Table of Contents

Introduction

The incarceration rate of Aboriginal people in the criminal justice system is staggering. Despite comprising only 3% of Canada's population, Aboriginal offenders comprise nearly 20% of the federal inmate population.[1] These staggering statistics are not new. As far back as the mid 1980's it was documented that while Aboriginal people made up only 2% of the Canadian population, they represented roughly 10% of the penitentiary population.[2]

Piecemeal attempts have been made to address the issue. The *Marshall* inquiry, conducted in 1989 after a Mi'kmaq man was wrongly convicted for murder and spent 11 years in jail, recognized that part of the reason he was "convicted and sent to prison, [was] in part at least, because he was a native person".[3] Along with numerous other findings the Marshall Inquiry called for the consideration of unique sentencing factors that should be taken into account for minority offenders such as Aboriginal people. This general recommendation related to minorities was codified with particular emphasis on Native offenders with the addition of section 718.2(e) to the *Criminal Code* in 1996.[4] The Marshall inquiry and resulting *Criminal Code* amendment did not explicitly outline exactly how unique "Aboriginal factors" were to be considered by the courts. Despite the Marshall inquiry and section 718.2(e) incarceration rates as a percentage of overall population rose from the mid 1980's to the late 90's.[5]

---

[1] Statistics Canada, *Adult Correctional statistics in Canada, 2010/2011* (Ottawa: StatCan, 12 October 2012).
[2] [Jackson] Michael Jackson, "Locking up Natives in Canada", online: (1989) 23 UBC L Rev 215 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1890909>.
[3] The Marshall Inquiry Report, *Royal Commission on the Donald Marshall, Jr., Prosecutions* (Ottawa: Royal Commission December 1989) at 7.
[4] Criminal Code, RSC 1985, c C-46.
[5] By 1997 Aboriginal people were closer to 3% of population and roughly 12% of inmates. Due to reporting margins of error, this 1997 factor is effectively the same proportion of incarcerated aboriginal people per population as the statistic from the mid 1980's. [Jackson, *Supra* note 2.]

The most notable case that has clarified section 718.2(e) is *R v Gladue*.[6] In this case the accused was charged with second-degree murder after stabbing her boyfriend following an altercation and night of heavy drinking. The initial trial judge sentenced the accused to a three year term of imprisonment. The conviction was ultimately appealed up to the Supreme Court which held that the trial court judge had not correctly considered the unique Aboriginal factors of the accused under section 718.2(e).[7] Up to this point there had been debate about whether section 718.2(e) was a restatement of existing principles or a section that required unique consideration. The majority of the court in this case held the latter. Justice Cory and Iacobucci JJ writing for the majority stated, at paragraph 75, that taking section 718.2(e) and the section it falls under as a whole, its purpose is "to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders. Section 718.2(e) requires that sentencing determinations take into account the unique circumstances of aboriginal peoples." The "unique factors" have become known as the "*Gladue* factors" and specialized "Gladue courts" have since been created for Aboriginal offenders. A detailed look at the application of the Gladue factors and a detailed look at Gladue courts is outside the scope of this essay.[8] What is important to note is that it has been over 10 years since the *Gladue* decision was released and the percentage of Aboriginal offenders in the Canadian criminal justice system has not improved.[9]

Following the *Gladue* case, it is clear that all courts prosecuting a *Criminal Code* violation are supposed to consider the Gladue factors in cases dealing with Aboriginal people. In practice however, it is difficult for courts outside of centres with large Aboriginal populations to

[6] [Gladue], [1999] 1 SCR 688.
[7] Gladue is hotly discussed. See the Women's Justice Network article titled "What Does the Gladue Case Mean for Women Facing Criminal Charges" and "R. v. Gladue: Where We Were, Where We Are and Where We Might Be Going" at <pi.library.yorku.ca/ojs/index.php/sclr/article/viewFile/34898/31687> for two examples.
[8] For more information see *Supra* note 6 & 7.
[9] *Supra* note 5.

obtain the necessary training required to fully consider the *Gladue* factors.[10] In reality, for most Aboriginal offenders who find themselves in the Canadian Criminal Justice system, the unique factors that contribute to over-incarceration and harm to Aboriginal communities will not be meaningfully considered by the court. Even in larger centres where training is available to educate criminal court workers and justices on the *Gladue* factors, Aboriginal offenders represent a higher percentage of the inmate population than their portion of Canada's population would suggest.[11]

It is clear that despite the addition of section 718.2(e) and *Gladue*, over representation of Aboriginal people in the criminal justice system continues. What is being overlooked? Why are Aboriginal people over represented in the criminal justice system despite obvious judicial and government recognition and attempts to consider particular Aboriginal factors in sentencing? What is missing from the current *Criminal Code* and consideration of Gladue factors to remedy the issue?

