Indigenous Jurisdiction over Indigenous Justice Systems & Steps Along the Way: An Overview

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Overview

- There are many people in this room that know far, far more than I do about traditional Indigenous approaches to developing and enforcing the laws and expected behaviour within their own nations passed on through many, many generations that long predate the arrival of European settlers over 400 years ago.
- Thus, my role here is to provide an introductory overview regarding the degree and the various ways in which Indigenous peoples have been creating space to modify or push back the dominant Canadian legal system to enable their own approaches to grow.
- Part of my goal is also briefly to sketch some of the approaches that Indigenous peoples outside of Canada have pursued with support from the dominant governments in those nations so that we neither feel that we are alone in grappling with these issues nor without any lessons that we might learn form elsewhere.
- Let me begin with an historical reminder.

Royal Proclamation of October 7, 1763

- 260 years ago last month
- Purpose included address key Indian Nation concerns of x-French allies that British victory would challenge Indian sovereignty & control of traditional territories via:
  - Declaring would be no disturbance of "**Nations** or Tribes of Indians" living in colonies under British protection [including former French areas]
  - No Colonial governors to survey or patent or purchase Indian lands in colonies without Royal consent [Pontiac's 'Rebellion' begin May 1763] with any sales via treaties negotiated in public and only with Imperial Crown representatives
  - Declare all lands west of existing colonies reserved under Royal protection exclusively for Indians 'for the present' with survey of boundary promised & settlers to leave
  - All traders with Indian nations must have a Crown licence to trade
  - OK pursuit by military to capture colonist felons in Indian territory
  - RP 1763 seen as Niagara Treaty as formally presented by Ambassador Johnson & accepted by Indian Nations from across much of No. Am. who were present

Aboriginal/Native/Indian/ Customary Title

- Doctrine of "Aboriginal Title" [as called in Canada] NOT derived from European or Asian law NOR from traditional laws of Indigenous Nations
- = a midpoint or contact point between 2 very different legal systems AND world views
- Labeled *sui generis* (unique) by SCC in *Guerin v. The Queen* (1984), as the SCC sought to reconcile Indigenous systems of land tenure with Euro property systems, BUT Indigenous legal systems NOT seen to carry same weight as imported colonizing system, nor do differences among Indigenous legal systems get much attention, even if they were profound and were developed in light of the differing environmental conditions in their traditional territories, the size of their populations, the degree to which they possessed permanent settlements or not, etc.

Discovery Doctrine

US governments & courts far ahead of Cdn counterparts as addressed real conflict of world views, growing invasion of colonists not recognizing pre-existing sovereign governments with their own laws & territories under their control. USSC play huge, early vital role

RP 1763 influenced American thinking so sought Indian Nations as military allies in their Revolution, entered into treaties, respected tribal jurisdiction to deal with their own internal legal issues, sought to 'quiet' Indian title by purchase & resell at a profit.

Johnson v McIntosh (USSC 1823) declared US government had the exclusive right to purchase Indian land & that any US citizens who had done so via contract or treaty had to turn to that Indian nation's laws for any remedy

CDN courts silent on Marshall CJ's residual sovereignty, or "domestic dependant nation" concept, of *Cherokee Nation v Georgia* (USSC 1831)– still largely true today re continuing US recognition of tribal sovereignty BUT US plenary power under "Indian commerce" clause of US Constitution & *Lone Wolf v Hitchcock* (USSC 1903) enable Congress to do anything, including tribal termination by explicit statutes

Discovery Doctrine Travels to Cdn Law

St Catherine's Milling (JCPC 1886) regard aboriginal title as:

1. "personal or usufructuary right" = right to use & enjoy land & waters but NOT OWN or able to alienate, as subject to Crown's "present proprietary interest" via underlying or radical Crown title

2. held communally amongst Indigenous tribe or group

3. was "dependent upon the goodwill of the Sovereign" so led to belief was easily extinguished by Crown unilaterally OR by treaty

No recognition of Indigenous sovereignty as in *Cherokee Nation* 55 yrs before

Canadian governments, lawyers & courts all then interpreted aboriginal title as of little significance, as easily pushed aside whenever Crown lost its 'goodwill' vs. treaties that retained some legal importance

Revival of Aboriginal Title

Calder v. AG BC (SCC 1972) 6 of 7 judges re-emphasised common law's acceptance of aboriginal title as continuing, meaningful burden on Crown title **without** require express Crown action or recognition;

