settle whether restorative justice is a process or an outcome; whether it is based on sound criminal justice principles; whether it really reconciles relationships between victims and offenders; and whether restorative justice and retributive justice are conflicting justice practices. Restorative justice faces challenges in identifying how its objectives and processes can be integrated with the criminal justice system. Moreover, it remains financially dependent on the criminal justice system.[63]

The process of crafting a definitive definition of restorative justice and articulating it as a comprehensive criminal justice theory remains in flux. Restorative justice has been variously described as creative restitution and therapeutic justice, as well as being a component in equivalents like problem solving courts, drug courts, and healing and wellness processes. Outstanding issues include the safe accommodation of vulnerable victims in restorative justice processes, the adequate resourcing of community input into the restorative processes and measures and the maintenance of a consistent justice standard across time and space. The last involves challenges presented in maintenance of consistent standards in different provinces and territories, in urban, rural and remote locations and sustaining that consistency over time as justice personnel, governments, and budgets change.

John Braithwaite sought to address these questions by proposing what he characterised "restorative justice and responsive regulation" in his book of the same title.[64] He set out three categories: restorative justice, deterrence and incapacitation. Restorative justice processes would be directed to offenders whose offending behaviour caused harm but who would be responsive to restorative measures. This could be accomplished by addressing underlying causes of the

[61] Johannes Wheeldon, Finding common ground: restorative justice and its theoretical construction(s), Contemporary Justice Review, Vol. 12, No. 1, (2009) 94-96.
[62] Popa, Restorative justice: a critical analysis, 6-8.
[63] Popa, Restorative justice: a critical analysis, 9.
[64] John Braithwaite, *Restorative Justice & Responsive Regulation*, Oxford: Oxford University Press 2002.

criminal behaviour whether treating addictions and dealing with underlying traumas, followed by assisting with re-integration into the community and making amends to those harmed. Deterrence would be directed to those who would respond rationally to deterrence measures, such as the imposition of financial penalties or seizure of property such as loss of a vehicle for drinking and driving offences, business fraud, and the like. Incapacitation would be confinement or imprisonment for those persons who would not desist from dangerous criminal behaviour because of irrational or deviant makeup such as untreatable mental illness or sociopathic personality. Restorative justice would be the response for the majority of crimes, deterrent penalties for the middle group and incapacitation for the incorrigible.[65] The responsive regulation determination would be based on the causes underlying the offense and the responsiveness of the individual who committed the offence. This approach would constitute a complete and interrelated justice system to respond to crime in society. At this point, this proposal remains an idea to be considered.

Having conducted this review of restorative justice generally, it is now time to turn to the review of commentary on Indigenous restorative justice which, as I will show, is not quite the same as restorative justice.

Indigenous Restorative Justice

In a 1992 earlier IBA submission to the Law Reform Commission of Canada, the writers concluded the difference between the Aboriginal perspective and the non-Aboriginal perspective lay in the treatment of the wrong doer. [66] Both traditional and contemporary Aboriginal justice approaches gave priority to restoration of harmony by emphasizing helping the Indigenous wrong doer return to proper relationships with others rather than continue a harmful relationship.[67] The IBA's subsequent submission to the parliamentary committee during the second reading of Bill C-90 emphasized Indigenous participation in the justice process. It submitted that the fundamental purpose of justice in Aboriginal societies in dealing with crimes

[65] Braithwaite, Chapter 2, Responsive Regulation, *Restorative Justice & Responsive Regulation*: 29-43.

[66] Mandamin Leonard, Denis Callihoo, Albert Angus, and Marion Buller, The Criminal Code and Aboriginal People, University of British Columbia Law Review Special Edition, Morriss Printing Company, Victoria. 1992.
[67] Indigenous Bar Association. Aboriginal Considerations, 2.

was to restore peace in the community. In making this point, the IBA referenced the Manitoba Justice Inquiry's statement:

> The underlying philosophy in Aboriginal societies in dealing with crime was the resolution of disputes, the healing of wounds and a restoration of social harmony. It might result in an expression of regret for the injury done by the offender or by members of the offender's clan … Whatever the process, the matter was considered finished once the offence was recognized and dealt with by both the offender and the offended. Atonement and the restoration of harmony were the goals -- not punishment.[68]

Of interest is the language used. In 1993, the IBA wrote of '*Aboriginal justice'* and this term was repeated by in the 2000 summary report by Kent Roach at a conference[69] held in Saskatoon. He also referred to the 1994 Ministers of Justice Conference where the Ministers "recognized the '*holistic*' and '*healing*' approach of aboriginal justice as essential to reform"[70] and he further noted that Saskatchewan was "a province with a vibrant and growing use of *aboriginal justice*."[71] At the time, critical commentators such as Carol LaPrairie wrote of '*restorative*' and '*aboriginal forms of justice'*[72]. In *R. v Ipeelee*[73] the Supreme Court of Canada referenced the 1996 RCAP Report "*Bridging the Cultural Divide*" which identified, as a factor, "the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice."[74] There are few references to '*Indigenous restorative justice'* except in the title of an article by Cyndy Baskin and another recent article by Jeffery Hewitt. [75] I submit that, in general,

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[68] Manitoba, Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System & People, Volume 1, (Winnipeg, Queen's Printer, August 1991), 394.
[69] Changing Punishment at the Turn of the Century conference held in Saskatoon in 1999.
[70] Roach, Changing Punishment at the Turn of the Century, 253.
[71] Roach, Changing Punishment at the Turn of the Century, 252.
[72] Roach, Changing Punishment at the Turn of the Century, 273.
[73] Lebel J. in *R v. Ipeelee*, 2012 SCC 13 [57].
[74] RCAP, *Bridging the Cultural Divide,* 309.
[75] Cyndy Baskin, Holistic Healing and Accountability: Indigenous Restorative Justice, *Child Care in Practice*, Vol 8 No. 2, 2002 p. 133 but the author only refers to a "culture-based approach to restorative justice" which suggests the title is an editorial gloss; also see Jeffery G. Hewitt, Indigenous Restorative Justice: Approaches, Meaning & Possibility, *University of New Brunswick Law Journal* Vol. LXXVII, (2016).

these writers and commentators were referring to Aboriginal justice, which is now is morphing into 'Indigenous justice.'[76] The term is used to refer the original and continuing concepts of justice held by Indigenous peoples in Canada.

I would adopt a more limited meaning to the term 'Indigenous restorative justice', giving it a specific meaning that describes the approaches adopted by Indigenous communities in responding to needs arising because of wrong doer Indigenous individuals being caught up in the mandatory processes of the criminal justice system. This is also applicable for those caught up in other compulsory systems such as child protection, mental health reviews, and the like. In the main, Indigenous restorative justice are measures utilized by Indigenous communities where their members are charged with offences and are enmeshed in the criminal justice process. These measures are the Indigenous communities' attempts to restore those individuals to the proper way of behaving and mitigating the harm caused by their criminal actions rather than leave them to the criminal justice system and its failings. The communities are drawing on their Indigenous justice roots to 'restore' the offending individual and those harmed by that person's actions, whether victim or community, to a harmonious and peaceful relationship amongst each other, that is, a harmonious way of living together.

Returning to the discussion in academic research, restorative justice writers acknowledge that Indigenous traditional justice shares many of the objectives of restorative justice.[77] David Milward draws on the RCAP observation that the contemporary expression of Aboriginal concepts and processes of justice are likely to be more effective than the existing criminal justice system.[78] Megan Berlin considered restorative justice for Aboriginal offenders as a process for developing an expectation-led reform. However, Val Napoleon argued that comparing restorative justice to Aboriginal ameliorative approaches to dealing with the over-representation of Aboriginal offenders in the criminal justice system delegitimizes Indigenous legal traditions and law.[79] This criticism by Napoleon highlights two points. The first being that Indigenous justice is

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[76] The term 'Aboriginal' gained widespread use after the inclusion of s. 35(2) in the *Constitution Act* 1982, Schedule B to the Canada Act 1982 (UK) 1982, c.11 which reads: "In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada." The term Indigenous is now gaining wide usage on being promoted by the Indigenous Bar Association and its usage in international forums.

[77] Megan Stephens, Lessons From the Front Lines, 2007 24; Zachary T. Courtemanche, The Restorative Justice Act: An Enhancement to Justice In Manitoba? *Manitoba Law Journal,* Volume 38 Number 2. 2014, 3.

[78] Milward, Making the Circle Stronger, 2008.

[79] Megan Berlin, Restorative Justice Practices for Aboriginal Offenders: Developing an Expectation-Led Definition for Reform, *Appeal* vol. 21-3, (2016), 4.

based on Indigenous governance which draws on pre-colonial Indigenous legal traditions and law. The second being that Indigenous restorative justice is an ameliorative response by Indigenous communities to the justice crises impacting their communities. Although the two are different, implicit in both is that they rest on a fundamentally different social and cultural worldview than that of the Euro-Canadian worldview on justice and the processes used to achieve justice.

Jane McMillan confirms this point when she says the keys to Mi'Kmaw justice is recognition of Mi'Kmaw treaty rights and development of Mi'Kmaw self government. She is referring to the 1700's treaty covenant chain between the Mi'Kmaw Nations and the British. The covenant treaties do not explicitly reference to the Mi'Kmaw maintaining their own justice system but imply such. The later 1800's numbered western Indian treaties would all contain an express justice clause about the First Nations maintaining peace and good order amongst themselves and with others.[80] McMillan goes on to explain Mi'Kmaw community justice processes rest on traditional kinship and communal obligations that rely on ancestral concepts such as 'apiksituaguan' (process of forgiving) and 'netukulimk' (responsibility for provisioning and sharing).[81]

Jeffery Hewitt wrote about Bidaaban, a community healing program based on restorative justice rooted in Anishinaabe legal principles.[82] Bidaaban was established on the Rama First Nation for offenders in the Rama community. It commenced in 1993, operated effectively in reducing the offenders' recidivism to less than five percent. However, the government ceased funding Bidaaban in favour of measures that that emphasized numbers of participants over lower recidivism rates. This government emphasis on statistics has the effect of shifting attention from the Indigenous principles governing the restorative process to requirements for securing program funding.

Don Clairmont, writing on the Elsipogtog Healing and Wellness Court, also observed a growing consensus of academic literature recognizes Indigenous self-governance in justice matters is based on pre-colonial exercise of governance rather than cultural differences or

[80] For example, see Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Appendix The Treaties at Fort Carlton and Pitt. Number Six. 355.
[81] L. Jane McMillan, Living Legal Traditions: Mi'Kmaw Justice in Nova Scotia, University of New Brunswick Law Journal Vol 67: 189-190.
[82] Jeffery G Hewitt, Indigenous Restorative Justice: Approaches, Meaning & Possibility, University of New Brunswick Law Journal Vol. LXXVII, (2016).

overrepresentation in prisons.[83] Clairmont goes on to reinforce Napoleon's second point when he explains the Elsipogtog First Nation has had to deal with serious social and crime disorder by taking ameliorative Indigenous restorative justice actions. This is the very point the Indigenous Bar Association was making, that Indigenous communities had to be involved, in their submission to the Parliamentary Committee considering the proposed amendments to the Criminal Code, in particular s. 718.2(e) in 1993.

Section 718.2 (e) of the Criminal Code

The sentencing amendments to the *Criminal Code*, particularly s. 718.2 (e), led to a shift in sentencing of Aboriginal offenders. This specific provision reads:

> 718.2 a court that imposes a sentence shall also take into consideration the following principles:
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders. [emphasis added]

This provision was considered by the Supreme Court of Canada in *R. v Gladue*.[84] The Supreme Court held that the effect of the provision was to alter the analysis sentencing judges are to use in the sentencing of Aboriginal offenders. The sentencing judge must consider the background factors which play a part in bringing a particular Aboriginal offender before the court and the sanctions which may be appropriate circumstances for this offender because of his or her Aboriginal heritage. Judges may take note of the broad systemic factors affecting Aboriginal people and the priority Aboriginal cultures give to restorative approaches. Case specific information may be provided by counsel or in a presentence report. The Supreme Court held that s. 718.2 (e) applies to all Aboriginal offenders whether on-reserve or off-reserve and whether in rural or urban settings. It is an error for a judge to fail to consider these factors. The

[83] Don Clairmont, The Development of an Aboriginal Criminal Justice System: The Case of Elsipogtog, *UNB Law Journal* Vol 64, (2013) 167.
[84] *R. v Gladue* [1999] 1 SCR 688.

Supreme Court emphasized that s. 718.2 (e) was drafted in response to the over-incarceration of Aboriginal persons in prisons and the provision was remedial in nature, a measure of restorative justice by requiring "a sensitivity to aboriginal community justice initiatives."[85]

Over a decade later, the Supreme Court again revisited the issue in *R. v Ipeelee*[86] and re-emphasized the remedial nature of 718.2 (e), stressing that the provision imposed a statutory duty on sentencing judges to consider the unique circumstances of Aboriginal offenders. Failure to apply these Gladue principles would run afoul of the statutory duty and would constitute an error justifying appellate intervention.

The Supreme Court stated that a 'Gladue Report' was an indispensable sentencing tool required at the sentencing hearing of an Aboriginal offender. Presentence reports were generally not structured to provide the systemic or individualized Indigenous background factors that were required by *R. v Gladue*, which led to the emergence of Gladue reports. These reports are intended to help the judge tailor an individualized sentence for the Indigenous offender. Such reports provide more information on the systemic and background factors that bring the offender before the court. They address both the broad factors of Aboriginal marginalization as well as the offender's specific individual, family and community background. Such reports are often written by Indigenous or trained court workers and may include extensive information gathered from interviews with the offender, his or her family, community members and Elders about what may be troubling the offender, how to approach the problem and what the options may be available.[87] Carmela Murdocca quoted one Judge's assessment of the utility of a Gladue report:

> … Such reports are very useful in telling a judge about the particular nature of the offender's Aboriginal ancestry and how being an Aboriginal person has affected his or her life circumstance. The report talks about how the offender has been influenced by his or her Aboriginal ancestry, whether specifically in his or her life, systemic factors, or historical reasons. In other words, there are many ways Aboriginal ancestry can affect an offender's life and can be telling as to why he or she committed the crime. … There are many ways that sharing an

[85] *Gladue* at para 18.
[86] *R. v Ipeelee* 2012 SCC 13.
[87] Alexandria Hebert, Change in Paradigm or Change in Paradox? Gladue Report Practices and Access to Justice, *Queen's LJ*. 149, (2017) 157-158.