I believe that the answer to these questions requires an uncomfortable trip down residential school filled memory lane. I argue that overrepresentation of Aboriginal people in the Canadian criminal justice system itself is not the issue. Rather, it is a symptom of the ongoing damage done by the horrific abuse, neglect and trauma of the residential school system imparted on multiple generations of people. It has not only affected the way Aboriginal people view "Canada" but also how they are socialized and interact with the criminal justice system. Assuming this to be correct, this paper argues that the best way to heal the harm caused by the residential school system and reduce incarceration rates of Aboriginal people in Canada is to

[10] Lori Arias, (Lecture in Professor Coyle's Aboriginal Law Class, delivered at the Spencer-Niblett Law Building, Western University, 30 September, 2014), [unpublished]. Ms. Arias indicated that, due to population and budget constraints, many judges outside major city centres simply say "I have considered the *Gladue* factors" without any meaningful explanation of how those factors were applied in the legal case at hand.
[11] *Supra* note 1.

formally recognize Indigenous legal traditions and jurisdiction in the area of criminal law and allow Aboriginal people convicted of crimes to be subject to this newly recognized legal order.

This essay begins with an overview of the residential school system and why I believe it is one of the most important factors influencing the current state of Aboriginal people in the criminal justice system. Next, I will broadly examine what traditional indigenous legal traditions were and look at why the current Canadian criminal law system is not working for Aboriginal people. I will review government reports that indicate that autonomous Aboriginal jurisdiction is the way forward to reducing their over representation in the Canadian Criminal Justice system. Finally, I will look at the US tribal court system and its application to criminal law in the United States. The US Tribal court system and practices will then be explored through a Canadian lens, and how a similar system implemented in Canada would allow Aboriginal communities to heal from the harm of the residential school system. Foreseeable problems and issues with the separate criminal jurisdiction of Aboriginal communities will be examined. I will conclude with a summary of my findings.

Residential Schools – The After Effects

Residential Schools – A History and Their Stated Purpose

The government began setting up residential schools in the 1880's. The last one was closed down in 1996.[12] The aim of these schools was to "kill the Indian in the child" and assimilate Aboriginal children into white society.[13] This was achieved by removing these children from their homes and forcing them to attend church run government sanctioned schools. Aboriginal children were forbidden from speaking their own language at many residential

[12] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press Incorporated, 2010) at 44.
[13] Prime Minister Stephen Harper, official apology, June 11, 2008.

schools and were often beaten if they disobeyed.[14] The boys were taught physical labour jobs like agricultural work and tin-smithing while girls were primed for domestic service.[15] It is now widely acknowledged that numerous children suffered physical and sexual abuse in the residential school system.[16]

Aftermath – When Children Left the Residential Schools

When children turned 18 they were no longer required to attend the residential school. Upon leaving, Aboriginal children were discouraged from pursuing further education.[17] Many students returned to their families only to find they were now aliens in their own homes.[18] No longer able to speak their native language, survivors of the residential schools quickly realized they could not effectively communicate with their families. The years of ministers' teaching students that their Aboriginal lineage made them inherently inferior to white people also further distanced residential school survivors from the communities they returned to.

Canadian society was not accepting of Aboriginal people either. Although these students attended school to the age of 18, many students from residential schools had the effective education of a fifth grader.[19] This lack of education, coupled with the inherent racism against Aboriginal people in society, often meant these survivors were aliens in "white" society as well and had difficulty securing jobs in the Canadian economy.[20] In other words, they fit into neither the Aboriginal or Euro-Canadian white community.

Alienation, Drug Abuse and Crime – Residential School Legacy

[14] Celia Haig-Brown, *Resistance and Renewal* (Vancouver: Arsenal Pulp Press, 1998) at 16.
[15] The University of British Columbia, *The Residential School System*, online: Indigenousfoundations.arts.ubc.ca <http://indigenousfoundations.arts.ubc.ca/home/government-policy/the-residential-school-system.html>.
[16] *Supra* note 14 at 18.
[17] *Supra* note 15.
[18] *Ibid*.
[19] *Ibid*.
[20] *Ibid*.

After leaving the residential schools survivors of the residential schools were now truly alone. No longer tied to their heritage due to 18 years of physical separation, continuous years of physical and sexual abuse at the hands of state sanctioned institutions and too "Indian" to fit in to white society all dealt a devastating blow to Aboriginal communities. After failed attempts to find work many of the survivors ultimately decided to live on the reserves with their families despite feelings of alienation.[21]

The Statistics

Childhood trauma has been shown to be a strong indicative factor of substance abuse developing as an adult[22] and a correlative factor that contributes to mental illness.[23] There is a strong positive correlative factor between substance abuse, mental illness and poverty.[24] Poverty is known to contribute to criminal behaviour. One study showed that people whose incomes fell in the bottom 20% were seven times more likely to be convicted of crimes such as drug possession than people whose income fell in the top 20%.[25] A study done in 1989/90 by Correctional Services Canada showed that 64% of surveyed federal inmates admitted to having used intoxicating substances on the day predicating their crime.[26] Treating mental illness within the study group was linked with a 60% drop in criminal behaviour.[27] In Canada, the more