- Court split 3-3 re general vs explicit colonial legislative language required to extinguish; so split 3-3 re whether Nisga'a still have aboriginal title after colonial land administration statute
- US require explicit legislation to extinguish; NZ accept general language if necessarily inconsistent with continued aboriginal title
- 6 of 7 agree only federal law could extinguish post BC joining Canada in 1871 & 7th judge decide against Nisga'a as couldn't sue provincial Crown without its permission (fiat)

Calder cause P Trudeau OK comprehensive land claims policy in 1974 that include inherent right of S-G in 1994 that enable constitutionally protected Indigenous legal systems via s. 35(3) *Constitution Act*, 1982 as am. 1984

S. 35: Canadian Constitution, 1982

25. The guarantee in this Charter of certain rights and freedoms shall not be construed as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired [amended 1984].

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

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired. [added in 1984]

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. [added in 1984]

Tsilhqot'in Nation v BC (2014 SCC)

- *Tsilhqot'in Nation* = 1st Cdn case ever to
  - (a) decide aboriginal title exists for specific nation over identified territory 1750 sq kms = 676 sq mi [vs exist in principle but where applies still to be proven via evidence per *Delgamuukw*];
  - (b) declare that a provincial natural resource statute does NOT apply over specified lands due to aboriginal title
  - (c) is collective title but similar to freehold
  - (d) terra nullius was never part of Cdn law

  Key Elements:
  - Test for Aboriginal Title
  - Rights Before AND After Title Proven
  - Remedies
  - Impact Upon Provincial Legislation

Treaty Relationship

- Pre-1982 – treaty rights could override provincial legislation [except re public safety or essential for conservation] but vulnerable to federal law, including s. 88 *Indian Act*
- Treaties "should be liberally construed & doubtful expressions resolved in favour of the Indians"
- S. 35(1) – extinguishment without consent after 1982 prohibited; infringement of treaty rights by otherwise valid legislation to be justified must meet *Sparrow* test (per *Badger* SCC)
- Terms amendable by agreement between the treaty partners
- Are detailed legal principles for treaty interpretation
- No recognition YET re Two Row & Covenant Chain = s. 35(1) treaties
- If these treaties are between 2 sovereigns, then Indigenous treaty partners must have possessed own legal systems & still do, unless they willingly gave them up & no evidence of that but can negotiate new treaties

Fiduciary Relationship

- SCC 1984 in *Guerin v. The Queen* declared Crown has fiduciary relationship with First Nations since contact due to Crown claiming (1) overriding sovereignty & (2) radical title with monopoly on acquisition of aboriginal title. Relationship pre-dates s. 35
- *Sparrow* clarify relationship not limited to *Indian Act* bands or to reserve lands, as exists with all s. 35(1) "aboriginal peoples"
- Crown must act honourably, no sharp dealing & avoid conflict of interest BUT only liable if clear duty apply on facts & breached – Broader than US, as there only trustee to tribes re $ & land

Haida Nation v BC (SCC 2004) adopt principle:

- Crown in right of Canada & provinces each owe **duty to consult & accommodate Indigenous concerns** whenever Crown **has actual OR constructive knowledge** that it's pursuing conduct that **might** adversely affect aboriginal rights or title [later confirmed in *Badger* for treaty rights] as is key part of reconciliation

Indian Act

- 1st passed 1876 consolidate # colonial statutes empowered imposing elected band councils; enable federal management of reserve lands; Supt of Indian Affairs take trust account $; define Indians as minimum ¼ blood; women lost status if marry male not meet definition
- Amended 25 times since 1876 to make worse – main changes were: pass laws & make Indian agents JPs 1881; compel parents to send children to schools; impose potlach bans 1884; remove control over non-Indians on reserve 1894; ban all ceremonies 1895; give 50% of surrender proceeds to members 1906; allow municipalities to expropriate reserve lands for roads, railways & other public works 1911; allow Supt-Gen to lease uncultivated lands to non-Indians for farming/pasture 1918; rez school mandatory & ban hereditary leaders 1920; prevent $ raising to pursue legal claims 1927; prevent entry to pool halls 1930; Indian agents chair Council & vote to break ties 1936; allow Indian women to vote 1951 [non-Indian women had franchise in all of Canada except Que by 1922]; end compulsory enfranchisement of bands 1961; amend post-*Drybones* 1970; end enfranchisement & lost status via marriage but create new anomalies re 6(1) & (2) status via 1985 (C-31); allow off-reserve to vote 2000; Gender equity 2011 & 2017 & more

