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Karen Whonnock, BA, JD, LLM



ABORIGINAL COURTS IN CANADA

Our vision of the future of our justice system is that it will promote the healing of First Nations individuals, families and communities and provide the flexibility to accommodate the cultural, geographic, and linguistic diversity of our peoples, not only on and off reserves but also in the urban setting. Strengthening our families, protecting First Nations people from injury, and restoring the traditional core values that once guided our people in regard to justice constitute the ultimate purpose of our justice initiatives.¹

1. Introduction

What is an Aboriginal court? Some would say that it is the development of a unique, Aboriginal culturally based justice system that serves Aboriginal peoples. As the quote above reflects, it would be sensitive to and reflect the local Aboriginal population and be a comprehensive system that incorporates healing and restoration of balance.

This paper explores the different kinds of Aboriginal courts in Canada, starting first with the crucial issue of jurisdiction, which determines:

- The subject matter of the court; that is, does it cover criminal law, family law, small claims, and so on?
- Personal jurisdiction; that is, does it have jurisdiction over Aboriginal citizens or only citizens of one particular First Nation? Or over all Canadian citizens including non-Aboriginal persons?
- Geographical jurisdiction; that is, what territory or land does the court have powers over?

¹ Federation of Saskatchewan Indian Nations, “Indian Justice: Our Vision” (Saskatoon: 1997), 2:3.

The jurisdiction of Aboriginal courts is examined here under three main topics:

- Federal and provincial powers, self-government rights, and negotiated agreements
- Existing Aboriginal courts (Tsuu T'ina Court, Cree-speaking courts, Gladue Court, and First Nations Court)
- Development of Aboriginal courts considering the *Charter of Rights and Freedoms*, criminal and personal jurisdiction, and uniformity

Of course, the first question is why should there be an Aboriginal court in Canada at all? The Royal Commission on Aboriginal Peoples² notes that the current Canadian criminal justice system has failed the Aboriginal peoples of Canada. Others argue that minor attempts to accommodate Aboriginal peoples are not working.³ Some suggest that the price is too high to adapt ourselves and our culture to the Anglo-Canadian system.⁴ And still others argue that Aboriginal courts are required to deal with the crisis of Aboriginal people with the Western legal system⁵ because Native people feel their value systems and beliefs are excluded.⁶ Certainly, it has become clear that the current legal system is not working and not inclusive for Aboriginal people.

Reflecting that view, the Indigenous Bar Association argues that Aboriginal courts are needed to address the inability of the present Western system to respond to Aboriginal oral history, the adversarial process, and the history of exclusion of sovereign Aboriginal nations.⁷ However, some argue that an Aboriginal court by itself would be inadequate and that what is needed is a comprehensive Aboriginal justice system that includes Aboriginal courts along with Aboriginal judges, police, support services, healing processes, and a different sort of jail.⁸ This argument supports a parallel Aboriginal Court system:

² Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Canada Communication Group Publishing, 1996).

³ Leroy Little Bear, "An Independent Native Judiciary" in A.P. Morrison, ed., *Justice for Natives: Searching for Common Ground* (Kingston, ON: McGill-Queen's University Press, 1994), 286.

⁴ Little Bear, *ibid.* at 290.

⁵ Urban Alliance on Race Relations, "An Aboriginal Justice System" (1990) 6(3) *Currents* 14–16.

⁶ Little Bear, *supra* note 3, at 291.

⁷ Indigenous Bar Association Spring 2002 Symposium on Specialized Tribunals and First Nations Legal Institutions, *Final Report* at 4 (hereafter cited as "IBA").

⁸ Hon. Alvin C. Hamilton, *A Feather Not a Gavel: Working Towards Aboriginal Justice* (Winnipeg: Great Plains Publications, 2001), 194.

An Aboriginal Court would augment the services of the Provincial and Superior Courts and would take nothing of significance from them. It would operate with three objectives in mind: to deal with criminal and civil matters in a fair and effective manner; to apply culturally appropriate methods; and to stop the incarceration of so many people.⁹

2. Jurisdictional issues

The jurisdictional powers of any court, including an Aboriginal court, are directly related and linked to the manner in which the court is created. The jurisdiction of a court may be over persons, lands or territories, and subject matter. If a court has no jurisdiction, then it cannot proceed to make rulings over a person who comes before it.

There are several ways in which Aboriginal courts can be created: under federal or provincial legislation, through inherent Aboriginal rights under section 35 of the *Constitution Act, 1982*,¹⁰ or through negotiated agreements.

a. Federal legislation

Provisions in the *Indian Act*,¹¹ such as section 107, allow for the creation of an Aboriginal court on any reserve in Canada:

The Governor in Council may appoint persons to be, for the purposes of this Act, justices of the peace and those persons have the powers and authority of two justices of the peace with regard to

(a) any offence under this Act; and

(b) any offence under the *Criminal Code* relating to cruelty to animals, common assault, breaking and entering and vagrancy, where the offence is committed by an Indian or relates to the person or property of an Indian.”

⁹ Hamilton, *ibid.* at 196.

¹⁰ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11

¹¹ *Indian Act*, R.S.C. 1985, c. I-5, s. 19(a) (hereafter cited as “*Indian Act*”).

However, some have expressed concern about the extent of flexibility of this section in terms of creating an Aboriginal justice system.¹² The Aboriginal Justice Inquiry of Manitoba¹³ has referred to section 107 courts as “Indian agent courts,” which historically were created to empower non-Native Indian agents on reserves.¹⁴ These courts are viewed as degrading, colonial, limited, and directly in opposition to the inherent Aboriginal and treaty rights that First Nations seek to further.¹⁵ This leaves the question of whether a section 107 court is a true Aboriginal court, as it would stem from a very negative piece of legislation for Aboriginal peoples, the *Indian Act*.