> Aboriginal heritage can be relevant for sentencing. … It is a judge's role in a Gladue court to shed light on these ways.[88]

However, after a review of Gladue sentencing cases across the country, Alexandra Hebert found inconsistent application from one province to the next and concluded that the availability of consistent and uniform standard of Gladue reports was an access to justice issue for Aboriginal offenders.[89]

A more in-depth assessment of the criminal courts' application of the Supreme Court's directions in *Gladue* and *Ipeelee* was conducted by Denis-Boileau and Sylvetre originally published in French in 2017 and subsequently translated into English.[90] The authors took a critical look at the adherence by Canadian criminal courts to s. 718.2 (e) and the Supreme Court directions in *Gladue* and *Ipeelee*. Justice LeBel had identified a number of errors in the post-*Gladue* period. These were the requiring of offenders to establish a causal link between the Indigenous background factors and the offence committed; the irregular application of Gladue principles in sentencing of violent offenders; and giving sentencing parity, i.e., similar sentences for similar offences, priority over consideration of s. 718.2 (e) background Indigenous circumstances. With respect to the last error, over half of the 635 trial and appellate decisions reviewed since *Ipeelee* was decided, made no connection to the fact that the offender was an Indigenous person when considering the principle of proportionality.[91] The type of penalty imposed does not appear to have changed since *Ipeelee* with incarceration imposed in 87.7 % of the reviewed cases and only approximately 10% attracting non-custodial sentences leading the authors to observe incarceration appears to be the sentencing predilection where the offender is Indigenous.[92]

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[88] Carmela Murdocca, Ethics of Accountability and the Limits of Restorative Justice, CJWL/RFD Vol 30, (2018) 534 citing Nakatsura in *R. v Armitage* 2015 ONCJ 64 [2].
[89] Hebert, Change in Paradigm or Change in Paradox? 171-172.
[90] Marie-Andree Denis-Boileau and Marie-Eve Sylvestre, Ipeelee and The Duty To Resist. *Canadian Criminal Law Review* 21 CCLR 73, (2017) 548-611.
[91] Jonathan Ross, Eyes Wide Shut: The Alberta Court of Appeal's Decision in R. v. Arcand and Aboriginal Offenders, *Alberta Law Review*, 48:4, (2011): 987-1008.
[92] Denis-Boileau and Sylvestre, Ipeelee and The Duty To Resist, 578.

Denis-Boileau and Sylvestre conclude that the vast majority of judges are resisting the Ipeelee principles.[93] The authors emphasize that the Truth and Reconciliation Commission recommended the following:

> In keeping with United Nations Declaration on the Rights of Indigenous Peoples, we call upon the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law Institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.[94]

Denis-Boileau and Sylvestre also recommend that Gladue reports not only cover the negative impact of background and systematic factors but also document the restorative justice processes of the Indigenous community.

Court Related Restorative Justice Cases

The first reported decision on circle sentencing was the 1992 decision in *R v Moses.*[95] Phillip Moses, a 26 year old member of the Na-cho Ny'ak Dun First Nation of Mayo, Yukon, was found guilty of carrying a weapon, theft, and breach of probation. He grew up in poverty with a difficult childhood. He had a problem with alcohol abuse and a horrendous criminal record of 43 prior offences. Phillip had significant dysfunctional coping skills, limited education and no work skills. His future prospects were non-existent. A 1989 psychiatric assessment concluded:

> His life has so far involved a vicious circle of criminal behavior, alcohol abuse, and deteriorating self-esteem and general psychological health which will likely

[93] Denis-Boileau and Sylvestre, Ipeelee and The Duty To Resist, 607.
[94] Truth and Reconciliation Commission of Canada, Call to Action: 50, Summary of the Final Report of the Truth and Reconciliation Commission of Canada, (2015) 207.
[95] *R. v Moses* 71 C.C.C. (3rd) 347.

lead to a worsening and, perhaps tragic outcome if major interventions are not employed.[i]

Yukon Territorial Court Judge Stuart wrote that for ten years Phillip travelled from alcohol abuse to crime and then to jail. Each time he returned angrier, more deeply entrenched in a marginal existence. He returned to Mayo more dangerous to his community and himself. Judge Stuart wrote that the criminal justice system had failed both the community and Phillip Moses. Judge Stuart observed this was hardly the model case to experiment with community alternatives. However, Judge Stuart asked, "What could be lost in trying?"

The sentencing hearing was adjourned for three weeks. The probation office was sent to Mayo to inquire if Phillip's family could become involved. The local RCMP was asked about enlisting other community involvement. Crown and defence counsel were asked to consider what might be done to break the vicious cycle Phillip was enmeshed in. The probation officer met with the Chief and other members of the community who agreed to assist in searching for a solution. Crown counsel visited May two days before the hearing to learn more about the community. When it came time for the sentencing hearing, the court configuration was changed. It remained an open court but with two concentric circles set up. Those who would participate sat in the inner circle which accommodated approximately thirty people. The judge sat in the circle. Phillip, his family and counsel sat on one side and the Crown prosecutors on the other side. The hearing began with introductions all around the circle and then 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. Even Phillip spoke in the circle discussion. At the end, Judge Stuart imposed a suspended sentence with two years probation which required Phillip live with a family member on the trapline, attend a two-month residential substance abuse counselling program, and take upgrading and employment skill training. From time to time a court review, again using the circle process, would be conducted to monitor Phillip's progress.

In his judgment, Judge Stuart concluded that the process would not be easy for Phillip, and it may not succeed but nonetheless, the criminal justice system must find a way to change. It could do by engaging communities, First Nations, professionals and lay people willing to work together to explore "truly new ways".

Sentencing circles began to be held more and more often, notably in Saskatchewan. Two decisions expressly addressed the question of when a sentencing circle should be held. In 1993, Saskatchewan Queen's Bench Justice Grotsky was asked to hold a sentencing circle for a Metis offender in Saskatoon. He denied the application because of the severity of the offense but set down what he considered suitable criteria for holding a sentencing circle. The offender, he wrote, must be:

a. a fit and proper candidate therefor, including, in the particular circumstances, eligible for either a suspended sentence; or an intermittent sentence; or a short term of imprisonment, coupled in either case with an appropriate term of probation on terms realistically adequate for the particular purpose;

b. genuinely contrite with respect to the offence of which he stands convicted and faces sentencing;

c. supported in the request for the establishment of a sentencing circle by the offender's own community willing to participate in the sentencing circle process and to make meaningful sentencing recommendations. As well, to assume responsibility for the supervision and enforcement of the terms of the probation order including the reporting of any breach of the terms thereof. In this context the term "community" ought to receive a wide and liberal construction as the term "community" may be, and probably is, a term capable of different interpretations depending on the residence, or proposed residence, of the particular offender and/or any other factor relevant to that term's interpretation;

d. a person honestly interested in turning his or her life around with the assistance and supervision of his or her community.[96]

[96] *R. v Cheekinew* (1993) 108 Sask. R. 114 (QB).

It is to be noted that Justice Grotsky's criteria b & d suggests it is the prosecutor or the judge who is making the assessment. This is problematic. Chief Justice Lilles, in his discussion of exercise of discretion, cautioned:

> While discretion is an essential part of the administration of justice, it is often associated with disparity in treatment of individuals. Nowhere is discretion more evident than in the sentencing process. In every instance where discretion exists, the intrusion of bias is probable. A composite of age, religion, social class, parental influences, personal experiences and environmental pressure will affect the exercise of discretion and thus the making of decisions. So too will the information, which is available, but in the criminal justice system it is often collected or presented by others whose sense of priorities and relevance is determined by their personal backgrounds, experiences and bias. Moreover, the objective information that is available may be misinterpreted where the cultural values of decision maker differ from those of the person about whom the decision is being made.[97]

Justice Grotsky's criteria invites bias to intrude into the criminal justice process arising from the cultural difficulty of a non-Indigenous judge reading an Indigenous offender's demeanour and contrition on sentencing.

In the 1996 case, *R. v Joseyounen,*[98] Saskatchewan Provincial Court Judge Fafard heard an application to hold a sentencing circle. Judge Fafard was very experienced with the sentencing circle process having held, by his estimate, 60 sentencing circles. In deciding the application, he set down criteria upon which such applications would be considered. The criteria were:

> (1) The accused must agree to be referred to the sentencing circle.

[97] Lilles, Chief Judge, Some Problems in the Administration of Justice in Remote and Isolated Communities, 14.
[98] *R. v Joseyounen* [1996] 1 C.N.L.R. 182.

(2) The accused must have deep roots in the community in which the circle is held and from which the participants are drawn.

(3) That there are elders or respected non-political community leaders willing to participate.

(4) The victim is willing to participate and has been subjected to no coercion or pressure in so agreeing.

(5) The court should try to determine beforehand, as best it can, if the victim is subject to battered spouse syndrome. If she is, then she should have counseling made available to her and be accompanied by a support team in the circle.

(6) Disputed facts have been resolved in advance.

(7) The case is one in which a court would be willing to take a calculated risk and depart from the usual range of sentencing.

Judge Fafard decided against holding a sentencing circle because of the severity of the offense, an aggravated assault by one brother on another leaving the victim with permanent and debilitating brain damage. The offense would attract a sentence more than two years which could not be coupled with probationary conditions. However, because the family and community did see value in holding the session, he indicated it could be held as a healing circle.[99]

These early sentencing circle decisions were held prior to the enactment of section 718.2 (e) and the guidance of the Supreme Court of Canada in *R. v Gladue* and *R. v. Ipeelee*. They explore the mechanisms of engaging the Indigenous community in the process but are essentially

[99] An Indigenous restorative justice sentencing circle would involve the offender acknowledging the harmful actions, making amends, committing to undertaking measures settled on by the circle to address the harmful behaviour. The circle would recommend these measures to the sentencing judge to be incorporated into the sentence as probationary conditions. Here probation would not arise since the judge decided the sentence had to be more than two years. Presumably, the judge was considering a healing circle that would involve the offender's acknowledgement and acceptance of responsibility of the harm caused and sharing of the family's grief as part of a healing process.

centered on the judge's approval. Without the support of the judge for the sentencing circle process, it was not likely to occur.

In Saskatchewan, the number of sentencing circles has declined considerably in recent years. This has been attributed to relocation of criminal justice personnel, community fatigue and lack of substantive resourcing. However, I would suggest a more fundamental reason is because these restorative justice measures do not originate from the Indigenous community. To address this question, I will turn in the next chapter to Indigenous restorative justice initiatives that did originate with the Indigenous community.

Chapter Three

Indigenous Restorative Justice Initiatives

The findings of RCAP and Supreme Court of Canada pronouncements in *Gladue* and *Ipeelee* do not offer much in the way of guidance in identifying and implementing Indigenous restorative justice. To accomplish these tasks, it becomes necessary to ground the exercise in real world experience of Indigenous communities implementing Indigenous restorative justice. I submit that identification of Indigenous restorative justice initiatives requires answering the following questions:

1. Is the exercise devised and delivered by the Indigenous community?
2. Is the exercise based on the culture and experience of the Indigenous community?
3. Does the exercise engage with individualized social disorder and the Canadian criminal justice system?
4. Does the exercise address the issues of social disorder in Indigenous communities and over-incarceration of Indigenous offenders?

If the answers to above questions are in the affirmative, then I would submit the exercise to be that of Indigenous restorative justice.

In this chapter, I review three Indigenous restorative justice initiatives I was involved with: the Bigstone Restorative Justice Committee, the Tsuu T'ina Peacemaking Court, and the Siksika Aissimohki Traditional Mediation. I have chosen these initiatives because I have some knowledge of their origins acquired during my law practice and sittings as a provincial court judge.

As stated earlier, during the 1980's and early 1990's, a series of Indigenous justice inquiries and reviews were held both in both provincial and federal jurisdictions, largely triggered by the wrongful imprisonment of Donald Marshall Jr. in Nova Scotia which led to the Royal Commission on the Donald Marshall, Jr. Prosecution[100] and the shooting death of John Joseph Harper by Winnipeg police officers in 1988 which led to the Aboriginal Justice Inquiry of

[100] Royal Commission on the Wrongful Imprisonment of Donald Marshall, Jr. Prosecution, *Commissioners' Report: Findings and Recommendations, Volume I,* (Province of Nova Scotia, 1989).

Manitoba.[101] In Alberta a justice inquiry was initiated by a 1990 government Order in Council which established the Task Force chaired by Justice Robert Allan Cawsey and led to the report, *Justice on Trial.*[102] It was during this period that those involved in the criminal justice system, judges, prosecutors, lawyers and, significantly, First Nations community justice committees, began to take advantage of the discretionary powers of prosecutors and judges to innovate in criminal procedure. Out of this period emerged the beginnings of Indigenous restorative justice.

I have chosen to begin each account with a story: the first showing how the Indigenous restorative justice process benefited the offender, the second showing how the process benefited members of the community and the third showing how traditional teachings are in accord with the contemporary Indigenous justice approach.