General Canadian Federal Statutes re s. 91(24) “Indians” [excl LCAs & SGAs]

An Act respecting first nations goods and services tax, S.C. 2003, c. 15, s. 67
file:///H:/TRU%20LAW%203460/Cdn%20Fed%20Legn/An%20Act%20respecting%20first%20nations%20goods%20and%20services%20tax.html

Family Homes on Reserves and Matrimonial Interests or Rights Act S.C. 2013, c. 20
file:///H:/TRU%20LAW%203460/Cdn%20Fed%20Legn/Family%20Homes%20on%20Reserves%20and%20Matrimonial%20Interests%20or%20Rights%20Act.html

First Nations Commercial and Industrial Development Act, S.C. 2005, c. 53
file:///H:/TRU%20LAW%203460/Cdn%20Fed%20Legn/First%20Nations%20Commercial%20and%20Industrial%20Development%20Act.html

First Nations Elections Act, S.C. 2014, c. 5,
file:///H:/TRU%20LAW%203460/Cdn%20Fed%20Legn/First%20Nations%20Elections%20Act.html

First Nations Financial Transparency Act, S.C. 2013, c. 7
file:///H:/TRU%20LAW%203460/Cdn%20Fed%20Legn/First%20Nations%20Financial%20Transparency%20Act.html

First Nations Fiscal Management Act, S.C. 2005, c. 9
file:///H:/TRU%20LAW%203460/Cdn%20Fed%20Legn/First%20Nations%20Fiscal%20Management%20Act.html

Federal Acts continued

- **First Nations Jurisdiction over Education in British Columbia Act,** S.C. 2006, c. 10 file:///H:/TRU%20LAW%203460/Cdn%20Fed%20Legn/First%20Nations%20Jurisdiction%20over%20Education%20in%20British%20Columbia%20Act.html
- **First Nations Land Management Act,** S.C. 1999, c. 24 file:///H:/TRU%20LAW%203460/Cdn%20Fed%20Legn/First%20Nations%20Land%20Management%20Act.html Repealed and replaced by *Framework Agreement on First Nations Land Management Act*, **S.C. 2022, c.19**
- **First Nations Oil and Gas and Moneys Management Act,** S.C. 2005, c. 48 file:///H:/TRU%20LAW%203460/Cdn%20Fed%20Legn/First%20Nations%20Oil%20and%20Gas%20and%20Moneys%20Management%20Act.html
- **Framework Agreement on First Nations Land Management Act, S.C. 2022, c.19**
- **Indian Act, S.C. R.S.C., 1985, c. I-5 as of Dec 2017 http://laws-lois.justice.gc.ca/eng/acts/i-5/**
- **Indian Act Amendment and Replacement Act,** S.C. 2014, c. 38 file:///H:/TRU%20LAW%203460/Cdn%20Fed%20Legn/Indian%20Act%20Amendment%20and%20Replacement%20Act.html

Federal Acts continued

- **Indian Oil and Gas Act,** R.S.C., 1985, c. I-7 file:///H:/TRU%20LAW%203460/Cdn%20Fed%20Legn/Indian%20Oil%20and%20Gas%20Act.html
- **Mi'kmaq Education Act, S.C. 1998, c. 24** file:///H:/TRU%20LAW%203460/Cdn%20Fed%20Legn/Mi%E2%80%99kmaq%20Education%20Act.html
- **Safe Drinking Water for First Nations Act,** S.C. 2013, c. 21 http://laws-lois.justice.gc.ca/eng/acts/S-1.04/index.html
- **An Act Respecting Indigenous Languages (S.C. 2019, c. 23)** https://laws-lois.justice.gc.ca/eng/acts/I-7.85/page-1.html (Bill C-91)
- **An Act respecting First Nations, Inuit and Métis children, youth and families (S.C. 2019, c. 24)** https://laws.justice.gc.ca/eng/acts/F-11.73/index.html (Bill C-92)
- UNDRIP Act, S.C. 2021, c. 14 https://www.laws-lois.justice.gc.ca/eng/acts/u-2.2/FullText.html

Bill C-92

- *First Nations, Inuit and Metis Child and Family Services Act* binding on federal & provincial govts
- Affirms inherent right to S-G
- Affirms best interests of child, cultural continuity, substantive equality & UNDRIP
- Priority to be given to preventive care
- Strong placement priorities
- Inherent right "includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority." (s. 18(1))
- Enable "Coordination Agreements" with feds & province
- May become part of inherent right jurisdiction in future

Cdn UNDRIP Act, S.C. 2021

Preamble para 12: "Whereas the Government of Canada recognizes that all relations with Indigenous peoples must be based on the recognition and implementation of the inherent right to self-determination, including the right of self-government;"

- Act embraces all Articles in UNDRIP; especially relevant are:

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.