Although federal power exists to create justices of the peace under section 107 anywhere in Canada on reserve land, there have been very limited appointments, which appear to be in the eastern provinces only.¹⁶ Currently there are only three section 107 Aboriginal justice of the peace courts, all of which are in Quebec: Pointe-Bleue, Kahnawake, and Akwesasne.¹⁷ It is not clear why these are only the only three section 107 courts in existence in Canada and why the western provinces and territories have not used this section of the Indian Act.¹⁸

A justice of the peace in these courts would have criminal jurisdiction over *Indian Act* violations and summary offences created by federal regulations (e.g., logging, mining, and traffic).¹⁹ The court could also deal with band council bylaw violations, and if it incorporated by reference all provincial legislation, then it would have all the powers of a regular Provincial Court, such as family matters (including divorce and division of property), criminal matters, small claims, and so forth.²⁰ A justice of the peace could

¹² Gary Youngman, *S. 107 and Other Alternative Justice Systems for Indian Reserves in BC* (Vancouver: Canada (Dept. of Indian Affairs), 1978), 18.

¹³ Alvin C. Hamilton and C. Murray Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The justice system and Aboriginal people* (Winnipeg: Queen’s Printer, 1991) <http://www.ajic.mb.ca/volume.html> (accessed April 16, 2008), vol. 1, chap. 7—Aboriginal Justice Systems.

¹⁴ Matthias R.J. Leonardy, *First Nations Criminal Jurisdiction in Canada* (Saskatoon: Native Law Centre, 1998), 282.

¹⁵ Leonardy, *ibid.* at 288.

¹⁶ Youngman, *supra* note 12, at 21.

¹⁷ Leonardy, *supra* note 14, at 289.

¹⁸ Note as well that there is little public material on this subject and much of it is dated.

¹⁹ Leonardy, *supra* note 14, at 283.

²⁰ Leonardy, *ibid.* at 284.

issue search warrants²¹ as well as peace bonds between the parties,²² and may have civil jurisdiction, especially over child welfare and marriage.²³

Other provisions of the *Indian Act*, such as sections 73 and 81, give the band council very limited legislative powers to create bylaws.²⁴ Some ponder whether this could be an appropriate venue for more Aboriginal control of the administration of justice on reserve.²⁵ However, even this approach would require ministerial approval, which could be refused.²⁶ One example of a band successfully using sections 81 and 83 of the *Indian Act* is the Spallumcheen child welfare bylaws, which led to social service and treatment programs and has generated community pride.²⁷

Some argue that the *Indian Act* could be amended, or new federal legislation created, to permit the development of Aboriginal courts.²⁸ Others argue that a federal First Nations court could be created under section 101 of the *Constitution Act of 1867*²⁹ “for the better administration of the Laws of Canada” or under section 91 (27) of the *Criminal Code*.³⁰ And still others argue that the *Constitution Act, 1982* should be amended to make space for Aboriginal self-determination, including the administration of justice.³¹

²¹ Pursuant to s. 103(4) of the *Indian Act* according to Leonardy, *ibid.* at 285.

²² Pursuant to the “preventive justice” provisions of s. 810 of the *Criminal Code*, R.S.C. 1985, c. C-46 (hereafter cited as “*Criminal Code*”), according to Leonardy, *ibid.* at 285.

²³ Leonardy, *id.*

²⁴ Youngman, *supra* note 12, at 19.

²⁵ Youngman, *ibid.* at 19.

²⁶ Bradford W. Morse, *Indian Tribal Courts in the United States: A Model for Canada?* (Saskatoon: University of Saskatchewan Native Law Centre, 1980), 24.

²⁷ Jonathan Rudin and Dan Russell, *Native Alternative Dispute Resolution Systems: The Canadian Future in Light of the American Past* (Toronto: Ontario Native Council on Justice, 1993), 64. It should be noted that this is an example of band bylaws and it is not by any means an example of an Aboriginal court or being used in Aboriginal court.

²⁸ Morse, *supra* note 26, at 27. Morse argues that a hypothetical example of “The Indian and Inuit Court Act” under s. 91(24) should be created to allow for future Aboriginal courts.

²⁹ *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3.

³⁰ Leonardy, *supra* note 14, at 291–292; *Criminal Code*, *supra* note 22.

³¹ Rudin and Russell, *supra* note 27, at 65.

b. Provincial legislation

Clearly it is possible for Aboriginal courts to come under provincial jurisdiction, as is the case with all existing Aboriginal courts in Canada. In fact, some argue that Aboriginal courts should become part of the Provincial Court system.³² One proposal is for a unified “House of Justice” where Aboriginal peoples could adjudicate their own disputes but also utilize provincial services and programs. In the House of Justice model, Aboriginals would enjoy the best of both worlds and could apply Aboriginal laws or non-Native laws depending on the context:

...the *House of Justice* could have many different options within it to pursue the resolution of disputes. There could be functions for peacekeepers, elders, mediation, adjudication, and justices of the peace. In a reserve setting a *House of Justice*, as part of a unified court structure, could solely apply the laws of the treaty nation of which they are a part.³³

c. Inherent right to self-governance

An argument exists that First Nations could, without negotiations with the Canadian government, “simply assert their jurisdiction to resolve internal disputes amongst their members within their territory [so that] laws would be formally enacted or customary laws revived to be applied in settling legal problems.”³⁴ In fact, the Indigenous Bar Association has stated that Aboriginal courts are a right of self-government.³⁵

It is unclear how an Aboriginal court under section 35 of the *Constitution Act, 1982* would differ from one of the models of existing Aboriginal courts. In *Campbell v. British Columbia (Attorney General)*,³⁶ the British Columbia Supreme Court decided that Aboriginal self-government rights have not been extinguished by the passage of

³² Hon. Gerald T.G. Seniuk and John Borrows, “The House of Justice: A Single Trial Court” in *Final Report —Volume II: Submissions to the Commission* (Saskatchewan: Commission of First Nations and Metis Peoples and Justice Reform, 2004)

<http://www.justicereformcomm.sk.ca/docs/HouseofJusticefinal1.pdf> (accessed April 16, 2008), 4–5.