Bigstone Restorative Justice Committee[103]

> *An older man had accidentally shot his brother while hunting and, as a result, faced charges in court. The Native youth justice committee Elders were approached for their assistance. Even though the man was in his fifties, the Elders, who were in their 70's and 80's, regarded him as young. Moreover, they knew his history and his problems with alcohol abuse. They agreed to take on the matter. Not only did he have a problem with alcohol, but he was also diabetic. One consequence of diabetes is deteriorating eyesight, which likely contributed to the accident. The Elders focussed on his lifestyle issues with alcohol. Under their guidance he took steps to change his ways and the matter was resolved to everyone's satisfaction, including the brother who had been injured in the hunting accident. The brother who had been injured later told me of an important benefit*

[101] Aboriginal Justice Inquiry of Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People, Vol. I and The Deaths of Helen Betty Osbourne and John Joseph Harper, Vol. II,* (Winnipeg: Queen's Printer, 1991).
[102] Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, *Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta: Justice on Trial, Vol. I,* (Alberta: Queens Printer. 1991).
[103] Much of the information in this section is drawn from my personal discussions and participation in Indigenous matters over the years. Some of the information concerning Bigstone was included in Leonard Mandamin, Advancing Indigenous Restorative Justice, Unpublished, (2020).

resulting from the Elders' intervention - his older brother quit abusing alcohol altogether.[104]

The Bigstone Cree Nation is a First Nation with over eight thousand members with seven reserves in north-central Alberta, five of which are in the Wabasca-Demarais area. Some thirty-five hundred live on reserve.[105] Their restorative justice initiative developed in an organic manner, rather than by intentional design.

The Bigstone Restorative Justice Program's origins go back to the early 1980's. The Indigenous people in the northern 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 youth detention centre in the south. With the co-operation of the Youth Court Judge, they formed a Native youth justice committee.[106] Young people who either pled guilty to or were found guilty of offences were referred to the Committee. The Committee met with the youth and his or her parent or guardian and then made recommendations to the Judge on what they considered an appropriate disposition. The same judge also sat in Demarais, Alberta where the Bigstone Cree Nation has several reserves. He suggested Bigstone consider a similar approach. A Bigstone delegation, including Elders, visited Fort Chipewyan to observe the process and speak to the Fort Chipewyan Native youth justice committee members.

The Bigstone justice group decided to establish a Native youth justice committee but with a difference. The Fort Chipewyan committee consisted of community members drawn from the two First Nations and the Metis community with an Elder to provide guidance. In Bigstone, the Elders decided that the committee should be all Elders. They would meet with the youth and his or her parent or guardian. They would ask what was going on in the youth's life. They would offer advice, often drawn from their own experience and come to an agreement with the youth about what should be done. The Elder who chaired the Native Youth Justice Committee took their recommendations to Youth Court. She continued in that role for many years, assisted by a Bigstone justice worker. The Native youth

[104] It was the injured brother who engaged me to represent his older brother in court.
[105] Bigstone Cree Nation *https://www.bigstone.ca/* and also *https://fnp-ppn.aadnc-aandc.gc.ca/fnp/Main/Search/FNMain.aspx?BAND_NUMBER=458*
[106] The *Young Offenders Act* had contained a provision which provided that a local justice committee could advise the youth court judge on youth matters. *Young Offenders Act* c. Y-1 R.S.C. 1985 s. 69.

justice initiative was taken up by other First Nations and Native communities, then spread to non-Native communities in Alberta.[107]

As illustrated by the opening story, the Bigstone Native Youth Court Justice Committee did not confine their involvement to youth. From the Elders' perspective, adults, in their 20's and older, were still young people in their eyes. During the 1990s. I had a general practice and was involved in a number of matters with the Bigstone Cree Nation. My law practice included criminal cases. It was in that role that I represented a young Bigstone man in his twenties who had been involved in a domestic dispute and was subsequently charged with assaulting a peace officer. He was potentially facing a period of incarceration for his offenses. The Bigstone Elders agreed to take on the matter because he was a young man and in need of their guidance. Because of their involvement, the young man was able to address his alcohol and family issues. The Court result was a favourable non-custodial outcome. After Court, I asked about his session with the Elders. He said it was a good experience, but he was also adamant he did not want to go through the experience another time. For him, being before his Elders was a daunting experience not to be repeated.

The Bigstone Native Youth Justice Committee no longer exists. The Elders who led the Committee have since passed on. However, their example and teachings have lived on, with their restorative justice initiative evolving into the Bigstone Restorative Justice Program. The program continues to be involved in assisting Bigstone members who face charges in court, preparing Gladue and other reports, counselling individuals on rehabilitative options, and making recommendations to the Court on appropriate sentencing dispositions. They also become involved in post sentencing reviews and counselling of individuals.

The Bigstone Justice Coordinator has said his thinking is influenced by the years spent working with the Bigstone Elders. This group had been led by four women Elders, especially the Elder who assumed the role of chairperson of the Native Youth Justice Committee. The Elders explained that if you harmed someone, your parent would take you to that person to apologize. In other words, you had to be accountable for your actions. Moreover, the Elders would address the problems behind the problem. Their teachings of traditional ways involved helping the person to travel on a new path. The current

[107] Today there are some eighty youth justice committees operating in Alberta.

Bigstone Restorative Justice Committee continues with these traditions, addressing the problems behind the problem and assisting individuals to walk a new path.[108]

The Bigstone Justice Coordinator observed that ninety-five percent of Bigstone members appearing in court charged with committing offences are there because of substance addiction, primarily alcohol but more increasingly illicit drugs. For that reason, the Committee has increasingly focussed on advancing their Indigenous restorative justice process towards establishing a Healing to Wellness Court in order to better address substance addiction issues. The Bigstone proposal involves establishing a healing plan with periodic court reporting for individuals charged with offences to confirm they are keeping to the plan. A central component of this initiative is to establish the Healing to Wellness court on a facility on the Bigstone Cree Nation reserves. The Committee has identified a suitable facility in reserve and is in the process of securing dedication of the facility for a Healing and Wellness Court by the Bigstone Chief and Council and by the Alberta Provincial Court.

Tsuu T'ina Peacemaking Court

> *A woman attempted to steal some pills and was charged with shoplifting. She was referred to peacemaking. She had low self esteem and was very depressed. When asked in the peacemaking circle what skills she had, she answered that she had no skills, she had nothing. The pills were to help her cope with her depression. She had been relying on pills for a long time and she was addicted to them. Her life was going nowhere. She had not finished high school. In the peacemaking circle, the participants asked her if she could cook and keep house. She said yes. They asked if she could make camp. She said yes. They asked if she could make traditional garments. She said yes. Through their questions she came to realize she did have skills. They asked what her dreams were. She said she had wanted to go to college. The circle decided she must take counselling for her drug dependency, complete high school, and then she was to go to college. She took counselling for her addiction to pills. She finished her high school equivalency and registered in Mount Royal College. Some time later she came to the*

[108] Conversations with the Coordinator of the Bigstone Justice Restorative Justice Program. Given these conversations were in a private setting, his consent was sought and confirmed orally both at the time and after providing him with an opportunity to view what was written.

Peacemaker Coordinator and explained she was withdrawing from college. She had two teenage daughters that needed her help and attention. She was going to concentrate on helping them and then she would return to college.

The Tsuu T'ina Nation is a Dene First Nation in southern Alberta. It has one reserve with a total population of some twenty-four hundred members of which two thousand are on reserve.[109] The Tsuu T'ina retained many aspects of the Dene boreal culture but also adopted features of Blackfoot plains culture with whom they were closely allied. The Tsuu T'ina developed their restorative justice initiative in a very deliberative manner.

The impetus for the peacemaking court began with an Elders direction to the Tsuu T'ina Chief and Council. An Alberta court decision had held that provincial motor vehicle laws did not apply to roads on the reserve.[110] The Elders became concerned with reckless driving on reserve and presented a petition to Council about curbing that dangerous behaviour. Given the respect held by the Tsuu T'ina for their Elders, the Council began by developing comprehensive traffic legislation. Realizing their traffic bylaw would be ineffectual if not enforced, the Council considered establishing a traffic court on their reserve. Community consultations broadened this plan as members advocated going beyond traffic matters and addressing criminal offenses arising in their community, while others sought the use of a culturally relevant approach to address the range of problems affecting their community.[111]

In 1996, the Council visited the Navaho and Apache courts in the United States to observe the operation of American Indian Tribal Courts. The planners also reviewed a peacemaking process developed by the Piikani. The Piikani approach was developed by the Piikani Cultural Director, and a Piikani RCMP police officer. The Cultural Director described the traditional Blackfoot approach to resolving issues as utilizing a circle process guided by Blackfoot laws as contained in the medicine bundle. The circle process originated within the teepee setting. Different participants occupied specific locations in the circle according to their role in the process. The contemporary Piikani peacemaking process was one where they kept the circle process but utilized Canadian laws in place of the medicine bundle Blackfoot laws. The

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[109] Siksika Nation *http://siksikanation.com/wp/about/* and also *https://fnp-ppn.aadnc-aandc.gc.ca/fnp/Main/Search/FNMain.aspx?BAND_NUMBER=430.*
[110] *R. v Crowchild* 1987 ABCA 41 (Alberta Court of Appeal).
[111] Marian E. Bryant, Tsuu T'ina First Nations: Peacemaker Justice System, *Law Now*, February (2002).

genius in this insight was the realization that the setting and process utilized had a significant impact on the resolution of conflict issues. [112] The Tsuu T'ina eventually entered into an agreement by which the Piikani would share with the Tsuu T'ina their process for peacemaking.[113]

The Tsuu T'ina decided they would utilize the provincial court system but with modifications. Their proposal envisioned the Office of a Peacemaker working with the Court to:

> "...resolve problems, investigate and discover root causes of the behaviour which has translated into criminal activity or disharmony in the communities or among families."[114]

The Peacemaker Coordinator's role would be to decide if the matters were to be accepted into peacemaking, to appoint peacemakers to resolve disputes, and to make recommendations based on the outcome of peacemaking to the Crown prosecutor or the Court on dispositions. The peacemakers would be people highly regarded in the community. They were individuals whom Tsuu T'ina membership considered would be fair to both sides of any issue. The approach would draw upon traditional Tsuu T'ina notions of justice. The role of the peacemaker was to:

> "...actively promote and teach traditional values as well as determine why an individual is out of harmony with the community and to restore harmony."[115]

The peacemaking system would be aimed at restoring healthy relationships helping those who have breached trust find their way back and giving those harmed a substantial role in the process.[116] The Tsuu T'ina proposal consisted of three fundamental concepts:

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[112] Both the Navaho and the Apache are Dene peoples as are the Tsuu T'ina. Historically, the Tsuu T'ina had allied with the Blackfoot (Kainai, Siksika and Piikani).
[113] As recounted at a Piikani gathering attended by the writer.
[114] Report of the Review Team established to Study the Tsuu T'ina Nation proposal for a First Nation Court, (September 1998).
[115] Report of the Review Team, (1998).
[116] Report of the Review Team, (1998).

> "...the appointment of a First Nations' judge to preside over a reworked court established on First Nations' lands, establishment of a Peacemaker's component integrated with the court and management of the administration of the court itself. While the courtroom and approaches to handling cases would be refitted to meet the needs of First Nations, the peacemaking component, emphasizing healing and community values, is what will set this court apart."[117]

The Tsuu T'ina had asked the Elders what offences could be dealt with by peacemaking. After deliberating, the Elders advised that any offence could be considered for peacemaking except for homicide and sexual assault. The Tsuu T'ina also decided that they would only proceed with peacemaking if the victim of the offence agreed to participate.[118] The objective was to end conflict in their community which could not be achieved if victims did not have an integral role in the process.

The Court would be on First Nations land and the Office of the Peacemaker would be administered by First Nations people. Its activities would be handled in a culturally sensitive way. There would be non-legalistic language, interpreters, and qualified First Nations members who would serve as court clerks, interpreters, and court workers who would perform all necessary functions. The prosecutor's office would place emphasis on healing and restorative justice, balancing traditional and contemporary approaches in its exercise of discretion over which cases were suitable for peacemaking and which for prosecution in court.[119]

Other features of the Tsuu T'ina proposal included: a circle configuration for the courtroom with the offender facing the community and the judge only slightly elevated[120] to be able to take a full view; inclusion of symbols and representations of culture; traditional ceremonies as determined by the Elders and the Court; inclusion of a case reporting system; and guidelines ensuring the primary focus to be healing and restorative justice.[121]

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[117] Report of the Review Team, (1998) 15.
[118] L. S. Tony Mandamin in consultation with Ellery Starlight and Monica Onespot, Peacemaking and the Tsuu T'ina Court, *Justice as Healing*, Vol. 8, No. 1, Native Law Centre Saskatoon, (2003).
[119] Report of the Review Team, (1998) 19.
[120] This arrangement was discarded in favour of a circle setting with all seated on the same level.
[121] Report of the Review Team, (1998) 19.

In September 1997, the Alberta Justice Minister appointed a Review Team chaired by a Calgary Member of the Legislative Assembly to consider the Tsuu T'ina proposal.[122] The Review Team included Tsuu T'ina representatives, and provincial and federal justice officials. The Review Team concluded its review in 1998. It recommended the court be established on reserve, with a qualified First Nation judge, crown prosecutor, court clerks and a peacemaker co-ordinator. It also recommended the provincial government fund the court operations and the federal government fund the operation of the Office of the Peacemaker.[123] The following year, 1999, the Tsuu T'ina Nation, the Province of Alberta, and Justice Canada signed an agreement to proceed with the First Nation Court and Peacemaking Office.

Upon my appointment as an Alberta Provincial Court judge in September 1999, I was assigned to assist the Tsuu T'ina establish the Peacemaking Court. I chaired a planning committee which made decisions about court procedures, prisoner appearances, and court infrastructure and set the date of October 6, 2000, for the Court's first sitting.

The Tsuu T'ina Court began as a provincial court with an Indigenous Judge, Crown prosecutor, legal aid defence counsel and court clerks. It has full provincial court jurisdiction for criminal, youth, child protection, family, and civil matters as well as federal and provincial statutes and First Nations by-laws. The Tsuu T'ina Court commenced sittings on the reserve October 6, 2000. The Court initially sat twice a month in the Council chambers. Additional sittings were held from time to time for preliminaries and trials or make-up dates. The Court currently deals with criminal and youth matters as well as federal and provincial statutes and Tsuu T'ina Nation bylaws.

