

April 2008

Karen Whonnock, BA, JD, LLM



ABORIGINAL COURTS IN CANADA

What are Aboriginal courts?

Aboriginal courts are culturally appropriate dispute resolution systems that are inclusive, respectful, and designed by Aboriginal peoples. As there are many diverse Aboriginal peoples in Canada, each Aboriginal court will reflect the local Aboriginal culture and therefore be unique.

Prior to contact, all Aboriginal peoples had their own form of governance including their own form of dispute resolution, such as the Big House or Longhouse. Aboriginal Courts would include traditional forms of dispute resolution and may also include elders and peacemakers. Traditional forms of dispute resolution may include the use of smudging with sweet grass or sage, or using eagle feathers or eagle down.

How are Aboriginal courts different from the Provincial Court system?

The existing Aboriginal courts in Canada are all part of the Provincial Court system and are given equal weight, respect, and enforcement powers as the regular Provincial Court. The main differences between the two are the inclusion and design of Aboriginal courts by Aboriginal peoples to resolve problems in a manner that is culturally appropriate and holistic, and that promotes balance and healing.

Why should we have an Aboriginal court?

Presently the Canadian criminal justice system has failed the Aboriginal peoples of Canada. There have been numerous studies showing that racism is present in the justice system and Aboriginal peoples are over-incarcerated. Aboriginal communities and Aboriginal values must be included in the future development of the Canadian

criminal justice. Additionally, Aboriginal courts are a reflection of Aboriginal sovereignty, which can be implemented through treaties or self-government agreements.

Who would be subject to the jurisdiction of Aboriginal courts?

Aboriginal courts are intended to have powers over Aboriginal peoples in Canada, including the Metis, Inuit, and First Nations. Whether non-Aboriginal Canadians can be subject to Aboriginal courts will depend on how the Aboriginal court is implemented and structured.

What areas of law do Aboriginal courts deal with?

Traditional law or Aboriginal laws and cultures are included in most Aboriginal Courts. Whether family, criminal, and civil matters are included depend on the negotiations and jurisdiction of the court. Right now the Tsuu T'ina First Nation Court deals with criminal, youth, and bylaw matters, and they have plans to include family and civil law. The Gladue (Aboriginal Persons) Court in Toronto deals with sentencing of Aboriginal offenders where they have been found guilty or plead guilty, exclusively with criminal matters.

What happens to non-Aboriginal Canadians who commit crimes on land that has an Aboriginal court?

Many argue that Aboriginal justice systems should have personal jurisdiction over both Aboriginal and non-Aboriginal individuals, ensuring that the courts are not race-based but open to everyone. Another argument is that the location of the offence traditionally determines where the trial is held, so that it should be mandatory for both Aboriginal and non-Aboriginal offenders who commit offences within the Aboriginal boundary to be tried in the Aboriginal court. On the other hand, some argue that an Aboriginal court would be inappropriate for a non-Aboriginal offender who may not share the Aboriginal values and beliefs. The existing Aboriginal courts, described below, have resolved these arguments as they are part of the regular provincial court

system, thus ensuring equality of laws and legislation to both Aboriginal and non-Aboriginal offenders.

Where are Aboriginal courts operating in Canada today?

A. The Tsuu T'ina First Nation Court in Alberta

The first Aboriginal court in Canada was the Tsuu T'ina First Nation Court (also called the Tsuu T'ina Peacemaking Court), established in October 2000 in Alberta. The Tsuu T'ina Court has jurisdiction over criminal, youth, and bylaw offences committed on the Tsuu T'ina reserve. 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.

The Tsuu T'ina personal jurisdiction includes Tsuu T'ina members, Native non-Tsuo T'ina members, and non-Natives as it is also a Provincial Court of Alberta. The courtroom is held in the band building, which is modelled after a beaver lodge, shaped like a dam with the courtroom as the beaver den. (The beaver is the totem of the Tsuo T'ina people.) The Tsuo T'ina Court uses peacemaking traditions, including smudging with sage or sweet grass. The court clerks display embroidered eagle feathers on their court attire.

B. The Cree-speaking Court and Dene-speaking Court in Saskatchewan

The Cree-speaking Circuit Court was established in northern Saskatchewan in October 2001. The Cree court is based in Prince Albert and travels to Pelican Narrows, Sandy Bay, Montreal Lake, and Big River First Nation. The court includes a Cree judge, court clerk, crown prosecutor, and Legal Aid lawyer. All members of the Cree-speaking court are able to speak Cree, and the participants are able to request to speak in either English or Cree. The Cree-speaking Court will use peacemaking where appropriate.

In December 2006, the first Dene-speaking Court commenced circuit court sittings from Meadow Lake. The court will provide service in both the Cree and Dene languages with the assistance of translators. This court will also include a restorative

justice approach. The presiding judge is also Cree and speaks Cree. Court services will also be provided to English River, Buffalo River, Canoe Lake, and Big Island Lake.

C. The Gladue (Aboriginal Persons) Court in Ontario

Toronto's Gladue Court started in October 2001, making it the first urban Aboriginal Court. The purpose of the Gladue Court is to implement the Supreme Court of Canada's decision in *R. v. Gladue*,¹ and to fully realize section 718.2(e) of the *Criminal Code*.² 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 is voluntary and open to First Nations, Metis, or Inuit who identify themselves as such. As of 2007, the first Gladue Court in downtown Toronto at Old City Hall has expanded to three Gladue courts in Toronto, which are operating five days a week.

D. First Nations Court in British Columbia

The First Nations Court in New Westminster, BC commenced sitting in November 2006. The court sits once a month to hear two to three cases. The First Nations Court can consider guilty pleas for any criminal offence, but so far has dealt only with summary conviction matters. The court may hear related youth or family matters before the court.

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. 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

¹ *R. v. Gladue* [1999] 1 S.C.R. 688.

² Ontario Court of Justice, Old City Hall Fact Sheet, "*Gladue* (Aboriginal Persons) Court" (October 3, 2001).

opportunity to speak. 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.