³³ *Id.*

³⁴ Morse, *supra* note 26, at 22.

³⁵ IBA, *supra* note 7, at 2.

³⁶ *Campbell v. British Columbia (Attorney General)*, 2000 BCSC 1123, 79 B.C.L.R. (3d) 122.

time or the Constitution, and that those inherent Aboriginal rights are constitutionally guaranteed by section 35. The application of the *Campbell* decision to Aboriginal courts would then indicate that if a band wished to start its own Aboriginal court, it would appear to be protected under section 35.

d. Self-government agreements

Although treaties or self-government agreements do not bring immediately to mind Aboriginal courts, many of these agreements do contain provisions for the administration of justice. Only two of the many self-government agreements are discussed here: the James Bay and Northern Quebec Agreement and the Yukon First Nations Self-Government Agreement.

James Bay and Northern Quebec Agreement (“JBNQA”), 1975 (Que.)

Sections 18 (Crees) and 20 (Inuit) of the James Bay and Northern Quebec Agreement (“JBNQA”), 1975 (Que.) provide for the administration of justice through criminal courts.³⁷ Out of the JBNQA arose some accommodation in the Abitibi District Court. The Itinerant Abitibi District Court provides for four circuit court judges with jurisdiction over all civil, criminal, penal, and statutory matters excluding indictable offences under the JBNQA.³⁸ Personal jurisdiction over both Native and non-Native offenders and appeals are heard at the Court of Appeal sitting in Quebec.³⁹ The two aspects to the administration of justice under the JBNQA are indigenous participation and the reconciliation between indigenous values and Anglo-Canadian laws.⁴⁰

³⁷ Leonardy, *supra* note 14, at 298.

³⁸ Leonardy, *ibid.* at 298.

³⁹ Leonardy, *ibid.* at 299.

⁴⁰ *Id.* However, in 1998, 20 years after the JBNQA was signed, the Inuit and Cree expressed feelings of alienation due to the Anglo-Canadian legal system imposed on them. On February 7, 2002, the Grand Council of Crees signed the Agreement Concerning A New Relationship Between the Government of Quebec and the Crees of Quebec that will look at the unresolved and outstanding issues, including the administration of justice. There is no public material on the outcome of the 2002 agreement.

Yukon First Nations Self-Government Agreement, 1993 (Yukon)

In the Yukon First Nations Self-Government Agreement,⁴¹ there are framework provisions for all Yukon First Nations to negotiate for their own design, delivery, and administration of justice. However, as of 2008, there are no Aboriginal courts in existence under this agreement.

The agreement indicates that all Yukon First Nations may enact laws of a local nature with regard to their own land and welfare. This means that all Yukon First Nations may create and enforce legislation relating to the land and welfare, similar to municipal powers, and may include regulations pertaining but not limited to land-use planning, water use, school, health, social services, animals, the environment, and business.

Since this agreement was reached, several First Nations have entered into self-government agreements outlining the provisions for their courts, such as Kluane First Nation, Ta'an Kwach'an Council, Tr'ondek Hwech'in, Little Salmon/Carmacks, Selkirk First Nation, Vuntut Gwitchin, Teslin Tlingit, Nacho Nyak Dun, and Champagne and Aishihik First Nations.⁴² These nine self-government agreements are almost identical in terms of administration of justice, which is found in Part III, Section 13.6.0 in each of them. Each First Nation is able to negotiate the details and specifics of their own court (within the above framework provisions), including adjudication, civil remedies, and punitive sanctions including fines, penalties, and imprisonment. Each may also enforce any of their laws through prosecution and corrections.

⁴¹ *Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon*, 1993

⁴² See Kluane First Nation Self-Government Agreement, 2003; Ta'an Kwach'an Council Self-Government Agreement, 2003; Tr'ondek Hwech'in Self-Government, 1998; Little Salmon/Carmacks First Nation Self-Government Agreement, 1997; Selkirk First Nation Self-Government Agreement, 1997; Vuntut Gwitchin First Nation Self-Government Agreement, 1993; Teslin Tlingit Council Self-Government Agreement, 1993; Nacho Nyak Dun First Nation Self-Government Agreement, 1993; and Champagne and Aishihik First Nations Self-Government Agreement, 1993.

3. Current Canadian Aboriginal courts⁴³

As has been discussed, the creation of an Aboriginal court can be pursued through federal and provincial legislation, inherent Aboriginal rights, and negotiated agreements. The existing Aboriginal Courts discussed below share one thing in common: they are all part of the Provincial Court systems.