The Office of the Peacemaker directed the peacemaking process using traditional methods of healing and dispute resolution involving offenders, victims, family, and community members with the aim of resolving conflicts, dealing with the underlying causes of offender behaviour, and promoting a more peaceful community.

The Tsuu T'ina operated the peacemaking program as an integral part of the justice process at Tsuu T'ina.[124] The Tsuu T'ina decided that charges be laid when an offence is alleged, rather than the matter being diverted directly to peacemaking. In Court, a person charged has the

[122] Report of the Review Team, (1998) 2.
[123] Report of the Review Team, (1998) 42 – 47.
[124] Leonard Mandamin, *Tsuu T'ina Court and Peacemaking Evaluation Report Summary,* Unpublished, (2005).

option to ask for peacemaking. The person is not compelled to do so. If a case is accepted into peacemaking, the court proceeding is adjourned while peacemaking is underway. The Peacemaker Coordinator assigns the matter to a community peacemaker who is seen as being fair to both sides. The peacemaker then takes charge of the process. The Tsuu T'ina chose their peacemakers from the community by initially asking the members of every household on the Reserve who they trusted to be fair in peacemaking. By this process they identified people who could be peacemakers for the community. They provided them with training of their own devising. The Tsuu T'ina course reflected the Piikani concept of peacemaking, Tsuu T'ina values, mediation and dispute resolution practices. They also provided backgrounding on addictions, child welfare, and family issues. The peacemaker gathered together the person charged with the offence, the victim and family members of the offender or victim as they choose. There is always an Elder to see that the peacemaking is conducted properly. In addition, there may be resource people. For instance, if the offence involves alcohol or drugs, then there may be an addiction counsellor from the Spirit Healing Lodge.

A peacemaking circle may have anywhere from five to twenty-five people participating. Each peacemaking circle generates its own dynamics. Deception and evasion are discouraged because people are present who either know the event that happened or know the speaker. When one speaks, he or she has the attention of all those in the circle. A victim is supported and in a safe environment. The wrong doer is offered help. The peacemaker guides the process but does not take the direction away from the participants. The Elder's presence and input, derived from lifelong experience and knowledge of Tsuu T'ina traditions, adds depth to the peacemaking circle's understanding. The peacemaking circles are directed at resolving the conflict, healing the wrong doer, the person harmed, and restoring relationships. It may begin with a traditional ceremony using sage or sweetgrass, or a Christian prayer, or just a simple statement that the circle is about to deal with an important matter. When a circle is held, each person speaks, uninterrupted, while the others listen. The first time around the circle, they speak about what happened. The second time around the circle, each says how they were affected by what happened. The third time around the circle, they speak about what should be done. This continues until it is clear what should be done. In the fourth circle they speak about what is agreed. Circles may take from two hours to two days, although, most are concluded within an afternoon.

The person who committed the harm will sign an agreement to complete the undertakings he or she agreed to in the peacemaking circle. It may be an apology. It may be restitution for damage done. It may be taking alcohol abuse counselling, psychological counselling, or one on one sessions with an Elder. The person may undertake a traditional ceremony or community service such as working for the Elders. The possible tasks are as varied as the people in the circle. There often are several tasks that must be undertaken. Once the person completes those tasks, he or she returns for a final peacemaking circle where a ceremony is held celebrating the completion of the tasks. The matter is then returned to court. In Court, the Peacemaker Coordinator reports on what has been completed by the wrong doer. The Crown prosecutor assesses what has been done against the nature of the offence. If she thinks it is appropriate, the prosecutor will withdraw the charge. If the matter is serious, the prosecutor will agree that the peacemaking report will be part of the considerations placed before the court on sentencing. Either way, the outcome of peacemaking is important in resolving the offence.

The Tsuu T'ina approach to family violence is unique. Partners affected by domestic violence are accepted into peacemaking. Support is available for both husband and wife. Each are first offered separate counselling before peacemaking is undertaken.[125] When the matter returns to court, Crown and Defence recommend an appropriate disposition which may include imposition of a peace bond with continued counselling, probation, or conditional sentence. Where alcohol is involved, an accused is usually be required not to possess or consume alcohol in the family home and, if the accused consumes alcohol, then he is to keep away from the family home and the spouse until the effects have worn off. In this manner, the spouse is given control of what happens in the home while the accused can avoid breach of the condition if he succumbs to the craving for alcohol.

An evaluation was conducted in 2003, three years after the commencement of the Peacemaker Court.[126] The evaluation found most respondents considered the Peacemaker Court as positive. Those who went through peacemaking had the lowest rate of recidivism especially compared to those Tsuu T'ina members who went through criminal courts elsewhere and had the

[125] The question posed to both the wife and the husband is whether they want the union to continue. If they want it to continue, both are counselled. If one or both do not wish the relationship to continue, then counselling is available on how to proceed. Relationships with the children becomes an important consideration.
[126] Allen Consulting & Training and BIM Larsson & Associates, *Tsuu T'ina First Nations Court and Peacemaker Justice System: An Evaluation,* (2004).

highest rate of recidivism. 174 adults were charged with 461 offences during the period October 2000 to October 2001. Of these, 44 were referred to peacemaking. Both the 44 referred to peacemaking and the remaining 130 adults were tracked from the time of their dispositions to September 2003 to determine if additional charges were laid.

In looking at recidivism after peacemaking, forty-four adults that accessed peacemaking were tracked to October 2003:

- 50 % did not re-offend,
- 16% re-offended at Tsuu T'ina
- 20% re-offended elsewhere
- 14% re-offended in both locations

Those who had gone through peacemaking and subsequently re-offended in the community had a higher proportion of administrative/procedural offences (not complying with probation conditions) and relatively few new criminal offences.

Even those who plead guilty in the Peacemaking Court in the community but did not participate in peacemaking had a lower rate of recidivism. The remaining one hundred and thirty adults were tracked from the time of their dispositions to September 2003 to determine if additional charges were laid against them. Of the one hundred and thirty adults,

- 39% did not re-offend
- 15% re-offended at Tsuu T'ina
- 24% re-offended elsewhere
- 22% re-offended in both locations.

While these did not do as well as those who went through peacemaking, they did better than those who went through criminal courts elsewhere.[127]

An important element is the qualitative outcomes of the Tsuu T'ina peacemaking process. This is reflected in the responses given by different sectors of the community and the criminal

[127] Mandamin, *Tsuu T'ina Court and Peacemaking Evaluation Report Summary,* 33.

justice system. When wrong doers had the option of going to peacemaking, they found the experience less intimidating because an Elder and community members were in attendance. Some said peacemaking was good because one could start working on their issues right away. They found the peacemaking process and the Court considered underlying root causes that lead to their offending behaviour. One Crown prosecutor said people would come and say they were glad the person was getting the help needed. Some respondents thought peacemaking was an easy way out; however, those who were the subject of peacemaking did not perceive peacemaking that way. Community corrections staff felt offenders who came through the peacemaker program were easier to supervise and more committed to rehabilitation.[128]

In peacemaking, the wishes of the victims are respected. If an individual victim does not wish to be involved, that matter does not go to peacemaking. Some victims supported peacemaking and saw it as a healthy and appropriate way to have some say in the proceedings and deal with other issues. One said:

> *They had to take responsibility, they saw my emotion, and they had to repair the damage they did. It personalized the situation.*

The Elders approved of peacemaking. They felt it was a way of reintroducing traditional ways of dealing with those who offend as well as keeping offenders out of the destructive experience of going to prison. The Elders did not consider peacemaking an easy way out for wrong doers. A peacemaker explained:

> *In a peacemaking session you smudge, sit in a circle and talk honest and truthful and with respect so everyone understands, At the end, people shake and leave with clear hearts and heads and feel good to be a part of helping people to be a better person.*

One interviewee said:

> *The strength of the peacemaking is its ability to reconcile differences*

[128] Tsuu T'ina Stoney Community Corrections Society staff would be tasked with supervising those on probation.

> *between parties and address the wrong committed by one person against another.*

Another respondent said:

> *It brings home the effect they [the wrong doer] have had on friends, family, neighbors and the reserve.*

My last sitting in the Tsuu T'ina Peacemaker Court was youth court, which was held once a month. There were only three matters that day. Two were reviews of youth. One was a probation review to see how the youth was doing. He was doing well, indeed much better than previously. The second was a conditional sentence review where that young person was also doing well. The only new matter was a young lady who was charged with driving without a licence. The Peacemaker Coordinator was in court that day and after Court he advised that he had had the opportunity to review the Tsuu T'ina junior-senior high school student list. Remarkably, of the several hundred students, only three had matters in court.[129]

As a coda to my time in the Tsuu T'ina Peacemaking Court, the Peacemaker Coordinator reminded me about the lady who had been addicted to pills and had been told by the peacemaking circle that she should go to college as she had once dreamed. She completed her high school equivalency and went to college. She later withdrew, explaining that she had to give her attention to helping her teenage daughters who needed her. She said once this was accomplished, she intended to return to college. On my last day in court, the Peacemaker Coordinator told me that one of the lady's daughters had just graduated from high school.[130] In this case, two daughters gained a mother's help at an important stage in their life when they most needed it.

Siksika Aissimohki Traditional Mediation

[129] Personal conversation after Court with the Tsuu T'ina Peacemaker Coordinator.
[130] Tsuu T'ina Peacemaker Coordinator.

A Blackfoot Story: *There was once a man who was very fond of his wife. After they had been married for some time, they had a child, a boy. After that the woman got sick and did not get well. The young man did not wish to take a second woman. He loved his wife so much. The woman grew worse and worse. Doctoring did not seem to do her any good and at last she died. The man used to take his baby on his back and travel out, walking over the hills crying. He kept away from the camp. After some time, he said to the little child: "My little boy, you are going to have to live with your grandmother. I am going to try to find your mother and bring her back."*

The man began to travel guided by his dreams. He had a long and dangerous journey travelling toward the Sand Hills and eventually reached the ghost country. The ghosts were amazed at his arrival. They held a ceremony and prayed to enable him to return to his people with his wife. They gave him the Worm Pipe[131] *to take back. The ghosts counselled him to take a thorough sweat before rejoining his people and added "Take care, now, that you do as I tell you. Do not whip your wife, nor strike her with a knife, nor hit her with fire; for if you do, she will vanish before yore eyes and return to the Sand Hills.*

After purifying himself, the man returned to his people bringing back the Worm Pipe and his wife. Nor long after this, in the night, the man told his wife to do something; and when she did not begin at once, he picked up a brand from the fire, not that he intended to strike he with it, but he made as if he intended to strike her with it, when all at once she vanished, and was never seen again.[132]

The Siksika Nation is part of the Blackfoot Confederacy, with the Kainai and Piikani of southern Alberta and the Blackfeet of Montana. The Siksika Nation has a total membership of

[131] The Worm Pipe is one of the objects contained in a medicine bundle that is opened during Blackfoot ceremonies. Indeed, the opening of a medicine bundle itself is a ceremony. The objects contained in the bundle have stories associated with them which are Blackfoot teachings.

[132] George Bird Grinnell, The Origin of the Worm Pipe, *Blackfoot Lodge Tales – the Story of a Prairie People,* (Lincoln: University of Nebraska Press, 1962 Reprint, 127-131 Original printing in 1892). George Bird Grinnell was an American anthropologist, historian, naturalist, and writer.

approximately seventy-five hundred.[133] It has focused on developing a self-governing structure that includes a Justice Department which provides for alternative dispute resolution, community corrections, court work, legal services and security services. [134]

The Siksika took a major step in their justice process by persuading the Alberta government to relocate the area court point from Gleichen to Siksika, a physical distance of a few kilometers but an important territorial shift from a non-Native community onto the Siksika reserve. The Siksika Tribal Administration had been building a public safety building to house police, fire, ambulance, and the crises centre. Chief and Council decided to add a court facility to the structure. Their reasoning was that ninety-five percent of individuals appearing in Court were Siksika members and the court point was better located in their community. When I was appointed as a provincial court judge based in the Calgary Criminal Court division, the Siksika asked the Chief Judge that I be assigned as the judge sitting at the Siksika Provincial Court. The Siksika Court held youth and criminal court sittings once a week and family court once a month. During the first few years, a Siksika Justice committee, including myself, the Siksika Justice representative, the Crown prosecutor, the legal aid duty counsel, the police representative, and the probation officer would meet periodically to discuss community justice issues facing the Siksika Nation.

Siksika Child and Family Services

The Alberta Government revised its child protection legislation in 2000 which dramatically shortened the period of time an apprehended child could be in temporary custody before an application must be made for permanent custody.[135] The Siksika Nation had a Family Services Department which held delegated authority for child protection. They were concerned the child protection court process was too cumbersome and slow to respond in a timely manner as required by the new legislation. The Siksika Elders also had an ongoing concern for the well-being of the Siksika children. The Elders indicated they were prepared to help in child and family matters. The Siksika Elders decided to assist in child and family matters via the

[133] Siksika Nation *http://siksikanation.com/wp/about/* and also *https://fnp-ppn.aadnc-aandc.gc.ca/fnp/Main/Search/FNMain.aspx?BAND_NUMBER=430.*
[134] http://siksikanation.com/wp/about/.
[135] *Child, Youth and Family Enhancement Act,* RSA 2000, c. C-12.

Aissimohki process. The Blackfoot word 'Aissimohki' could be translated as 'discipline', a way of conducting oneself properly.

The Siksika Justice Department had been developing a contemporary version of their traditional Aissimohki mediation. They had arranged for an alternative dispute resolution [ADR] training for Siksika mediators, drawing on both traditional and academic ADR approaches. They then paired the Elders with the newly trained Siksika mediators.