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.

Article 27 States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

US Indian Tribal Justice Systems

- Existence of Tribal justice systems flows from continuation of Indigenous sovereignty & traditional law predating colonization, reaffirmed by USSC in *Johnson v McIntosh* (1823) re Indigenous law continues & *Cherokee Nation v Georgia* (1831) that tribes transformed into "domestic dependent nations" but still sovereign except can't pursue treaties with foreign nations.
- Cherokee Nation operated own court system along Anglo-American lines from 1808-1898 with written codes, constitution, trained lawyers & judges, but this the exception as norm was use traditional law & decision-making
- *Ex parte Crow Dog*, (1883) 109 U.S. 556 (USSC) confirm Sioux Nation have full jurisdiction to decide punishment for murder of 1 person by another member of nation, which it did via ordered killer to work for family for life to replace loss of son. US charged Crow Dog & was sentenced to hang so he bring habeas corpus petition. USSC decision overturn conviction - trigger huge outrage by white society, as murderer not hung - so led to Congress pass *Major Crimes Act*, 1885 removing 7 crimes from tribal jurisdiction [now 15], but all other crimes remained under tribal law.

BIA Intervention

- Bureau of Indian Affairs (BIA) unhappy having no control over tribal governments, their decisions or tribal laws. **BIA establish local Indian police forces paid by BIA that ignore tribal government decisions by enforcing "law and order" per BIA orders.** Congress authorize funds in 1878
- **1883 BIA establish Courts of Indian Offences (CIOs) with local BIA agents selecting members as judges.** Congress later authorize scheme with Commissioner draft civil & criminal code for CIOs to enforce on reservations. Ultimately get legal status under Code of Federal Regulations (as CFR courts) to enforce those laws but also can enforce customary law. Some CFR Courts still exist.
- **Congress empower tribes to reestablish themselves if they wish** under *Indian Reorganization Act* of 1934 (IRA) as part of Roosevelt New Deal to **create own constitutions, law & order codes & own courts [= "tribal courts"] displacing CFR courts BUT was delegation of power not express recognition of tribal sovereignty**
- Congress in 1950s seek terminate tribes & convert into public municipal gov'ts (= Cdn White Paper . Congress pass Public Law 280 in 1953 that transfer jurisdiction re civil & criminal jurisdiction re part or all of Cal, Neb, Wisc, Minn & Ore; Alaska included when become a state in 1958. 10 more states accept jsdn but only in some sectors or tribes, or required tribal consent that denied.
- *Indian Civil Rights Act*, 1968, impose some Am BoR concepts on tribes but authorized all tribes via ss. 1302 to assert jurisdiction via CFR or tribal courts and increase max penalties of 3 yrs &/or $15,000/offence to max 9 yrs

Tribal Courts in 1980s

- Reflect vast majority of courts on reservations but still are some: (1) CFR courts and (2) traditional courts with power sourced from traditional tribal law only limited by express federal legislation with most = (3) created by tribal law similar in style & format as federal & state criminal & civil trial courts
- **Tribal courts owe their existence, structure & jurisdiction to tribal constitutions & tribal legislation (& tribal customary law if part of their source of law) with judges appointed by tribal council or elected by tribal members.** Many have own or regional courts of appeal, own bar associations with bar admission requirements, public defenders, court officials, etc. with some federal & tribal$ as well as revenue from court fees.
- **In 1985 were 145 tribes with their own tribal courts, 14 with traditional or customary law jurisdiction + only 23 CFR courts left [were 111 CFR courts] not counting some "conservation courts" that only handle hunting & fishing offences re tribal members** mostly on reservation, but some do over full treaty area; **& peacemaker courts** [often as alternate to adversarial tribal courts OR as only internal court]