The first Aboriginal court in Canada, the Tsuu T'ina First Nation Court (also called the Tsuu T'ina Peacemaking Court), was established in October 2000 in Alberta. Approximately one year later, the Cree-speaking Court opened in Saskatchewan. At the same time, the Gladue (Aboriginal Persons) Court opened in downtown Toronto, making it the first urban Aboriginal court. The most recent Aboriginal court is the First Nations Court in New Westminster, British Columbia, established in November 2006.

a. Tsuu T'ina First Nation Court in Alberta

The Tsuu T'ina First Nation members are Dene people, numbering approximately 1,800 and living southwest of Calgary, Alberta.⁴⁴ On October 6, 2000, the Tsuu T'ina Peacemaker Court started operations just west of Calgary. It is "situated on the Reserve with jurisdiction for criminal, youth and bylaw offences committed on the Tsuu T'ina Reserve."⁴⁵ The Tsuu T'ina Court is a marriage of two separate systems, the Alberta Provincial Court and the peacemaker process, which work together in a unique way.⁴⁶

⁴³ The attention devoted to the Tsuu T'ina court in this paper is simply a reflection of the publicly available materials at the time of writing, which in turn exist because this court is the first Aboriginal court in Canada and has existed longer than the other three courts discussed here.

⁴⁴ Hon. L.S. Tony Mandamin, "Peacemaking and the Tsuu T'ina Court," in Wanda D. McCaslin, ed., *Justice as Healing: Indigenous Ways. Writings on Community Peacemaking and Restorative Justice from the Native Law Centre* (St. Paul, MN: Living Justice Press, 2005), 349–355.

⁴⁵ "Peacemaking," *ibid.* at 1.

⁴⁶ Joan Ryan and Brian Calliou, *Aboriginal Restorative Justice Alternatives: Two Case Studies* (Ottawa: Law Commission of Canada, January 2002), 36.

The Tsuu T'ina personal jurisdiction includes Tsuu T'ina members, native non-Tsuu T'ina members, and non-natives as it is a Provincial Court.⁴⁷ The primary objective of the court is "to make peace between the victim, wrongdoer and the community, using the traditional values and beliefs of the Tsuu T'ina people."⁴⁸ The mandate of the court is "to resolve problems, investigate and discover the root causes of the behaviour which has translated into criminal activity or disharmony in the community or among families."⁴⁹

The Tsuu T'ina Court reflects Tsuu T'ina culture. The beaver is the totem of the people⁵⁰ and the Tsuu T'ina administration building is shaped like a beaver dam. The inner part of a beaver dam is a beaver den, which is what the courtroom reflects.⁵¹ Other Tsuu T'ina traditions used in the court include starting proceedings with the smudging of sage or sweet grass and a prayer for guidance. The presiding judge wears a Tsuu T'ina medallion, and even the court clerks' attire is different, with an embroidered display of the sacred symbol of the eagle feathers.⁵²

If a person wishes to plead "not guilty" and enter into a trial, then the Tsuu T'ina Court proceeds under regular Provincial Court proceedings. On the other hand, if the accused wishes to plead "guilty," there are peacemaking provisions that can be used. First, both victim and offender must consent to Tsuu T'ina First Nation peacemaking system or else the Western justice system is used.⁵³ Second, the offender must say "yes, I did it" and "I agree to all the facts surrounding the case" before it can be accepted into peacemaking.⁵⁴ Third, the peacemaking will include elders, support persons, accused, victim, and community members.

⁴⁷ Ryan and Calliou, *ibid.* at 38.

⁴⁸ Norma Large, "Healing Justice" (May/June 2001) *Alberta Views* 20.

⁴⁹ Marion E. Bryant, "Tsuu T'ina First Nations: Peacemaker Justice Systems" (February/March 2002) *LawNow* 17.

⁵⁰ Justice for Youth, "Justice Dealt in a Beaver Lodge" (February 8, 2004)

http://www.justice4youth.com/main/article.php?article_id=36 (accessed April 16, 2008).

⁵¹ Justice for Youth, *id.*

⁵² Peacemaking, *supra* note 44, at 2.

⁵³ Large, *supra* note 48, at 23.

⁵⁴ Human Services Consulting Group, *Tsuu T'ina First Nation Court and Peacemaker Justice System: An Evaluation* by Allen Consulting & Training and BIM Larsson & Associates (April 2004), 5 (hereafter cited as "*Tsuu T'ina Evaluation*").

The peacemaking process will result in a plan of action that may include restitution, apologies, addiction treatment, public service, or a traditional feast.⁵⁵

Recent developments

Judge L.S. “Tony” Mandamin was appointed to the bench in 1999 as a judge in both the Tsuu T’ina Court and regular Provincial Court in Calgary. He is an Ojibway, a member of Wikwemikong First Nation in Ontario. Judge Mandamin has indicated that the court will preside over family and civil matters in the future.⁵⁶

The strengths of the Tsuu T’ina Court are that it allows community participation, a sense of ownership, accessibility, victim participation, and offender shaming.⁵⁷ As well, there is a community perception that peacemaking is successful and working and provides a support network for the offender.⁵⁸ Other identified benefits are having Aboriginal role models working in the criminal justice system and building community trust.⁵⁹

In April 2004, an independent evaluation was released⁶⁰ that made many recommendations to strengthen the program further:

- Undertake public awareness activities to educate the community about the court and peacemaking services
- Encourage youth aged 15 to 19 years old to access peacemaking
- Postpone the implementation of Family Court while this matter is reviewed with the community

⁵⁵ AmyJo Ehman, “A People’s Justice” (June/July 2002) [Canadian Bar Association] *National* 12 at 15.

⁵⁶ Nicky Brink, “Canada’s First Native Court: Peacemaking initiative topics at Calgary Town Hall Meeting” (February 9, 2001) 20(37) *The Lawyers Weekly* 1. Note that Judge Mandamin was appointed to the Federal Court of Canada on April 27, 2007, and has not presided over Tsuu T’ina Court since July 2007. Justice Mandamin is the first Aboriginal judge to be appointed to the Federal Court of Canada. As of April 2008, there are no public materials or announcements on a new judge for Tsuu T’ina.

⁵⁷ Law Commission of Canada, *supra* note 46, at 43–45.