I was invited, as the Provincial Family Court Judge, to attend a planning meeting involving the Siksika Family Services and Justice Departments to respond to the changes to the child protection legislation. The plan was to create a process which integrated what they chose to call the Judicial Dispute Resolution process [JDR] with the court child protection process. When a Siksika child was apprehended, the matter was, as required by legislation, filed in the Siksika Family Court. If Siksika Family Services saw the matter as one that could be resolved in the Aissimohki process, an application was made to have the matter referred to JDR. As the Family Court Judge, I would direct the parties to attend a JDR session and adjourn the court proceeding over to the next family court sitting.

In the Aissimohki traditional mediation session, the Elder began each session with a prayer to signify the importance and seriousness of the process. The JDR sessions were held in the body of the Siksika Court House. The public gallery chairs were removed and replaced by two tables pushed together to accommodate all the participants. The Elder and the Siksika mediator sat at one end. The parent or parents of the child sat on one side with supporting family members together with legal counsel (not common). The Siksika child protection worker and the Siksika Family and Child Services lawyer sat on the other side. I sat at the other end opposite from the Siksika mediator. The Siksika wanted me to be present in my Court robes, not to be in charge of the mediation, but to emphasize the importance of the Aissimohki session. The session would begin with a prayer by the Elder. The Siksika mediator would explain that everyone should be respectful, not interrupt, and speak directly to whoever was being addressed. What was said in the circle was to stay in the circle. Introductions were made by each person in turn. When it came to my turn, I would explain I would help the discussion as I could. If the parties came to an agreement I could accept in law, I would call the court clerk in and open court. On their joint application, I would make a court order based on their agreement. That would

conclude the court proceeding. If there was no agreement, the matter would go to the adjourned court date and be decided by another judge in open court.

In the exchanges between the parent and the child protection worker, or between couples in disagreement over family matters, the Elder would offer guidance to the parties about the right way to deal with matters. Given the respect the Siksika have for Elders, that guidance usually enables the parties to reach an agreement which forms the basis for a consent order resolving the matter. As time went by, the number of child protection cases, and later family custody and access cases, in court began to decline as more and more matters were resolved by the Aissimohki JDR process.

This JDR process was not the only way the Siksika combined contemporary approaches with Siksika traditions. The Siksika Family and Child Services sought out Siksika children that had been removed from the community and arranged to have them return to be fostered by extended family members. Any necessary support needed, either for the child or the foster family, was provided by the Siksika Family and Child Services. When the child's situation was stabilized with their new foster family, Siksika Family and Child Services initiated the legal process to have guardianship status withdrawn in favour of adoption by the foster family. These processes involved conventional legal steps, but the Siksika took this process back into their own traditional processes. They arranged for the child to participate in a traditional face painting ceremony and to be given a traditional Siksika name. The child was then presented to the assembly gathered to witness the ceremony, introduced by their Siksika name, and declared to be a full member of the Siksika Nation. After years of separation, the child was now home physically, legally, and culturally.[136]

Siksika Family Violence Protocol

I knew the Siksika community well as I had acted over the years as Siksika's legal counsel in various matters. When I was appointed to sit at Siksika as a judge, the question I asked myself was "How can I assist the Siksika from this position?" Over time I realized that many of those pleading to violent offences, had grown up witnessing family violence in the

[136] I was invited to join a gathering at Siksika and be a witness to the ceremony, naming and presentation. It was truly a powerful way of celebrating the child's return to the Siksika community.

home.[137] I turned to the question of how to address family violence. Over time a Siksika family violence protocol evolved as different components were added. These involved several steps: interim release, court appearances, the Crown prosecutor's role, the Aissimohki intervention, and the final Court disposition of the matter.

When police are called to a complaint of family violence, the accused, almost always, the man, is taken into custody. On application for release, the justice of peace either denies release or grants release on condition that he is to have no contact with his spouse. Usually, alcohol was involved and so a condition to completely abstain from alcohol is also imposed. On first court appearance, there is often an application by defence counsel for either release or a variation in release conditions.

The difficulty in the usual court process is that the person harmed, the wife, does not have a role until summoned to court to testify as a witness or provide a victim impact statement on sentencing. At Siksika, this process was changed with the Crown prosecutor interviewing the spouse at the earliest stage, usually the first court appearance, to ascertain her wishes. She usually has reasons why she wishes her partner to come home. She may be dependent on his financial support which would not be available if he must reside elsewhere. She may need his help with the children, for instance a teenage daughter who will not listen to her but will listen to her father. Or it may be that she simply needs his attention and support, which he provides when not intoxicated. On this input from the prosecutor and the wife's confirmation, I would, as the presiding judge, grant interim release but on different conditions. The first is that the man is not to possess or consume alcohol in the family home. If he comes home intoxicated, he must leave when she tells him to go. If he does, he is in compliance; if not, she could call the police because he is in breach of the court release order. The practical effect of this condition is to give the wife an important say in the home where children are part of the family.

In Court, defence counsel makes application for the release conditions to be varied to allow the accused spouse to return home on conditions. I would vary the 'stay away' and 'no alcohol' conditions to a 'keep away' condition where the accused may return to the home but is not to possess or consume alcohol in the family home. Further, if the accused does consume

[137] I prefer to use the term 'family violence' instead of the usual term 'domestic violence.' I do so because it infers children are involved, most often as witnesses to the violence. They too are victims who are traumatized by the violence.

alcohol, he is to also stay away from the home and his spouse until the effects have worn off. The reason for removing the no alcohol condition is that it is difficult for a person very used to consuming alcohol to completely abstain, and if he has a drink, his thinking can switch from not drinking to not getting caught drinking. At this point, I also ask the wife if she is prepared to keep an alcohol-free home because if would be unfair to the accused if she drinks at home and he cannot. There is no order made against her, only the request to which she usually agrees.

The Crown prosecutor has an important role to play in that he ensures the spouse is heard early in the process and makes her views known to the Court. He also liaises with the police and emphasizes to them that they are to respond promptly should a woman call when her intoxicated spouse does not leave when she asks. Importantly, the Crown prosecutor also lets defence counsel know that if the accused promptly seeks counselling or alcohol abuse treatment, the prosecutor will take into consideration whether to exercise his discretion to proceed with a peace bond order instead of an assault charge. This, of course is usually when the charge is simple assault and not aggravated assault which is a more serious charge.

The Elders indicated they were also prepared to assist in family violence cases through their Aissimohki process. These sessions are held without the participation of the judge, but the resulting agreement or treatment plan is brought back to the Court and is considered in the outcome of the court case. The feedback received was that, at the beginning of an Aissimohki session, it was difficult for either spouse to talk about the violence, but once it came out, the circle quickly moved to the factors behind the violence, whether it was financial stresses, breakdown in marital communication, unresolved grief issues, or addictive behaviour. Once these factors were brought out in the circle, the couple were able to begin speaking about what needed to be done to address these issues. These discussions usually lead to an Aissimohki plan to address the issues that lay behind the family violence.

Once the Elders became involved, I would order that the accused take part in Aissimohki mediation with his spouse. The court proceeding is then adjourned to a later date sufficiently along to allow the Aissimohki mediation to take place.

When the family violence matter comes back to court for final disposition, it still is on the basis of a criminal assault charge. The Crown prosecutor reviews the situation, including

again conferring with the wife and ascertain her wishes. If satisfied, he has a section 810[138] peace bond information prepared, which alleges that the accused caused his spouse to fear for her safety. A section 810 information is not an allegation of a criminal offence; rather, it is an information that, if proven, calls for a court order to keep the peace. Section 810 reads in part:

> 810 (1) An information may be laid before a justice by or on behalf of any person who fears on reasonable grounds that another person
>
> (a) will cause personal injury to them or to their intimate partner or child or will damage their property;
>
> …
>
> (3) If the justice or summary conviction court before which the parties appear is satisfied by the evidence adduced that the person on whose behalf the information was laid has reasonable grounds for the fear, the justice or court may order that the defendant enter into a recognizance, with or without sureties, to keep the peace and be of good behaviour for a period of not more than 12 months. [emphasis added]

In Court, the wife is invited to take the witness box and I, as judge, ask her if she is prepared to swear or affirm the information is true. When she does, I commission the peace bond information, thank her, and tell her she can step down.[139] The entire process, including the initial interview by the Crown prosecutor, the interim release conditions requiring the accused not to possess alcohol in the family home and the swearing of the peace bond information gives the wife a meaningful role in the court process. The Court proceeding then proceeds on the peace bond information instead of the criminal assault information.

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[138] *Criminal Code*. R.S.A. 1985, c. C-34, s. 810.

[139] This procedure is different than the usual process where a police office swears out the peace bond information.

The Crown prosecutor then states the facts as agreed with defense counsel. The husband admits the facts. Then counsel, either the Crown or defence, advise what has been agreed in the Aissimohki mediation on the family violence incident.

The Court has a role in addressing family violence. I would explain, at this stage, the reason these measures are taken is for the children's benefit, pointing out the most frightening event for children is to see their parents, whom they look to for security, fighting each other. I would sometimes explain the prohibition against family violence is contained in Blackfoot teachings that accompany the Worm Pipe.[140] I explain that resolving family violence is about helping Siksika children grow up without being exposed to family violence between their parents. I opine that if we can have a generation of children grow up without being exposed to family violence, we could emerge from this dark period we have been struggling with. I conclude with imposing the peace bond conditions to keep the peace, to maintain the keep-away condition of no alcohol in the home, and to observe the Aissimohki plan. The peace bond would remain in effect for one year.

The court proceedings on family violence did not operate in isolation from the Siksika community. Siksika Tribal Administration also took steps in concert with the Elders' lead with Aissimohki. It made available all counselling and support services to individuals taking treatment for alcohol abuse or pursuing other types of social and health support. The Administration sponsored a seminar for all staff, not just the social and justice departments but also public works, housing, and other employees on the importance of countering family violence. The Siksika Administration also hosted a community conference on preventing family violence, with grandparents and parents sharing their own experience with family violence and declaring it was to be different for their children.

A Crown prosecutor who had been involved in the Siksika family violence protocol closely tracked the outcome of cases for two years. He found the number of reported family violence cases coming before the court had increased, wryly noting that sometimes he had more wives coming to see him before court than lawyers. Sometimes it was the couple who came together to see the prosecutor. The prosecutor reported that the degree of violence had gone

[140] Grinnell, Origin of the Worm Pipe, *Blackfoot Lodge Tales*: 127-131

down, now a slap or a push down instead of the ambulance being called. The age of the couples also dropped until it was new family formations, young couples with their first child.

As a testimony to the efficacy of the Siksika family violence protocol, in the two years tracked by the prosecutor, there were only two repeat cases.[141]

Indigenous Restorative Justice

I had posed four questions which I intended to use to identify whether the Indigenous initiative could be identified as an Indigenous restorative justice initiative. I will not only address those questions with respect to the Bigstone, Tsuu T'ina and Siksika justice initiatives but also go deeper into the analysis of what makes up an Indigenous restorative justice initiative. For the convenience of the reader, I am repeating these questions. They are:

1. Is the exercise devised and delivered by the Indigenous community?
2. Is the exercise based on the culture and experience of the Indigenous community?
3. Does the exercise engage with individualized social disorder and the Canadian criminal justice system?
4. Does the exercise address the issues of social disorder in Indigenous communities and over-incarceration of Indigenous offenders?

The short answer to the questions posed is that all the initiatives, the Bigstone Restorative Justice Committee, the Tsuu T'ina Peacemaking Court, and the Siksika Aissimohki Traditional Mediation are all delivered by the respective First Nation, draw on each First Nation's culture and experience through the guidance of their Elders and address the problems of individual members who have become enmeshed in either the criminal justice system or the child and family courts. These initiatives contributed to the reduction of social disorder and over-incarceration of Indigenous offenders in those communities.

[141] As recounted by the Crown prosecutor for the Siksika Provincial Court circa 2005.

Chapter Four

Common Elements of the Three Indigenous Restorative Justice Initiatives

The Bigstone restorative justice initiative was an undertaking by the Elders of the Bigstone Cree Nation. At the time, there was no youth justice program of the sort in existence. They made their decision after they visited and met with the Fort Chipewyan Native Justice Committee. They decided to act in 1990. because of their concern for the youth of their community. Two years later, in May 1992, the Alberta Attorney General wrote:

> I am extremely pleased to formally establish the Wabasca-Demarais Youth Justice committee under Section 69 of the Young Offenders Act of Canada. Enclosed with this letter is a Certificate under my signature which provides tor the formal establishment.[142]

This Native youth justice committee approach was replicated by other Indigenous communities in Alberta. In a typical Indigenous process, First Nations' members would meet and thoroughly discuss the question of starting a Native youth justice committee. They did not develop detailed plans or wait for official approval. When ready, they would just start. In contrast, non-Indigenous communities would develop plans and prepare protocols, engage in preparatory training, and wait on official recognition and approval before proceeding. Government recognition of Native youth justice committees would occur two years after a Native youth justice committee began activity. This two-year waiting period after the start of a Native Justice Committee had become Alberta government policy.[143]

The Tsuu T'ina peacemaking initiative was initiated by the Elders who presented a petition requiring that the Chief and Council address issues of reckless driving on Tsuu T'ina roads. That started a process that eventually led to the Tsuu T'ina proposal for the establishment of a Tsuu T'ina peacemaking court. Developing the peacemaking proposal was done by a team of councillors, staff, and advisors delegated by Chief and Council to respond to the Elders'

[142] Correspondence by Alberta Attorney General, May 20, 1992.
[143] The 10 year anniversary of the Fort Chipewyan Native Youth Justice Committee, an event attended by the writer, was recognized by Alberta Justice 12 years after the Committee actually began.

directive.[144] This group was also guided by the Tsuu T'ina community at large through community consultations. The community's views led the Tsuu T'ina team to expand the scope from traffic matters to youth and criminal justice issues. Moreover, community consultations were used to identify community members who could serve as peacemakers. As part of the peacemaking process, Elders were included to monitor the process and ensure peacemaking is conducted in keeping with Tsuu T'ina values.