US Indian Tribal Courts Jurisdiction

- For tribes that (a) not subject to US PL-280 transfer of partial or full jsdn to state in which reservation located OR (b) have chosen not to create own justice system OR (c) have entered into compact with state to use state court system.
- *Indian Child Welfare Act* (*ICWA*) of 1978 mean virtually every tribe has a child welfare court, so able to accept transfer of child welfare case re member from state court to tribe per *ICWA*. Congress pass *ICWA* to combat huge loss of Indian children via state agencies [just as in Canada 41 yrs later]. Compels state courts transfer case to tribal court of that nation UNLESS natural parents veto transfer OR tribe refuses accept jsdn. Many really small tribes only create an *ICWA* court with judge paid per diem or use tribal employee & use alternate to a courtroom; as few as 1 case/yr.
- Many small tribes have a formal court under their law, but with small civil and/or criminal caseload, while larger tribes may have very busy courts. Both situations usually have own court of appeal or shared regional CA.
- **Jsdn includes civil & criminal issues under tribal law subject to Congress limits** [incl PL-280] **re tribal members resident on reservation. Many include non-resident members in civil law matters (e.g., divorce), some include non-member Indian residents.**

Indian Tribal Courts & Non-Indians

- *Montana v United States*, (1981) 450 U.S. 544 - Crow Tribe of Montana prohibit all hunting & fishing within its reservation by anyone who is not member of the tribe (both Indian and non-Indian) by relying on its ownership of the bed of the Big Horn River & treaty confirming its reservation lands & its inherent power as a sovereign nation, including on lands inside reservation owned in fee simple by non-Indians [via *General Allotment Act* 1887]. USSC reverse & say (1) bed of River passed from US to Montana; (2) can control non-members hunting & fishing on tribal land & land held in trust by US 4 tribe, but it cannot do so re non-members on land owned by non-members even if within reservation borders.
- BUT tribes do have jsdn over non-Indians as tribes "inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservation, even on non-Indian lands. A tribe may regulate, though taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contract, leases, or other arrangements." It also said that tribes retain "inherent power to exercise civil authority over the conduct non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe."

Recent Tribal Courts Jurisdiction Expansions

- *Indian Civil Rights Act* (*ICRA*) 1968 imposed some Am BoR concepts on tribes but also expanded criminal sentences from 1 yr to "a term of 3 years or a fine of $15,000, or both", if multiple offences & could be "a total penalty… a term of 9 years" Greater sentences are possible if prior convictions of same or similar offences occurred anywhere in US. Sentences are to be served in tribal or nearest federal correctional centre, or state facility if is agreement with tribe [e.g., Yakima tribe has own facility & contracts to take convicts in from state system]
- *Violence Against Women Act* (*VAWA*)1994 empower tribes, if they opt in, to charge Indian males under Act with domestic or dating violence or sexual assault & for violations of protection orders. *VAWA* amended in 2022 to empower tribes to prosecute non-Indian offenders committing these offences on reservation vs Indian females; thereby excluding effect of *Oliphant v Suquamish Tribe*, 425 US 191 (1978) that overturn tribal jsdn re non-Indian offenders on reservations. Fed $ provided.
- 25 US Code para.1304 extend tribal jsdn re "assault of tribal justice personnel" re investigating, adjudicating, detaining, incarcerating, providing services, etc. "over all persons" concurrent with US or any state with full rights of defendants including *habeas corpus* petitions. Fed $ re all costs

US Indian Tribal Courts Systems Data

- Latest US Bureau of Justice Statistics (BJS) of 2021 with 2014 data from 234 Indigenous courts in lower 48 states [= 52 more courts in 29 years]. 80% serve tribes under 10,000 pop; 77% with both civil & criminal jsdn; 72% exercise criminal jsdn over members AND others; 28% only re tribal members. Many tribes have compacts with outside govts to share courts, jails, x-deputize police, even transfer cases for trial. BIA suggests are approx 400 tribal justice systems across USA. 90% have prosecutors, 61% public defenders; 42% court registries with restraining or protection orders; 91% have appeal process 90% do child welfare, 87% abuse or neglect cases,90% guardianship; 81% foster care, 75% terminate parental rights, 69% juvenile delinquency, 68% pre-adoptive placement, 65% status offences & 85% guardian ad litem cases for kids in care
- Since US Bill of Rts N/A to tribes [per *Talton v Mayes 1896*, USSC], Congress enact ICRA 1968 to impose most of BofRts [except no right to bear arms]
- Is diverse array of courts with Navajo having largest reservation = 27,000 sq mi [larger than 10 US states] spread across 3 states with 170,000 members as residents in 110 chapters electing 88 Council Delegates, which requires 100% vote in favour of new law. Navajo system has 11 District Courts, with appeals to 3-member Navajo Nation Supreme Court; **overall handles 50,000+ cases/yr**! Civil jsdn is re all [incl non-Indians] who are residents OR lawsuit arise on reservation; with criminal jsdn over Indians on reservation (& off if Navajo accused hurts another Navajo). Compare N.S. civil cts 35,446 in 2019-20 for population of 933,000
- At other end, are Indian Child Welfare Courts as the only court on some small reservations who hear only 1 or few cases/yr per ICWA with P/T or per diem judge or tribal employee
- Data N/A since 2014 BUT recent volume clearly well over 100,000 cases/yr; vs 604,559 cases in all of Canada with only 47% = guilty!!