⁵⁸ *Tsuu T’ina Evaluation*, *supra* note 54, at 25–26.

⁵⁹ *Ibid.* at 37–40.

⁶⁰ *Tsuu T’ina Evaluation*, *supra* note 54, at 9–12.

- Improve data collection, including tracking offenders post-disposition for at least five years to develop a long-term evaluation
- Support elders for court attendance, case briefing, and follow-up
- Conduct a needs assessment related to the Office of the Peacemaker job function, hire more peacemakers, and improve their training
- Provide separate, secure, and private facilities for the Office of the Peacemaker
- Provide formal training for defence counsel who want to practise in Tsuu T'ina
- Produce written criteria and procedures for the peacemaking process
- Review availability and need for added resource programs
- Review the court sitting to determine if additional time is needed⁶¹

b. Cree-speaking Court in Saskatchewan

On January 26, 2001, the appointment of Judge Gerald Morin, a Cree member of the Cumberland House First Nations, to the Provincial Court of Prince Albert was announced.⁶² Judge Morin was appointed to help develop the Cree-speaking Court, which commenced in October 2001.

The Cree-speaking Court is based in Prince Albert and travels to Pelican Narrows, Sandy Bay, Montreal Lake, and Big River First Nation. On docket day, the court may handle as many as 170 files.⁶³ The court party includes a clerk, crown counsel, and defence counsel.

The entire court party can speak and understand both Cree and English, and all offenders brought to the court may request to speak in either language.⁶⁴ “By using the traditional language, the Cree Court provides the accused, who is in conflict with

⁶¹ *Ibid.* at 51–57.

⁶² Wanda McCaslin, “Saskatchewan Holds Court in Cree” in Wanda McCaslin, ed., *Justice as Healing: Indigenous Ways. Writings on Community Peacemaking and Restorative Justice* (St. Paul, MN: Living Justice Press, 2005).

⁶³ Ehman, *supra* note 55, at 15.

⁶⁴ Saskatchewan, Final Report of the Commission on First Nations and Métis Peoples and Justice Reform (2004), <http://www.justicereformcomm.sk.ca/> (accessed April 15, 2008) (hereafter cited as “Commission on First Nations and Metis Peoples and Justice Reform”), 6-9.

the law, the opportunity to give full answer to the charge.”⁶⁵ Some examples of Cree concepts include “Eh-kakeepatchsit, one who makes a mistake. The mistake can be minor or major but does not reflect a pattern”⁶⁶ and “Eh-keetimakissit, one who is impoverished of social skills, including, but not limited to alcohol and drug addictions.”⁶⁷

While the communication greatly enhances the court, it is the understanding and expertise by the court team that really makes the court effective and credible.⁶⁸ The Cree-speaking Court relies “heavily on youth justice workers, probations officers and the Tribal Council court/mediation workers.”⁶⁹

One important element of the court is peacemaking, allowing the parties to mediate outside of court through an agency such as Prince Albert Grand Council mediation services. Even serious charges, such as assault with a weapon, could be mediated through the peacemaker process.⁷⁰

Recent developments

The initial evaluation of the implementation of the Cree-speaking Court indicated that it is appreciated in the reserve communities where it operates.⁷¹ A second phase of the evaluation is now underway; it will show the impact of the Cree-speaking Court on the reserve communities.⁷²

The Commission on First Nations and Métis Peoples and Justice Reform (2004) viewed the Cree-speaking Court as very successful and recommended the expansion of the

⁶⁵ McCaslin, *supra* note 62.

⁶⁶ Hon. Gerald Morin, “The Cree Court in Saskatchewan” (Summer 2005) 28(1) *Provincial Judges’ Journal* 49.

⁶⁷ Morin, *ibid.* at 49.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Commission on First Nations and Métis Peoples and Justice Reform, *supra* note 63, at 6-13.

⁷¹ Saskatchewan, Legislative Assembly, Standing Committee on Intergovernmental Affairs and Infrastructure (April 16, 2007) 42 *Hansard Verbatim Report* 32.

⁷² *Id.*

peacemaker functions, more community involvement, and more funding for community programs.⁷³ The Commission also suggested that other courts should copy the Cree-speaking Court by using First Nations languages.⁷⁴

Dene-speaking Court

In December 2006, Saskatchewan's Cree-speaking and Dene-speaking Court commenced circuit court sittings from Meadow Lake and will travel to English River, Buffalo River, Canoe Lake, and Big Island Lake. This reflects an expansion of the first Cree-speaking Court services. This court will provide the public with their choice of English, Cree, or Dene languages through translators. Judge Donald J. Bird, a member of Montreal Lake Cree Nation who speaks Cree, will preside over the new service.⁷⁵

The Dene-speaking Court will have Dene interpreters available. Like the Cree-speaking Court, it will also use restorative justice. Judge Bird states that this court increases public accessibility to justice since the locations are so remote.⁷⁶

⁷³ Commission on First Nations and Métis Peoples and Justice Reform, *supra* note 63, at 6-13.

⁷⁴ Commission on First Nations and Métis Peoples and Justice Reform, *ibid.* at 6-9.

⁷⁵ There is no indication in the publicly available materials that Judge Bird is able to speak Dene; however, there will be Dene interpreters available.