Elders were also involved in the development of the Siksika Aissimohki process. The Siksika involvement in justice began with Chief and Council's decision to include a courtroom to the public safety complex being built at Siksika.[145] Once the Siksika court began operating, the Siksika Elders had decided they would assist in family issues. When the Alberta child welfare legislation[146] was amended to require earlier guardianship decisions in child apprehension cases, the Elders became directly involved. This led to the development of the Siksika judicial dispute resolution process in child protection and family access and custody cases. Later, as the Siksika family violence protocol developed, the Elders joined through Aissimohki addressing this critical issue.

The Elders' Role

In each of the forgoing three examples, the Elders played a key role. Their involvement ensured the initiative was based on the culture and experiences of the First Nation instead of externally imposed procedures or norms. In each, the First Nation's own governmental agency delivers the restorative justice program whether it is the Bigstone Restorative Justice Committee, the Tsuu T'ina Office of the Peacemaker, or the Siksika Justice Department.

All three of these Indigenous restorative justice initiatives address the difficulties of individuals enmeshed in the criminal justice system. These individuals all have the option of refusing to participate and remaining with the criminal justice processes. Their participation in Indigenous restorative justice processes is voluntary. This is in keeping with the non-coercive approach of Indigenous peoples in managing their relationships. A partial exception is the

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[144] The Elders called their direction a 'petition' but, given the respect the Tsuu T'ina have for their Elders, the petition was more of a directive to Chief and Council.
[145] The initial design called for a building to only include police, fire, and ambulance, and a crises call centre facilities.
[146] *Child, Youth and Family Enhancement Act,* RSA 2000, c C-12.

Siksika JDR process where the judge directs parents or guardians to participate, but even then, they may decline or opt out.

The Indigenous restorative justice initiatives address all offences although the Tsuu T'ina have established some formal limitations. They had asked the Elders which matters they could deal with in peacemaking. The Elders advised that peacemaking could address all matters with the exceptions of sexual assaults or homicides. No explanation was offered but it is my opinion that these offences engage strong emotions such that the restorative justice initiative might be overwhelmed and falter in addressing such matters.

Finally, the Tsuu T'ina decided they would not undertake peacemaking when the person harmed declines to participate. Their reasoning was that they wanted to end conflict in their community, and it could not be achieved without the victim's participation. To overcome the initial anger people have about the harm they suffered, the Tsuu T'ina sought to persuade them that peacemaking gave them an opportunity to express their views directly in a timely and safe way to the offender. Given the outcome of proceedings were generally known in the Tsuu T'ina community via open court, the beneficial effects of peacemaking become known and received greater community acceptance, which led to more victims electing to participate.

The last question is whether Indigenous restorative justice addresses the issues of social disorder in Indigenous communities and over-incarceration of Indigenous offenders. The evidence is somewhat limited but points in that direction. The initial Tsuu T'ina evaluation pointed to less recidivism and more community satisfaction with the peacemaking system. Informal tracking of family violence cases by a Crown prosecutor in Siksika also indicates better and earlier reporting of family violence cases with only a few repeats, in contrast with domestic violence elsewhere which typically is under reported and frequently repeated. Finally, Indigenous restorative justice with its emphasis on addressing underlying problems does not rely on incarceration unlike the denunciation and deterrence mantras of the criminal justice system. Consequently, Indigenous restorative justice does not usually resort to incarceration even though the criminal justice system frequently does.

The Elders' Teachings

The Elders of the three First Nations, from different tribal groups (Blackfoot, Cree, and Dene), spoke of common values that underlay the Indigenous restorative justice. Those values

are accountability for one's personal conduct, helping or healing those who have transgressed, valuing relationships, and living in the proper way.

Early on during the emergence of Indigenous restorative justice, I asked Tom Crane, a Siksika Elder, if he knew of such practices in the past. He thought for a moment and told me of an incident that happened in his youth.[147] He and some other young people had done something that led to their being summoned to appear before the Council. They were required to take steps to make up for what they had done after which they had to again appear before the Council to report. This requirement for accountability was echoed by Bigstone Elders who explained that in years gone by a youth who had done something wrong would be taken by a parent or grandparent to the person harmed to apologize and make up for the harm. The Tsuu T'ina saw their peacemaking process beginning with the offender acknowledging what he or she did. Without that acknowledgement, they would not proceed with peacemaking. The underlying principle was accountability; a person must be accountable for his or her actions.

I once listened to Lillian Crop Earred Wolf, a Kainai Elder, who was speaking at a justice conference.[148] She explained that her people's idea of justice is that when a young person makes a mistake, they try to teach the young person the right way of behaving. She did not see the conduct as a crime but rather a mistake which called for teaching and helping the young person to the right way to behave. This view about helping wayward youth is what led the Bigstone Elders to get involved and continue to be involved, even though the individual Elders changed over the years. The Bigstone Elders had been chosen from among individuals who were living a good life, had raised their families well, and were always ready to help.[149] The Tsuu T'ina had much the same view. This did not mean a person had to always be such. The Elders recognized sometimes a person could be on the wrong path, even refusing to respond to being helped to change. They said sometimes you had to wait until that person hit rock bottom before the person was willing to be helped. In the end, the objective was to enable that person to be restored to a

[147] The Elder, Tom Crane, was a respected Siksika Elder who was recalling a personal experience in answer to my question whether he knew of any actual instance of Indigenous justice. I have named the Elder in keeping with the Indigenous oral story protocol of providing the provenance of the story, in other words, who told the story and the circumstances in which it was told.
[148] The Elder, Lillian Crop Earred Wolf, was speaking at an important event, with members of her First Nation present. These are circumstances that enhance the truth telling processes in Indigenous communities.
[149] As explained by the Bigstone Justice Technician who does much of the legwork involved in the Bigstone restorative justice process.

good way of life; once that occurs, the person could help others, having been there himself. This helping, this healing process, was the key to the restoration of the proper way of conducting oneself. In my language, Anishinaabemowin, our word for this process is '*Naadamaagewin*,' to help others in need of assistance.

I had often thought about how it was that the Tsuu T'ina peacemaking process was singularly effective in leading to change in offenders. Peacemaking was done in a circle process with the wrong doer making an agreement with the circle about what he or she had to do to atone and to heal. Russel White, a Siksika Elder touched on this process of making agreements during self government deliberations among the Siksika.[150] We were talking about making laws and the Elder explained that the Siksika laws were agreements. If everyone agreed on something, that became their law. This explains the reverence the Siksika have for the Treaty.[151] It also explains why the Tsuu T'ina peacemaking agreements are so effective. It is driven by the agreement reached in the peacemaking circle. The agreement process resonates for Indigenous people more so than do statute imposed mandatory laws and court orders. Underlying this Indigenous perspective is the importance of relationships amongst Indigenous peoples.

These three values - individual accountability, helping a person restore their lives in a good way and maintaining good relationships with others - underlie Indigenous restorative justice initiatives.These are values deeply imbedded in Indigenous cultures including my own Anishinaabe culture. These values have been documented in both the past and present day. George Copway, a Mississauga (a branch of the Anishinaabe), wrote in 1850:

> Among the Indians there have been no written laws. Customs handed down from generation to generation have been the only laws to guide them. … this fear of the nation's censure acted as a mighty band, binding all in one social honourable

[150] The Elder, Russel White, was chosen to help guide the Siksika self government negotiation committee in the self government negotiations.

[151] Treaty 7: this is viewed by the Treaty 7 First Nations as a Nation to Nation treaty. It is sacred and holds the same place for the Indigenous people in southern Alberta as does the Magna Carta does for the English people. Treaty 8 between the Cree and the Crown was described by the Supreme Court of Canada in *R. v Badger* in the following language: "First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred."

> compact. They would not as brutes be whipped into duty. They would as men be persuaded to the right.[152]

While Copway did not elaborate further, a contemporary scholar, Melissa A. Pflug, does in an article on contemporary Odawa rituals. She writes:

> …we can begin to see that the Odawa traditionalists understand *pimadaziwin* as a state of being that every person human and otherwise, ethically is charged with upholding. Each person doing so contributes to the goal of attaining a good, healthy and interactive moral life for the collective and, therefore a unique and empowered sense of community.[153]

My home community, Wiikwemikoong, is an Odawa community, and Pflug's article touches on much of what I know given my upbringing and experience. I know of *Pimadaziwin*, which may be spelled as *Bimaadiziwin*[154], the way of living a good life.[155] Pflug writes of the "Seven Ways," which she describes as "to be pure of heart, in body and in soul; humble; honest; loving; and respectful."[156] These are commonly described as the Seven Sacred Teachings[157] and are widely known. I have encountered these teachings different forums and circumstances. The first was in a 1980's painting, "Indian Law," by the northwestern Ontario Anishinaabe artist, Roy Thomas. The painting depicts a moose standing on a grassy granite outcrop with pine trees in the background. Thomas explained the tall straight pine trees represented honesty; the soft grass represented kindness or love, the strong hard granite represented courage; and the moose represented sharing, also an aspect of love. These teachings arose again in in 1996 in a response by a Cree Elder in Alberta. Dan McLean was a respected Sturgeon Lake First Nation Elder,

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[152] George Copway, *The Traditional History and Characteristic Sketches of the Ojibway Nation*, (Toronto: Prospero Books. 2001, Facsimile Reprint of the original published London: C. Gilpin. 1850).
[153] Melissa A. Pflug, Pimadaziwin: Contemporary Rituals in Odawa Society, *To Hear the Eagles Cry: Contemporary Themes in Native American Spirituality, American Indian Quarterly*, Summer-Autumn 1996. Vol 20 No. ¾ Special Issue: Summer-Autumn, (1996): 489-513; https://www.jstor.org/stable/1185789.
[154] Ningewance, *Ojibwe Thesaurus,* (2020).
[155] Anishinaabe spellings are not standardized, hence different spellings.
[156] Pflug, Pimadaziwin: Contemporary Rituals in Odawa Society, 498.
[157] Sometimes referred to as the Seven Grandfather Teachings although I have heard it recounted by Algonquin grandmothers.

whose testimony on the treaty right to hunt was accepted by the Supreme Court of Canada in its decision in *R. v Badger*. After the Supreme Court decision, I asked Elder McLean what Indigenous law applied to the case. He thought for a moment and answered with a single word, "Respect." Finally, the teachings were recounted by a group of Algonquin Grandmothers in Quebec in their presentation at the Federal Court Dispute Resolution Seminar at Kitigan Zibi First Nation October 2013. They explained that there are seven values: Honesty, Courage, Love, Humility, Respect, Truth, and Wisdom which are part of Algonquin law.

These fundamental Indigenous principles guide a person how to live well. They are positive instructions on living properly, in contrast to the negative injunctions of criminal law intended to direct individuals how not to conduct their lives. The seven teachings say, 'Do this', unlike criminal law which says, 'Don't do this.' Yet the Seven Sacred Teachings are law, not merely moral instructions. Rupert Ross, a Crown prosecutor, was given the time and resources to go and learn what Indigenous people were talking about when they talked about Indigenous justice.[158] He wrote:

> I'm not sure why it took me so long, but it is now clear the elders have been giving their researchers – and the rest of us – one single coherent and powerful message: justice involves far more than what you do after things have gone wrong. Instead, it involves creating the social conditions that minimize such wrongdoing. In short, a "justice system" in their eyes does indeed encompass much more than a "legal system," … It involves instead all the social mechanisms that teach people from the moment of their birth how to live "a good life." In fact, "a good life" is often an expression that has the same meaning as "the law."[159]

The seven teachings are intricately connected to the Indigenous restorative justice process. Honesty and courage[160] are linked to the accountability asked of a wrong doer; love

[158] Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice*, Toronto: Penguin Books Canada Ltd. (1996).

[159] Ross, *Returning to the Teaching, 256.*

[160] Courage is certainly needed for an offender to face both the person harmed and members of the community and admit to his or her harmful actions.

motivates the Elders to help the wrong doer heal; and restoration and repair of damaged relationships calls for both respect for others and the wisdom to see the need for harmonious relationships. The remaining two teachings are also relevant to the Indigenous restorative justice process. Humility is the willingness to listen and learn, while truth is to be able to see the world, and all in it, as it is.

The foregoing explains the relationship between Indigenous restorative justice and Indigenous justice. Indigenous restorative justice is a way of helping a wrong doer onto a healing path, addressing underlying problems that contributed to the person's harmful behaviour as a prelude to guiding the individual to the right way to live. In my language I would call Indigenous restorative justice, *Naadamaagewin*, and Indigenous justice, *Bimaadiziwin*, the way of living a good life. Both are rooted in the Indigenous worldview of justice and the ways of achieving justice.

The Indigenous perspective on how to achieve justice does differ from the Canadian perspective on how to achieve justice. The solution crafted by Indigenous communities to reconcile their approach to achieving justice with the criminal justice process is to insert Indigenous restorative justice into the criminal justice system.

There are challenges in introducing Indigenous restorative justice as an ongoing component in the Canadian criminal justice system. The first is the resistance within the criminal justice system to making room for Indigenous restorative justice. The second is the clash between constitutional and legislated Canadian individual values and Indigenous collective community values. Lastly, there is a challenge within contemporary Indigenous communities that relates to power imbalances which distort relationships within Indigenous communities and between Indigenous men and women. I will address these challenges in the next chapter.

Chapter Five

There are obstacles that work against ready adoption of Indigenous restorative justice as an approach to addressing disorder in Indigenous communities and resolving the ever-increasing over-incarceration of Indigenous offenders. Three such obstacles are resistance to change, conflict between individual and collective rights and internal power imbalance issues. The first is the resistance of the criminal justice system to change as exemplified in *R. v Arcand*.[161] The second is the differing societal views about individual rights as reflected in the Canadian Charter of Rights and Freedoms[162] and the Indigenous views about collective Aboriginal rights. The third obstacle is the presence of internal power imbalances within Indigenous communities not only in relation to local governing power structures but also including power imbalances between men and women. Any fulsome discussion of Indigenous restorative justice must also have regard to these issues.