US Tribal Courts & Canadian Sentencing Circles

- US Dept of Justice credited Justice Barry Stuart, of Yukon Territorial Court, as creator of "circle sentencing" in 1992 & that it spread 1st to Minnesota in 1996 before being implemented by other tribes elsewhere in USA.
- Its basic concept, as envisioned by Justice Stuart, was drawn from traditional Indigenous dispute resolution & peacemaking techniques he learned particularly from members of the Nacho Nyak Dun First Nation in the area around the village of Mayo, Yukon. The key was getting essential players in the dispute to speak openly in front of, & with the support of, their families as guided by elders - with an obligation to be truthful, admit how they contributed to causing the conflict, & that they needed to help find a solution to return to the good path. The goal is not the offender's punishment but restoring harmony within the community & the families affected while bringing healing to the offender & restoring all persons involved in the event to their proper place in the society. These efforts are reflected in his decision in *R. v. Moses*, [1992] B.C.W.L.D. 1294 (YKTC).

The Canadian Scene

- No one in Canada has been proactive in monitoring developments by Indigenous communities in establishing their own courts, traditional peacemaking or other forms of dispute resolution across the country. CBA best in identifying prov/terr
- Govt of Canada has consistently refused requests for decades from FNs to appoint members as JPs per s. 107 of *Indian Act* to exercise:
  - "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."
- There are 3 FNs in ON & Que that persuaded Canada to appoint FN members as s. 107 JPs after Indian agents left & still possess this system. The Quebec CA has ruled that Kahnawake JPs' jsdn are notably more than the scope of JPs normally due to *CC* jsdn. Akwesasne and Kahnawake have had unique cross-sharing of JPs for many year. Mohawk Council of Akwesasne (MCA), with some help from CIAJ, has trained more of their members to expand the scope of their courts via MCA legislation to include administrative & other laws.
- Cree Court in No. SK exist for many years with full court party fluent in Cree
- Long history of many Indigenous JPs in many provinces & territories since 1970s

Diverse Experiences in Canada

- There are no specific courts to enforce criminal or civil violations of *Indian Act*, its Regs or FN by-laws, except s. 107 JPs. There are no intergovernmental agreements to mandate federal or provincial/territorial courts to exercise this jdsn, or cover staff & travel costs to do so even when fly-in court parties are there with judge, Crown counsel, duty counsel, translator(s), clerks, etc. Provs/terrs feel have no jsdn to deal with s. 91(24) issues. Net result is many laws not enforced & police not lay charges as fear liability EXCEPT in Tsuu T'ina Aboriginal Court in AB.
- Why not apply Jordan's Principles priorising closest health services for kids & sort out who pays later to this situation?? Same problem NOT exist re enforcing municipal & regional govt laws – just re FN laws.
- !st sentencing circle in Canada may have begun in Mayo, YT in 1992 by Justice Barry Stuart or in northern Saskatchewan by its circuit court.
- It took only 3 years to give life to the 1996 *Criminal Code* addition of s. 718.2(e) via *R. v. Gladue*, [1999] 1 SCR 688. Both the amendment and the *Gladue* decision compelled federal, provincial & territorial governments to confront massive overrepresentation of Indigenous men, and even higher #s of women, in jails of all sorts all across Canada. The SCC's decision triggered national debate & action by Cdn courts to reconsider their sentencing policies and the personal histories when Indigenous persons faced criminal charges. Concepts like "restorative justice," "circle sentencing," "a healing pathway," and others became common but action was slow. While formal training programs to become certified '*Gladue* Writers' sprung up & some funding for them, the #s of Indigenous accused has far overwhelmed the need & $ available.
- But progress has been made.