⁷⁶ Saskatchewan Courts, News Release (December 1, 2006).

c. Gladue (Aboriginal Persons) Court in Ontario (“Gladue Court”)

Gladue Court started in downtown Toronto at Old City Hall in October 2001. The purpose of the Gladue Court is to implement the Supreme Court of Canada’s decision in *R. v. Gladue*,⁷⁷ and to fully realize section 718.2(e) of the *Criminal Code*.⁷⁸ The judiciary, staff, lawyers, and workers of the Gladue Court give full consideration to the unique circumstances of adult Aboriginal accused and Aboriginal offenders. The Gladue Court offers bail hearings and variations, remands, trials, and sentencing.⁷⁹ It is voluntary and open to First Nations, Metis, or Inuit who identify themselves as such.⁸⁰

Each caseworker presents a “Gladue report” on the accused’s childhood, family, education, discrimination, and addictions for the court to consider.⁸¹ Note that this report should not be confused with a pre-sentence report as there are important differences. A Gladue report is more in-depth and put the offender’s situation into the Aboriginal context. It also addresses ways in which the Aboriginal offender may have been a victim of colonization or not been provided with a meaningful opportunity to succeed in life, residential school experience or effects, and his or her ties to the Aboriginal community, Aboriginal cultures, and Aboriginal values. The Gladue report will not excuse criminal behaviour, but it provides valuable information to the court in making a sentence that is fit, proportionate, and unique to the Aboriginal offender with emphasis on rehabilitation where the community safety is not at risk.

⁷⁷ *R. v. Gladue*, [1999] 1 S.C.R. 688 [hereafter cited as “*Gladue*”].

⁷⁸ Ontario Court of Justice, Old City Hall, Fact Sheet, “*Gladue* (Aboriginal Persons) Court” (October 3, 2001). Section 718.2(e) requires that the court take into consideration all available sanctions other than imprisonment that are reasonable in the circumstances for all offenders, with particular attention to the circumstance of Aboriginal offenders. So when it is safe to do so and there is a viable option to the court, the court must consider releasing offenders, in particular Aboriginal offenders in response to the epidemic of their over-incarceration.. This does not mean that Aboriginal offenders will receive lighter sentences. The important Supreme Court of Canada decision, *R. v. Gladue*, was the first case to interpret s. 718.2(e) and provide the analysis required when sentencing Aboriginal offenders. This is sometimes referred to as Gladue analysis.

⁷⁹ Ontario Court of Justice, *id.*

⁸⁰ Ontario Court of Justice, *id.*

⁸¹ David Gambrill, “Toronto sole provider of Gladue-type Court” (June 23, 2003) *Law Times* at 5.

The Gladue Court caseworker, as an Aboriginal, can often establish a rapport with the Aboriginal offender, which can help move the process further along.⁸² Essential to this process is the application of Gladue to bail situations, which can motivate the accused to demonstrate progress to the Gladue Court prior to trial.⁸³

Recent developments

The Gladue Court in Old City Hall in downtown Toronto has expanded from operating one and a half days a week to five days a week in three different locations (Old City Hall, 1000 Finch Court, and College Park). Other jurisdictions have expressed an interest in starting their own Gladue courts, but to date none have done so.⁸⁴

There have been two formal written evaluations of the Aboriginal Legal Services of Toronto Gladue Caseworker Program (Year One October 2004–September 2005 and Year Two October 2005–September 2006),⁸⁵ which are available on the Aboriginal Legal Services of Toronto website.⁸⁶ Both evaluations focus on the Gladue caseworkers and Gladue reports provided to the Gladue courts. These evaluations found that the Gladue reports:

- Are helpful in format and structure
- Allow the court to follow the requirements of section 718.2(e) of the *Criminal Code*
- Provide a sound basis for sentencing
- Can result in changes to Crown Counsel's submission on sentence

⁸² Ontario Court of Justice, *supra* note 78, at 9.

⁸³ Gambrill, *supra* note 81, at 5.

⁸⁴ Gambrill, *ibid* at 5.

⁸⁵ Campbell Research Associates, *Evaluation of the Aboriginal Legal Services of Toronto Gladue Caseworker Program, Year One, October 2004–September 2005* (Mississauga: Campbell Research Associates, 2006) and *Evaluation of the Aboriginal Legal Services of Toronto Gladue Caseworker Program, Year Two, October 2005–September 2006* (Mississauga: Campbell Research Associates, 2006).

⁸⁶ Aboriginal Legal Services of Toronto website <http://www.aboriginallegal.ca/> (accessed April 16, 2008).

Other issues identified in the evaluations include:

- Aboriginal offenders are benefiting through the rehabilitation plan and practical options being presented, and by sentencing being more tailored to individual needs
- Overall court efficiency has improved because some of the lengthier cases are now in the Gladue courts, which are able to dedicate more time to sentencing
- Judges, crown counsel, defence counsel, and court workers report a high level of satisfaction with the court
- There are some issues regarding the length of time for Gladue reports to be prepared, particularly when the offender is incarcerated.

d. First Nations Court in New Westminster, BC

The First Nations Court commenced sitting with little fanfare in November 2006 in New Westminster, BC.⁸⁷ This Aboriginal court is presided over by the Honourable Judge Marion Buller Bennett, a member of the Mistawasis First Nation, the only First Nations female judge in British Columbia. This court is in fact, a judicial initiative of Judge Buller Bennett,⁸⁸ and it has been quietly operating for almost two years as a pilot project with no budget,⁸⁹ sitting once a month to hear two to three cases.⁹⁰

The First Nations Court can consider guilty pleas for any criminal offence, but so far has dealt only with summary conviction matters.⁹¹ The court will hear about the offenders' education, employment history, past criminal history, extended family, housing and health needs, and availability of community-based resources.⁹² It will also consider related family court files and involve the entire family where appropriate.⁹³

⁸⁷ Correspondence with the Hon. Marion Buller Bennett, presiding judge of the New Westminster First Nations Court.

⁸⁸ Pete McMartin, *The Vancouver Sun*, "Native Court in New West Tests Holistic Remedy" (February 15, 2008).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Correspondence with the Hon. M. Buller Bennett, *supra* note 87.