Clash between Indigenous and non-Indigenous Approaches to Justice

The clash between Indigenous restorative Justice and the Canadian criminal justice system is exemplified by the 2010 Alberta Court of Appeal decision in *R. v Arcand*. Jonathon Rudin noted the Alberta Court of Appeal took scant notice that the young offender was Indigenous and thus called into play subsection 718.2(e) of the *Criminal Code*. However, there is more to this case. The difference lies in the contrasting approaches of Indigenous restorative justice and the retributive interpretation preferred by the Court of Appeal.

The young first-time offender was an 18-year-old member of a First Nation. He plead guilty to sexual assault. The presentence report outlined his disrupted childhood, health problems, and substance abuse issues. The forensic and community assessment report noted he had school problems, and psychological testing suggested impairment in some aspects of intellectual functioning, difficulty with concentration and perceptual organization as well as neurological deficits in impulse control. The regional First Nation's justice committee expressed strong support for the young man, his steps to reach sobriety, and his educational and cultural

[161] *R. v Arcand* 2010 ABCA 363 (Alberta Court of Appeal); Jonathan Rudin, Eyes Wide Shut: The Alberta Court of Appeal's Decision in R. v. Arcand and Aboriginal Offenders, *Alberta Law Review* 48:4 (2011).
[162] The Canadian Charter of Rights and Freedoms *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

activities since the crime. The committee recommended a summary disposition involving closely supervised probation. The trial judge accepted the recommendation and sentenced the young man to a 90-day sentence and three years probation.[163]

The trial judge's decision was appealed. New evidence was introduced on appeal, including a positive report from the probation officer who indicated the young man had completed 240 hours of community service work and also had attended both counselling and Alcohol Anonymous meetings. The psychologist who provided 21 months of counselling reported that the young man, through his own efforts and the support of others, had rehabilitated himself. The psychologist opined that jail would not have had a rehabilitative effect. The Court of Appeal found the sentence did not give proper weight to deterrence and denunciation and found that a fit sentence would be two years less a day and two years probation. However, given the long period of time it had taken the appeal and the fact that the young man had now completed the original sentence and most of the probation, the Appeal Court stayed the imposition of the two-year sentence. So, who was right? The First Nation's justice committee or the Court of Appeal? Which approach, that of Indigenous restorative justice or the criminal justice's deterrence and denunciation?

Another example of the tension between Indigenous and non-Indigenous approaches may be drawn from the experience of the Tsuu T'ina Peacemaking Court. There was a Tsuu T'ina family violence case that had dragged on in another court. The husband had pleaded not guilty, and the wife resisted participating in the court proceedings, resulting in an adjournment of the trial. When the second trial was to commence, the wife continued to resist participating. The Tsuu T'ina Peacemaking Court had commenced sittings. Ordinarily an accused is required to enter a guilty plea before the Crown agrees to a transfer to another court for sentencing. In this case the Crown prosecutor recommended the matter be transferred to the Tsuu T'ina Peacemaking Court and the presiding Judge agreed. When the matter came up before me, the husband requested going into peacemaking. The Crown prosecutor disagreed because Crown policy was that all family violence cases must be prosecuted. The Peacemaker Coordinator stated he was familiar with the matter and it should go into peacemaking. After hearing from all three, Crown, defence and the Peacemaker Coordinator I decided the matter could into peacemaking.

[163] A 90 day sentence may be served intermittently, for instance with weekends in custody.

The matter was subsequently satisfactorily resolved. [164] Again, who was right? The Peacemaker Coordinator or the Crown Prosecutor? Here, as a result, the Crown prosecutor's office changed its policy and agreed family violence cases could go to Tsuu T'ina peacemaking dependent on the circumstances and severity of the allegation.[165]

A Crisis for the Criminal Justice System

The Royal Commission on Aboriginal Peoples found, as its principal conclusion, that:

> The Canadian criminal justice system has failed the Aboriginal peoples of Canada - First Nations, Inuit and Métis people - on-reserve and off-reserve, urban and rural - in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different worldviews of Aboriginal and non-Aboriginal people with respect to such element elemental issues as the substantive content of justice and the process of achieving justice. [166]

An important factor contributing to the failure of the criminal justice system is the difference in the worldviews between Indigenous peoples and Canadian society on questions of justice and the process of achieving justice. Yet, without more, change is unlikely.

An undeniable consequence of the federal-provincial constitutional arrangement is that the existing criminal justice system is not going to go away or easily change how it operates. Despite the criminal justice system's resort to the harshest deterrence sanction against Indigenous offenders, being incarceration, crime levels in Indigenous communities remain higher than elsewhere in Canada.[167] And the increasing over-incarceration of Indigenous people is pushing the Canadian criminal justice system towards an even greater crisis.

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[164] The reasons I had for ordering the matter into peacemaking included that the wife clearly did not want the trial to proceed and had no fear of her husband; the couple had children; they had resumed cohabiting despite a no contact release condition; and they both worked in the same office in the community.

[165] The Crown prosecutor would agree the matter could go into peacemaking without a guilty plea but, in more severe cases, the Crown prosecutor would require a guilty plea with the peacemaking outcome used in the course of sentencing for the offence.

[166] RCAP, *Bridging the Cultural Divide*, Major Findings and Conclusions No. 1 309.

[167] RCAP, *Bridging the Cultural Divide*, 34; also Major Findings and Conclusions Nos. 2-4, 309.

Over-incarceration of Indigenous people is well documented, beginning with the 1967 *Indians and the Law* report by the Canadian Corrections Association and repeated in numerous Indigenous justice reports in the intervening years. Most recently, in January 2021, Indigenous over-incarceration was projected to continue to increase. The Office of the Correctional Investigator issued yet another report on the increasing over-incarceration of Indigenous persons in federal penal institutions. Dr. Zinger reported:

> On this trajectory, the pace is now set for Indigenous people to comprise 33% of the total federal inmate population in the next three years. Over the longer term, and for the better part of three decades now, despite findings of Royal Commissions and National Inquiries, intervention of the courts, promises and commitments of previous and current political leaders, no government of any stripe has managed to reverse the trend of Indigenous over-representation in Canadian jails and prisons. The Indigenization of Canada's prison population is nothing short of a national travesty.[168]

To put this statement into context, Indigenous people constitute approximately 5% of the Canadian population but 33% of the federal prison population, a number which has been steadily increasing. This crisis is not only found in federal penal institutions. It is occurring in all provinces and territories. At the same time, Indigenous communities continue to experience high levels of social disorder and crime. RCAP expressly linked these high levels of crime in Indigenous communities with the over-incarceration of Indigenous people.[169] This gives rise to the terrible irony that even though the *Criminal Code's* stated objective in sentencing is to maintain a just, peaceful and safe society[170], and even though the strongest denunciation and deterrence measure, incarceration, is applied to Indigenous offenders, Indigenous communities, on the whole, are the least peaceful and safe communities in Canada.[171]

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[168] Office of the Correctional Investigator. Indigenous People in Federal Custody Surpasses 30%; https://www.oci-bec.gc.ca/cnt/comm/press/press20200121-eng.aspx.
[169] RCAP, *Bridging the Cultural Divide*, 309.
[170] *Criminal Code,* R.S.C. 1985, c. C-46, s. 718.
[171] RCAP, *Bridging the Cultural Divide*, 34.

Higher Indigenous crime rates and over-incarceration are not the only consideration. The criminal justice system itself is seriously overloaded in trying to handle the demands on the provincial courts, especially in northern and remote communities where many Indigenous peoples reside. The overload in northern Alberta is well documented in an unpublished paper by Judge William Paul, an Alberta Provincial court judge who sits in northern Alberta.[172] Two of his conclusions are salient:

> The vast majority of offenders in the north are Aboriginals because the majority of the population in the north is Aboriginal and we therefore contribute by default to the noted over-representation of these peoples in our goals because of our present approach has not stemmed the tide. [173]

And also:

> The costs of maintaining our present model as the exclusive approach to addressing offending behaviour is exceedingly costly in every respect from actual dollars expended to the loss of opportunity to effectively address the issue of rehabilitation of offenders.[174]

Judge Paul underscores an important point. Not only is over-incarceration increasing, but the criminal justice system is both ineffective and extremely costly in addressing the issue of wrongdoing in Indigenous communities. Moreover, the court overload calls for a time pressed processing of the many cases coming forward.

The lack of court time to hear and consider the conduct and circumstances of Indigenous offenders jeopardizes the very quality of justice provided for both the Indigenous offender and the Indigenous community. To illustrate this point, I draw on a story I learned years ago during my law practice. A member of a First Nation had his home broken into by a gang on the reserve and numerous items were stolen. The culprits were caught and eventually appeared in court

[172] Paul, William G. Judge. The Architecture of Justice in Northern Alberta. Unpublished paper. 2016 (referred to with permission by the writer).
[173] Paul, The Architecture of Justice in Northern Alberta, (2016) ii.
[174] Ibid.

where they received short prison sentences. The member attended and listened to the court proceedings. He was not interviewed or asked to make any statement in the court proceedings. The gang were members of his First Nation and were responsible for many break-ins on the reserve. Later, he confronted and fought one of the group. Later, he also took on the leader of the group who pulled out a knife in the ensuring fight, which resulted in the member being hospitalized with a serious knife wound. His take was that the gang members were scornful of the court proceedings and considered the sentences they received to be something to laugh at even though they involved incarceration. He confronted the individual members of the gang so that they would know he would retaliate if they broke into his home again. It was only in this way that he could keep his home safe from more break-ins. There were no further break-ins to his home. In his view, the criminal justice system had dealt with the offenders narrowly, with little regard to him or the First Nations community. He felt he was left with no other option. Yet, this was a dangerous development which comes from a systemic failure to fully consider the issues and circumstances of the offences more broadly.[175]

Would an Indigenous restorative justice approach be more effective? I would think a way could be managed with the criminal justice system and an Indigenous restorative justice program working in collaboration to confront the offenders and enable the court to craft a more salutary disposition. An example of a collaborative outcome was recounted by Chief Justice Lillies where the Elder Clan leaders unexpectedly recommended imposing a more severe sentence on an Indigenous offender for a relatively minor offence. They were aware of significant background circumstances not known to the Court.[176] When asked, the Clan Leaders explained the offender had a significant alcohol problem and needed to abstain for a significant period in order to begin addressing his addiction. In result, the Judge imposed a slightly longer period of incarceration, though not as long as recommended, coupled with probation that began with a five-week residential treatment program, in effect replicating the Elders' recommendation.[177]

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[175] I visited the First Nation member in the hospital him and asked why he took on confronting the members of the gang. I have withheld the name of the individual I spoke to as well as the community involved but the incident is important because it illustrates the disconnect between the Indigenous community and the criminal justice system.
[176] Lilles, Chief Judge, Tribal Justice: A New Beginning, Whitehorse, Yukon, (September 3-7, 1991), 13.
[177] Lillies explained that, after sentencing, the probation officer advised the judge, that the young man when drinking would assault his elderly parents who would not lay a complaint against their son. The Clan Leaders and the community were well aware of the situation.

Challenges for Indigenous Restorative Justice

As a result of the forceful imposition of the Canadian criminal justice system and its override of Indigenous justice, the Indigenous community's understanding of and adherence to the rules of Indigenous justice have been disrupted. While there are Indigenous members who currently understand and espouse the dictates of Indigenous justice, others do not and will not comply without something more. This would be especially true for Indigenous members whose conduct is harmful. Something more is needed to secure their cooperation and compliance with the Indigenous restorative justice process. In the view of the Indigenous communities which have launched Indigenous restorative justice initiatives, that something more is the court's capacity to compel compliance with the process, in other words, coercion.

Coercion

The Tsuu T'ina did not want cases directly referred to them by the police. They wanted charges laid and the application to peacemaking made on appearance in court. The legal scholar, Braithwaite, was of a similar view given his discussion of the relationship between restorative justice and coercion. He wrote:

> The first point to make is a factual one. Very few criminal offenders who participate in restorative justice processes would be sitting in the room absent a certain amount of coercion. Without their detection and/or arrest, without the specter of the alternative of a criminal trial, they simply would not cooperate with a process that puts their behaviour under public scrutiny. No coercion, no restorative justice (in most cases).[sic][178]

The Siksika also understood the need for this form of motivation. In the Siksika Aissimohki child protection mediations, the choice for the parents or guardians is reaching an agreement on child protection in mediation or having the matter return to continue to be heard in open court. The Bigstone Restorative Justice Committee also identified the need for the specter of punishment in the background as a need to motivate wrong doers who must address addictions as part of their

[178] Braithwaite, *Restorative Justice & Responsive Regulation,* 34

healing journey. Bigstone seeks to establish a Healing to Wellness Court where participants are helped but face periodic court reviews to confirm their compliance and progress in addressing their addictions. The prospect of returning to a punitive justice system provides motivation to participate and comply with addressing their addictions. This linkage between Indigenous restorative justice initiatives and the criminal justice system may be considered as a blend of Indigenous approaches and criminal justice approaches.

The blending of approaches also may provide for resolving Charter and Indigenous differences as well.

Charter Issues

The conflict between Indigenous and Canadian justice systems in the criminal justice process comes into sharp focus in the interplay between Indigenous notions of collective rights and Canadian notions of individual rights. More specifically, could the collective views of a First Nation's community offend an individual's legal rights?