Diverse Experiences in Canada (contd)

- Wellness Courts – 1999 start by some US tribal courts but quickly spread to Canada – focus on developing plan to address mental, emotional & physical health; with interdisciplinary team of judges, Crown, defence, counsellors, elders, police, probation, mental health experts, and with family & friends in support, wherever possible, to contribute as they wish.
- Saddle Lake Cree Nation (AB) [11,000+ members with 6600+ on reserve] Restorative Justice operated via Saddle Lake Boys & Girls Club via $ from Fed Indigenous Justice Directorate to divert offenders with serious *CC* charges to circle sentence process offering guidance & support, including elders & community services. 2017-2019 (pre-Covid) handle 198 referrals with over 90% success completing commitments.
- 26 Community Justice Committees (CJCs) spread across 5 regions of NWT with 85% of CJCs = Indigenous Gov'ts or Orgs each with coordinator as main contact. RCMP receive pre-charge diversions & Crown receive post-charge diversions
- In 2021-22 the CJCs conducted 186 diversions & ran crime prevention activities in all 26 communities BUT decided need major overhaul to improve communication, training, victim & community inclusion, applying traditional justice knowledge, reducing high staff & volunteer turnover & instill relevant activities that fit each community

More Diverse Experiences in Canada

- Peacemakers – return to traditional method of resolving disputes; Navajo Supreme Court (NSC) embraced in 1980s as divert from Chapter Courts to Peacemaker option. NSC's CJ recruit his brother (traditional leader) to start Peacemaker program as diversion option where accused & victim agree, along with reps from families & support services. Has spread to Canada via some FNs in YT & elsewhere. Peacemakers usually are elders very knowledgeable in own language, history & culture, well-respected in community & not relative of either party. Try to engage families of 2 disputants to get to source of problems & develop joint plan to resolve dispute via payments of food, goods, services or $; plan for behavioural change, family's promise to support adherence to plan, seek help from counselling or other relevant resources, return together regularly to assess progress in fulfilling plan until fully implemented.
- Indigenous/First Nation Courts in Canada follow similar structure except require guilty plea in advance as precondition for admission, with Crown support, & usually occur in open court (or special circular purpose-built facility) with elders, support services, probation officer, Native Courtworker, victim's & offender's families & friends, Crown counsel & defence lawyer, & police, usually seek 4-6 month healing plan. May include sentence (after *Gladue*, pre-sentence & psychiatric reports that show how plan will aid in healing), but often not. Offender returns to open court every month or so for status report to learn about his/her compliance & any change in situation with elders, families & victims all present if wish. Often there's ceremony at end of entire process & gift of blanket, eagle feather or other culturally significant objects for this person to celebrate his/her change and place on the good path to better future.

First Nation/Indigenous Courts

- BC has 8 such courts (1 more in process) around province with 1 on Vancouver Island, 2 in metro Van, 1 in north & 5 in Interior re adult criminal matters & 1 Aboriginal Family Healing Court Conference (AFHCC) launched in 2016 in New Westminster.
- Yukon has 4 First Nation based courts, 1 Yukon Community Wellness Court & 1 Domestic Violence Treatment Option Court
- Alberta had its 1st restorative justice court model launched at the Alexis Nakota Sioux Nation in 1993 with a local justice committee providing sentence recommendations. The Alberta Court of Justice has sat at Siksika Nation since 1998 with a justice of Indigenous heritage & dedicated Crown prosecutor to develop close connection with the community. The Tsuu T'ina First Nation Court (or Peacemaking Court) started in 2000 with jsdn over criminal, youth AND by-law offences committed on the Tsuu T'ina Reserve [only one in Canada??]. Indigenous Courts sit in Edmonton and Calgary with a Restorative Justice Committee Pilot Project started in 2022 in Calgary.
- Saskatchewan has no Indigenous or *Gladue* focus court on the CBA list but the Cree Court Party based in Prince Albert since 2001 & the Meadow Lake (Cree & Dene) Aboriginal Court Party since 2006 - both have a restorative justice goal focusing on northern SK
- Manitoba has none listed
- NWT has 1 Domestic Violence Treatment Court, 1 Territorial Wellness Court & 1 Deline Judicial Council