The court is held in a conference room around a large table, and proceedings are recorded. Taking part in the proceedings are a judge, crown and defence counsel, the offender and family members, probation officers, social workers, alcohol and drug counselors, and court workers.⁹⁴ Children are also welcome and quiet toys are provided.

The charge is read to the offender and a guilty plea is entered. After crown counsel describes the offence and its position on sentencing, everyone around the table has an opportunity to speak.⁹⁵ If there is a family or youth matter before the court, then that can be included in the discussion. After everyone has had an opportunity to say everything they need to say, the discussion ends.⁹⁶

After the discussion, there is a healing plan created to address the root cause of the criminal act and provide the offender with the help and support that he or she needs.⁹⁷ The healing plan may include probation officers, Native court workers, alcohol and drug counsellors, and other support services.⁹⁸ Consent agreements⁹⁹ aim to complement the healing plan and to ensure there are no conflicting terms. Afterward, there are review hearings to review progress and, if necessary, to change the healing plan.¹⁰⁰

Recent developments

The Honourable Judge Buller Bennett indicates that there are plans to expand the First Nations Court so that it becomes an urban circuit court in the Vancouver/Lower Mainland area.¹⁰¹ Hopefully this will start in 2008 with a dedicated court team consisting of a judge, lawyers, and service providers.

⁹⁴ McMartin, *supra* note 88.

⁹⁵ *Id.*

⁹⁶ Correspondence with the Hon. M. Buller Bennett, *supra* note 87.

⁹⁷ *Id.*

⁹⁸ McMartin, *supra* note 88.

⁹⁹ Consent agreements are written agreements or understandings reached between the parties.

¹⁰⁰ Correspondence with the Hon. M. Buller Bennett, *supra* note 87.

¹⁰¹ *Id.*

4. Outstanding issues

The Tsuu T'ina Court in Alberta, the Cree- and Dene-speaking Courts in Saskatchewan, the Gladue Court in Ontario, and the First Nations Court in British Columbia are all unique, but all share the same commitment and passion to serve Aboriginal peoples. As all are part of the Provincial Court system, all have been able to deal with the outstanding issues discussed below, and to resolve them. However, these issues are germane to any new Aboriginal courts that might be created in other parts of Canada.

While not an exhaustive list, the topics below cover the major questions of the application of the *Charter of Rights and Freedoms*, criminal and personal jurisdiction, and uniformity.

a. Application of the *Charter of Rights and Freedoms*

There have been strong arguments expressed against Aboriginal peoples adopting or applying the *Charter* to their people, including the following:

- Adopting the *Charter* to an Aboriginal court would be a "...continuation of cultural genocide"¹⁰²
- The *Charter* is in conflict with traditional Aboriginal customs: for example, the Canadian right to remain silent is fundamentally at odds with Aboriginal traditions of responsibility¹⁰³
- The *Charter* and Anglo-Canadian governments have failed to protect and respect Aboriginal peoples¹⁰⁴
- The *Charter* focuses excessively on individual rights while traditional Aboriginal laws place more value on communal well-being¹⁰⁵

¹⁰² Rudin and Russell, *supra* note 27, at 51.

¹⁰³ Hamilton, *supra* note 8, at 265.

¹⁰⁴ Hamilton, *id.*

¹⁰⁵ Rick H. Hemmingson, "Jurisdiction of Future Tribal Courts in Canada: Learning from the American Experience," [1988] 2 C.N.L.R. 1.

On the other hand, some would argue that the *Charter* should be adopted and applied in Aboriginal courts because doing so would provide beneficial rights to all Aboriginal persons, such as freedom of religion, voting rights, gender equality, and rights for the criminally accused.¹⁰⁶ This argument has been countered by saying that even if an Aboriginal court was created and explicitly excluded the *Charter*, the appellate courts would apply the *Charter* on judicial review and declare the Aboriginal court decisions invalid.¹⁰⁷

Fairness is another reason presented for adopting the *Charter*, or for applying it in an Aboriginal court setting. Given the history of unfairness and exclusion of Aboriginals, no Aboriginal government would want to deprive their people of the right to a fair trial.¹⁰⁸ The existing models of Aboriginal Courts have resolved this philosophical question as all models are part of the provincial court system and subject to the *Charter*.

b. Criminal Jurisdiction

One of the most controversial aspects concerning an Aboriginal court is the fear by opponents that hundreds of Indian bands across Canada would develop their own criminal codes.¹⁰⁹ This would result in each First Nation, Metis, and Inuit organization having their own unique criminal legislation, creating confusion for non-Aboriginal citizens who would be unsure of whether they were breaking criminal laws on Aboriginal lands.

This issue was addressed by the Tsuu T'ina people, who did consider creating a separate criminal code, but decided that doing so would create an undesired separation from the rest of society, and that while an assault remains an assault, the difference and key to success for the Tsuu T'ina would be the different cultural and

¹⁰⁶ Hamilton, *supra* note 8, at 265.

¹⁰⁷ Hamilton, *ibid.* at 265.

¹⁰⁸ Hamilton, *ibid.* at 266.