David Milward asks, "What happens if and when Aboriginal individuals assert their legal rights under the Charter against Aboriginal justice systems?" He suggests the Royal Commission of Aboriginal Peoples concept of culturally sensitive interpretation of legal rights may be a way to make room for Indigenous justice approaches while protecting against abuse of the collective power of First Nations.[179] He cites *Dagenais v Canadian Broadcasting Corporation* for the proposition that when constitutional rights come into conflict with Indigenous rights in criminal matters, each must be accommodated as much as possible in a non-hierarchical approach.[180]

The nine Charter rights Milward identifies are the right to be presumed innocent until proven guilty beyond a reasonable doubt, the right to silence, the right to counsel, the right to contest guilt through adversarial procedures, the right to be heard by an independent tribunal, the right to natural justice, the right against unreasonable search and seizure, the right to have evidence obtained in the course of violating constitutional rights excluded, and the right against cruel and unusual punishment,

It is to be remembered that I have distinguished between Indigenous justice and Indigenous restorative justice. The latter arises when an Indigenous person has been charged

[179] RCAP, *Bridging the Cultural Divide*, 267.
[180] *Dagenais v Canadian Broadcasting Corporation* [1994] 3 S.C.R. 835.

with an offence and is before the criminal justice system. Individuals have the choice of seeking Indigenous restorative justice. If they do not agree, they remain in the criminal justice process. Moreover, if they are in the Indigenous justice process and refuse to participate then the Indigenous restorative justice process ends, and they return to the criminal justice process. This voluntary choice by an Indigenous individual charged with an offence to enter into the Indigenous justice process obviates the need to consider the right to contest guilt through adversarial procedures. However, there remain differences and conflict between Indigenous restorative justice approaches and the legal rights of individuals in the criminal justice system. These are ably and extensively discussed by Milward in his book, *Aboriginal Justice and the Charter*. I will also canvas some, though not all, of these conflicts.

An admission of 'guilt' is not an objective of Indigenous restorative justice. Rather it is an admission of responsibility by the wrong doer for his or her actions, which is not necessarily the same as an admission of guilt. This requirement flows from the Indigenous tradition of truth telling. For Indigenous communities, the mantra is "What is said in the circle, remains in the circle." Yet, such admissions of responsibility could go against the right to be silent. If an individual were to admit wrongdoing in the Indigenous restorative justice process and later return to the criminal justice process, there might be steps by a Crown prosecutor to subpoena individuals who participated in the circle to testify as to the admissions made by the offender. This could circumvent the right to remain silent.

Another is the right to be heard by an independent tribunal. Since Indigenous restorative justice involves community members in its processes, an independent or impartial body is not necessarily available. This may not be possible where the First Nation community is relatively small and consists of people who are related and have lived in close contact for generations. Milward suggests this may be addressed under the doctrine of necessity,[181] but I would suggest this issue calls for safeguards under the heading of fairness. The Tsuu T'ina approach was to seek peacemakers whom the community and the parties in the Indigenous restorative justice process would see as being fair. The Indigenous choice is fairness over impartiality.

[181] Milward, *Aboriginal Justice and the Charter*, 215. Milward suggests use of community members as decision makers who may be related to the parties could be allowed under the doctrine of necessity to avoid a situation where no one who is not related can be found as would likely be the case in smaller Indigenous communities.

Natural justice calls for an offender having the right to be heard. Indigenous decision-making arises in more informal processes where people may receive information others are not aware of. Where this may break down in an Indigenous restorative justice process is the circle hearing or relying on information a wrong doer is not aware or is not given the opportunity to speak to.[182] Such a decision becomes judicially reviewable if the person affected by the decision does not have an opportunity to learn of and speak that additional information. An Indigenous answer would be to specifically guard against such as being against the principle of fairness.

To recap, Milward suggests that a culturally sensitive interpretation of legal rights may make room for Indigenous restorative justice and when constitutional rights come into conflict with Indigenous rights in criminal matters, each must be accommodated as much as possible in a non-hierarchical approach.[183] I would concur.

Other Issues

I would also suggest two societal issues present challenges for Indigenous restorative justice. They both arise from power imbalance. The first is in domestic or sexual assaults. The second is an abuse of power in Indigenous communities. These problems are not unique to Indigenous communities, but they can potentially disrupt and destroy an Indigenous justice initiative. Moreover, they can be interrelated.

In domestic and sexual assault cases there is usually a power imbalance between the victim and offender. Properly done, Indigenous restorative justice can counter that power imbalance. Annalise Acorn argues that restorative justice replicates the pattern of domestic abuse where the abuser causes harm to the spouse and then seeks forgiveness by apologising to the spouse to induce continuation of the relationship. Restorative justice seeks acceptance of responsibility followed by forgiveness.[184] The Siksika Aissimohki process countered this argument in its family violence protocol, which made the event known in the community through

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[183] *Dagenais v Canadian Broadcasting Corporation* [1994] 3 S.C.R. 835.

[184] Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice*, (UBC Pres. Vancouver. 2004), 74; Bruce Archibald, Why Restorative Justice is not Compulsory Compassion: Annalise Acorn's Labour of Love Lost, *Alberta Law Review* 42:3, (2005): 941-950.

open court and compliance with enforceable court conditions including the prospect for future escalated prosecution. In effect, court involvement constituted a form of oversight.

Acorn took her criticism further in the case of sexual assaults. This situation would be worsened where a powerful or influential individual or family in the Indigenous community could intervene to protect the offender and corrupt the Indigenous restorative justice process. Bruce Miller described this type of abuse of power occurring in the South Vancouver Island Justice Education Project.[185] Elders pressured female victims to acquiesce to lighter sanctions for the sexual offenders. The situation was worsened where Elders themselves had been sexual offenders. The South Vancouver Island Justice Education Project subsequently collapsed under the controversy.

On the other hand, the Hollow Water Healing Circles dealt with sexual and familial incest, the worst of sexual assault cases. Their initiative was successful in prompting disclosure of numerous concealed offenses, addressing the difficult issue in over 60 cases with only two repeats, a result far superior to the track record of the criminal justice system. The decision to take on this difficult issue came about thusly. A core group of community members had been meeting and planning how to address alcohol abuse cases in their community. The subject of sexual assault came up and they decided to hold a secret survey amongst themselves with only two questions for the participants. Answers were written down anonymously on slips of paper. Have you ever been sexually assaulted? Have you ever sexually assaulted someone? The survey results shocked everyone. It was then they realized they had a profoundly serious community problem they needed to address.[186]

The Hollow Water Healing Circle was an intense process in which the offender first pled guilty in Court and sentencing was adjourned while Hollow Water began its healing circles. The Healing Circles were led by women with men supporting their work. The process was involved and intense. Berma Bushie explained that they still needed the Court to help them hold people accountable. After sentencing, which involved probation rather than incarceration, Hollow Water would hold community review sessions every six months. The offender had to explain to the

[185] Bruce Miller, *The Problem of Justice: Tradition and Law in the Coast Salish World*. (Lincoln: University of Nebraska Press. 2001), 198-199.
[186] Recounted by Berma Bushie and other members of the Hollow Water Healing Circles team in a Hollow Water briefing given to Tsuu T'ina members planning for the establishment of the Tsuu T'ina Peacemaking Court where the writer was present.

community that they had followed the probation conditions required of them and, if not, why they had not. Bushie explained that this court ordered community review was highly effective in maintaining compliance.[187] Again, as with Siksika, there was court oversight in support.

The takeaway is that there are challenges for successful operation of Indigenous Restorative Justice initiatives. The challenge posed by the resistance to change by the criminal justice system is necessarily met by the Indigenous thrust for self governance. The Royal Commission on Aboriginal Peoples concluded that Aboriginal peoples' inherent right of self government "encompasses the authority to establish Aboriginal justice systems that reflect and respect Aboriginal concepts and processes of justice.[188] The challenge of conflicting rights' values, individual rights versus collective rights, may be addressed, as RCAP proposes[189] and Milward builds on,[190]by a culturally sensitive interpretation of the Charter rights and s. 35 Aboriginal rights to accommodate both. Lastly, internal challenges arising because of power imbalances within the Indigenous community must be met by an Indigenous commitment to fairness and oversight by Elders and by the justice system. All of these challenges can be met given leadership, determination and resources.

[187] Berma Bushie (Hollow Water) Transcript of a presentation, August 25, 1994.
[188] RCAP, *Bridging the Cultural Divide*, 310
[189] RCAP, *Bridging the Cultural Divide*, 311
[190] Milward, *Aboriginal Justice and the Charter,* 214

Chapter Six

Conclusion

The criminal justice system operates on the principle of retributive justice. A crime is an offence against the state's rules for maintaining peace and good order. Offences call for escalating denunciatory and deterrent responses to deter the offender and others from committing offences. The problem is that this approach does not work well with marginalized persons whose offences in the main are caused by human failings, problems, and circumstances. This is especially true for Indigenous peoples whose worldview does not conform with conventional thinking about justice.

An alternative to the retributive justice approach arose in the mid-twentieth century. Advocates of restorative justice viewed crime as a rupture of relationships, a harm inflicted by the offender on the victim and community which called for the offender to acknowledge that harm, to make amends and to address, aided by the community, the underlying problems that lead to the crime. Restorative justice is based on restoring good relationships between persons and the community.

Indigenous restorative justice is not merely a variant of restorative justice. Nor is it an alternative to retributive nature of the criminal justice system. It is a response by Indigenous peoples to mitigate the adverse impact of the criminal justice system. Indigenous restorative justice seeks to aid the Indigenous offender to deal with the underlying causes of the harmful behaviour, heal and return to a good way of living with others. It is about restoring harmonious relationships. It was prompted by Indigenous Elders who were motivated to help their members who went astray and got caught up in the criminal justice system. For this reason, I chose the Anishinaabe term 'Naadamagewin' ('helping') to characterise this process.

I have differentiated Indigenous restorative justice from Indigenous justice although both have their roots in Indigenous cultures. I regard Indigenous justice as based on Indigenous concepts. One example would be the Anishinaabe sacred teachings of Honesty, Courage, Respect, Humility, Love, Truth, and Wisdom. These teachings are to guide Anishinaabe to live in a good way and honour relationships. This positive expression of Indigenous rules of conduct is capable of being regarded as law just as much as the negative prohibitions of criminal law. Indigenous restorative justice is about helping an individual return to living harmoniously in accordance with Indigenous laws. In this manner, Indigenous people seek to achieve peace and security in their communities.

A Way Forward

The Canadian process for achieving peace and security is expressed through the criminal justice system. The division of criminal justice between a constitutional federal power over criminal law and a likewise constitutional provincial power over the administration of justice has resulted into a solidly entrenched interlocking federal/provincial criminal justice system. The takeaway is the criminal justice system will continue to operate in today's world much as it has since Confederation. Yet, the Canadian criminal justice system has failed Indigenous peoples. The Royal Commission on Aboriginal Peoples stated this in its first and principal conclusion in its review of Indigenous justice issues. I repeat what RCAP stated:

> The Canadian criminal justice system has failed the Aboriginal peoples of Canada - First Nations, Inuit and Métis people - on-reserve and off-reserve, urban and rural - in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different worldviews of Aboriginal and

> non-Aboriginal people with respect to such element elemental issues as the substantive content of justice and the process of achieving justice.

There are discretionary and, more recently, legislative mechanisms which make room for Indigenous restorative justice to operate in conjunction with the criminal justice system. The need to establish Indigenous restorative justice systems was confirmed by the many Indigenous justice reports issued, culminating with the 1996 RCAP *Bridging the Cultural Divide* report; the overload in provincial and territorial courts; and the 2020 Correctional Investigator's dire forecast of increasing Indigenous over-incarceration.

At present there has been limited resort to Indigenous restorative justice options. The question becomes what is required to enable both the criminal justice system and Indigenous restorative justice to operate in a complimentary and beneficial manner.

The Alberta Task Force, in its *Justice on Trial* report, opined that Aboriginal Justice System was a matter of negotiation between the Indian and Metis people and the Governments of Canada and Alberta.

> The Task Force Recommends:
>
> 11.1 That we favour the view of the Canadian Bar association Native Law Subsection. Whether an Aboriginal Justice System should exist and its scope and extent, is a matter for negotiation between the Indian and Metis people and the Governments of Canada and Alberta. [191]

In its report, the Law Reform Commission of Canada stated:

[191] Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta. *Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta,* 11-5

> We accept the necessity to effect fundamental changes to the criminal justice system in order to ensure that Aboriginal persons are treated equitably and with respect. Equal access to justice in this context means equal access to a system that is sensitive to the needs and aspirations of Aboriginal people. … Nor does it invariably require a marked departure from the present one. It must, however, be a system that the Aboriginal peoples themselves have shaped and moulded to their particular needs.[192]

The Aboriginal Justice Inquiry of Manitoba concluded:

> The time to act is at hand. Aboriginal people will be able to find their way out of the destructive labyrinth to which they have been consigned, but only if federal and provincial governments take positive action to fulfil their historic responsibilities and obligations. In this manner, government can begin to build a new relationship with Aboriginal people based on respect, understanding and goodwill.[193]

Finally, RCAP pointed the way forward with its finding and recommendation that:

> Aboriginal nations have the right to establish criminal justice systems that reflect and respect the cultural distinctiveness of their people pursuant to their inherent right of self-government. This right is not absolute, however, when exercised within the framework of Canada's federal system. The contemporary expression of Aboriginal concepts and processes of justice will be more effective than the existing non-Aboriginal system in responding to the wounds that colonialism has inflicted and in meeting the challenges of maintaining peace and security in a changing world.[194]

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[192] Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice Report 34*, Ottawa, Law Reform Commission of Canada, (1991) 94.

[193] Aboriginal Justice Inquiry of Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba,* 674.

[194] RCAP, *Bridging the Cultural* Divide, 310.

The existing Indigenous restorative justice initiatives operated by First Nations have proven the viability of such initiatives, but more is needed. Room has to be made in the criminal justice system for Indigenous communities to become involved in a meaningful way, to allow them to draw on Indigenous peoples' knowledge, to alter the approach to achieving justice, and to help their people who are in conflict with the law, so that peace and security for all, Indigenous or Canadian, becomes the way forward.

In closing, if I were asked to describe Indigenous world view about justice and the process to achieve justice, like Elder Dan MacLean, my answer would be one word: 'Naadamagewin,' the Indigenous community helping those in need of help. Application of this Indigenous restorative justice paradigm is a way forward out of the justice morass arising from the criminal justice system's failure to ensure Indigenous peoples can enjoy the benefits of a just system that allows Indigenous people and communities to enjoy peaceful and secure lives.

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