First Nation/Indigenous Courts

- ON has 7 Aboriginal Persons (*Gladue*) courts & 1 Child Welfare *Gladue* Court, 5 Indigenous Peoples Courts, 1 Child Protection Indigenous Court, 1 Child Welfare *Gladue* Court, 1 Aboriginal Youth Court, 2 justice councils, 1 Restorative Justice Program & 1 Justice Centre
- Quebec has 6 Justice Committees within the Grand Council of the Crees (Eeyou Istchee) communities
- Healing to Wellness Courts at Elsipogtog & Tobique FNs in New Brunswick
- Wagmatcook Healing to Wellness Court & Mi'kmaq Customary Law Program in Nova Scotia
- PEI & Newfoundland & Labrador do not ID any Indigenous centered justice initiatives
- Nunavut launched a community centered Therapeutic Justice Pilot Program in March 2019 in Cambridge Bay with a holistic approach based on Inuit Qauljimajatuqangit principles promoting rehabilitation & reintegration into society

Land Claims & Self-Government Agreements

- These agreements since early 1990s have capacity to address justice issues:
- Nisga'a Final Agreement of April 27, 1999 & *Nisga'a Final Agreement Act*, S.C. 2000, c. 7. Recognizes Nisga'a laws (s. 12). Chapter 12 empowers Nisga'a Govt to establish Nisga'a Police Board & Nisga'a Police Services, community corrections services, and confirms power of Nisga'a Lisims Govt to create Nisga'a Court to review admin decisions of "Nisga'a Public Institutions," prosecutions under Nisga'a laws, disputes between Nisga'a citizens on Nisga'a Lands, & can impose sanctions or penalties on non-Nisga'a so long as not "different in nature from those generally imposed by provincial or superior courts in Canada, without the person's consent." (Ch 12, s. 44). This Court may impose penalties under laws of BC, Canada or Nisga'a Lisims Govt including "traditional Nisga'a methods and values, such as using Nisga'a elders to assist in adjudicating and sentencing, and emphasizing restitution."(s. 41) Apples from Nisga'a Court may go to BCSC & Nisga'a Court orders can be filed with BCSC for enforcement.
- On recommendation of Nisga'a Lisims Govt, BC Govt "may appoint a judge of the Nisga'a Court as a provincial court judge, justice of the peace, or referee." (s.50)

Yukon Land Claims & Self-Government Agreements

- Carcoss/Tagish First Nation, Champagne & Aishhik FN, Nacho Nyak Dun FN, Kluane FN, Kawnlin Dun FN, Little Salmon/Carmacks FN, Selkirk FN, Ta'an Kwach'an Council, Teslin Tlingit Ciuncil and Tr'ondek Hwech'in, and Vuntut Gwithchin FN all have final land claim & self-government settlements of 1993 came into force via community ratification & federal & Yukon legislation. Separate agreements were reached re lands and re self-government. The Self-Government Agreement (SGA) confirmed extensive powers over their lands with "the power to enact laws" usually on 23 heads of power, including the "administration of justice" that can include courts (s. 13.3.17).
- These s. 35(4) *Constitution Act, 1982* protected agreements also deal with involvement in management of natural resources in the YT.
- The 3 remaining FNs in YT have not reached a settlement regarding aboriginal title & recognized governance authority.

Other Land Claims & Governance Settlements

- From James & Northern Quebec Agreement of 1977 to Tla'amin Nation Agreement of 2016 are 30 final land claims or governance agreements (or ones covering both aspects) but policy has undergone recent changes and *UNDRIP Act* further changes federal position on negotiating 'modern treaties'.
- Canada released its *UNDRIP Action Plan* on June 21, 2023 in compliance with *UNDRIP Act*, S.C. 2021, c14, s. 6(1). Among Plan's 111 commitments, Canada announced it's formally withdrawing its 'comprehensive land claims and inherent rights policies" and stating extinguishing rights is not a policy objective (para 23), removing barriers to settlement (para 24), will be honourably implementing historic & modern treaties & the right to S-G (para 25), and finalizing an Indigenous Justice Strategy to address systemic discrimination & supporting revitalization & enforcement of Indigenous laws and legal orders (par 28).
- We may genuinely be on the brink of fundamental change, assuming the Govt of Canada continues down this road after the next federal election & it genuinely embraces these commitments.

SCC Admonitions

"The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case."

BINNIE J., para 1, *Mikisew Cree First Nation v. Canada 2005 SCC 69*