¹⁰⁹ Luke McNamara, *Aboriginal Peoples, the Administration of Justice and the Autonomy Agenda: An Assessment of the Status of Criminal Justice Reform in Canada with Reference to the Prairie Region* (Winnipeg: Legal Research Institute of the University of Manitoba, 1993), 100.

holistic treatment of the source of the problem through peacemaking.¹¹⁰ Some state that the application of the *Criminal Code of Canada* to new Aboriginal justice systems can be helpful and provide consistency, stability, compatibility, and resource support.¹¹¹

However, the Indigenous Bar Association argues that “entirely new rules of evidence and procedure arising not from the Common Law but from Indigenous Peoples Law” would have to be developed.¹¹² There is a lot of merit in this argument. The current criminal justice system has over-incarcerated and excluded Aboriginal peoples and created an environment of fear, mistrust, and hostility for many. Why would any Aboriginal government wish to include the tools of the oppressor? Furthermore, the current *Criminal Code of Canada* is not inclusive of Aboriginal worldviews, the Aboriginal community, or respect for Aboriginal elders.

As described above, there are many reasons, then, why a new Aboriginal court would have to make a tough decision between one criminal code or another. Currently, however, the existing Aboriginal courts in Canada are following the *Criminal Code of Canada* because they are part of the Provincial Court system.

c. Personal jurisdiction over Aboriginals and non-Aboriginals

Hemmingson and others argue that Aboriginal justice systems should have personal jurisdiction over both Aboriginal and non-Aboriginal individuals¹¹³ because “...jurisdiction based on racial distinctions is a complicated and undesirable way of enforcing laws.”¹¹⁴ The Honourable Justice Hamilton points out that because the

¹¹⁰ Hon. Mme Justice Marsha C. Erb, “A New Direction: Report of the Review Team Established to Study the Tsuu T’ina Nation Proposal for a First Nations Court,” International Association of Women Judges <http://www.iawj.org/what/Session6Erb.doc> (accessed April 16, 2008).

¹¹¹ Leonard Mandamin, “Aboriginal Justice Systems: Relationships” in *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* by the Royal Commission on Aboriginal Peoples (Ottawa: Canada Communication Group Publishing, 1993), (hereafter cited as “*Aboriginal Justice Relationships*”), 302, and also Hemmingson, *supra* note 105, at 25.

¹¹² IBA, *supra* note 7, at 5.

¹¹³ Hemmingson, *supra* note 105, at 25 and 40, and Hamilton, *supra* note 8, at 198.

¹¹⁴ *Aboriginal Justice Relationships*, *supra* note 111, at 297.

location of the offence determines where the trial is held, it would be mandatory for both Aboriginal and non-Aboriginal offenders who commit offences within an Aboriginal boundary to be tried in the Aboriginal court.¹¹⁵ Still, Rudin and Russell contend that a culturally appropriate Aboriginal court would be inappropriate for a non-Aboriginal offender with different values and beliefs.¹¹⁶ Justice Hamilton argues that by making the Aboriginal courts an equal part of the Provincial Court, the issue of differential treatment is resolved.¹¹⁷

d. Uniformity

Some may feel that there must be uniformity and one set of specific rules and guidelines for all Aboriginal courts in Canada. However, given the diversity of Aboriginal peoples across Canada in terms of culture, geography, population, territory, legal status, and governing structures, it is likely that there would be many forms of Aboriginal courts.¹¹⁸ Proponents point out that Canada already has a pluralistic legal system: for example, the Quebec legal system and separate military courts.¹¹⁹ The Honourable Justice Sinclair, an Aboriginal justice of the Court of Queen's Bench of Manitoba, addressed this issue in one of his speeches:

What is the right thing? Well, we have to learn that. It's not going to be the same for our friends in Maniwaki as it is for our friends in Moose Factory. It is not going to be the same for the Ojibways in Roseau River, as it will be for the Crees in Lac L'Orange. It will not be the same for the people in the Blood Reservation in Alberta, as it will be for the west coast Indians in British Columbia, or the people of the Northwest Territories, or our Inuit brothers and sisters in Inuvik. They will all have different solutions based upon their understanding of how to do things

¹¹⁵ Hamilton, *supra* note 8, at 198–199.

¹¹⁶ Rudin and Russell, *supra* note 27, at 55.

¹¹⁷ Hamilton, *supra* note 8, at 200. The Aboriginal Courts of Tsuu T'ina First Nations Court, Cree-speaking Court, and Gladue Court all are part of the Provincial Court system and have jurisdiction over non-Aboriginal persons, although the Gladue Court is set up specifically to deal only with Aboriginals, and to date there is no published materials about non-Natives requesting to appear before the Gladue Court.

¹¹⁸ *Aboriginal Justice Relationships*, *supra* note 111, at 275.

¹¹⁹ Urban Alliance on Race Relations, *supra* note 5, at 14–16.

because process is just as important as results. We must never forget that. The process each will follow will reflect who they are.¹²⁰

5. Conclusion

As has been shown in the discussion above, Aboriginal courts are different from Provincial Courts, and there is a dire need for an Aboriginal court.

Aboriginal courts can be created through several means, and from their creation comes their powers or jurisdiction. They can be created through federal or provincial governments, inherent Aboriginal rights, or negotiations and agreements.

Currently there are four models of Aboriginal courts across Canada: the Tsuu T'ina First Nation Court in Alberta, the Cree-speaking Court in Saskatchewan, the Gladue Court in Ontario, and the First Nations Court in British Columbia. While there remain many unresolved issues, such as the application of the *Charter*, criminal and personal jurisdiction, and uniformity, these issues can help define the vision and dream of an Aboriginal court.

There is much work to do, but there is also a lot of potential and excitement in the establishment of a justice system that really reflects the hearts, minds, and values of Aboriginal peoples in Canada.

¹²⁰ Associate Chief Judge Murray Sinclair of the Provincial Court of Manitoba, Address to the Elders-Policy Makers-Academics Constituency Group Meeting, Aylmer, Quebec, April 16–18, 1997. <http://canada.justice.gc.ca/eng/pi/ajs-sja/pub/trans.html> (accessed April 16, 2008).

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