[21] *Supra* note 14.
[22] Robert Anda, et al. "The Enduring Effects of Abuse and Related Adverse Experiences in Childhood: A Convergence of Evidence from Neurobiology and Epidemiology" (2005) 256 Eur Arch Psychiatry Neurosci 174-86.
[23] Barbara Everett, Ruth Gallop, *The Link Between Childhood Trauma and Mental Illness: Effective Interventions for Mental Health Professionals* (California: Sage Publications, 2000) at 48.
[24] "Poverty" is being used in this essay to mean those who live below the federally established Low Income Cut Off (LICU) also known as the poverty line. *Poverty and Substance Abuse*, online: International Alcohol Rehab Association < http://alcoholrehab.com/drug-addiction/poverty-and-substance-abuse/>.
[25] Amir Sariaslan, et al., "Childhood family income, adolescent violent criminality and substance misuse: quasi-experimental total population study", online: (2014) 205 The British Journal of Psychiatry 5 <http://bjp.rcpsych.org/content/early/2014/08/14/bjp.bp.113.136200.abstract>.
[26] Parliament, Legislative Assembly, Drug Policy Committee, "Drugs and Drug Policy in Canada A brief review and Commentary" in *Parliamentary Business*, (November 1998) online: <http://www.parl.gc.ca/Content/SEN/Committee/362/ille/rep/rep-nov98-e.htm>.
[27] *Ibid*.

criminal behaviour one engages in, the more likely it is that they will eventually run into and have to deal with the criminal justice system. Given the abuse many Aboriginal children suffered in the residential schools as children it is not surprising many grew up to abuse intoxicating substances, developed mental illnesses and ended up living in poverty. The children of residential school survivors were subsequently subjected to poverty, mental illness and substance abuse in their home. Children who grow up around mental health issues and substance abuse are three times more likely to have mental health issues or substance abuse problems than children who do not grow up around either.[28] Children who grow up in poverty are nearly five times more likely to live below the poverty line as an adult compared with their peers who grew up above the poverty line.[29] It is not surprising that with all the increased risk factors Aboriginal people deal with that lead to increased criminal behaviour, one fifth of the people in federal custody are Aboriginal despite being less than one twentieth of the Canadian population.

Given this complex set of factors that were effectively condoned and enforced by the Canadian government for over 100 years, it is ludicrous to think that any amount of *Criminal Code* amendments relating to specialized sentencing factors will lead to reduced criminal activity in Aboriginal communities. The Canadian criminal justice system is simply not equipped to consider and remedy a century of harm caused by the residential school system. To suggest so is like proposing that neo-Nazi supporters should have determined how to heal the harm WWII inflicted on the Jewish people by the Nazis. Instead, Aboriginal groups must be given the autonomy to enact and enforce their own legal orders relating to criminal law. In order to begin to heal, only Aboriginal groups can fully understand the deep rooted harms caused by the residential school system and create sanctions for criminal behaviour that reflects the community's needs.

[28] *Supra* note 22 at 184.
[29] *Ibid*.

Unique Factors Lead to Unique Problems – Why Aboriginal Legal Orders and Jurisdiction Needs to be Recognized

If childhood abuse ultimately leads to increased crime rates, why should Aboriginal offenders be treated any differently than non-Aboriginal offenders who have suffered childhood abuse? Why should Aboriginal beliefs and legal orders be recognized over another group of people who are victims of abuse?

The reason is because the Aboriginal situation is unique. As noted above, the very institution that inflicted the harm upon them now claims to have programs in place to heal them. Although other groups were systemically discriminated against by the Canadian government,[30] no other groups endured 100 years of institutionalized schooling designed to "kill the Indian in the child". For 100 years Aboriginal children were systematically cut off from, and actively taught, to abhor their support systems. The abuse suffered by the Aboriginal people is exceptional and requires an exceptional solution. Unable to turn to the healing of their ancestors, the Euro-Canadian system held little help for them. Rife with racism and wrought with memories from their childhood, it seems completely irrational for the survivors of the residential school system to turn to the very institutions that caused their suffering in order to heal.

The exceptional solution I propose is the formal recognition by the Canadian government of Aboriginal legal orders. The government created the circumstances that allowed for the abuse to happen. It is the Aboriginal people themselves who need to create systems and orders to deal with the aftereffects of the residential school system that have resulted in increased criminal behaviour in the Aboriginal population. As explained above, the criminal behaviour and resulting overrepresentation of Aboriginal people in custody is linked to the harms caused by the

[30] For example, the Japanese internment camps. See "Pamela Suigan, "Memories of Internment: Narrating Japanese Canadian Women's Life Stories" (2004) 3 Can J Soc 360." for more information.

residential schools. When Aboriginal people currently deal with the criminal justice system they are faced with further cultural alienation. Instead of programs to treat the underlying emotional and psychological factors caused by residential schools through the use of a cohesive sentencing structure, Aboriginal offenders are told yet again that their belief systems and cultures are wrong. They are forced to conform to Euro-Canadian criminal law sentencing structures and beliefs. They are told their cultural sentencing beliefs are yet again inferior to the Euro-Canadian ones. Although Canadian court sentencing structures are supposed to take into account the unique factors inherent to Aboriginal people as described above, without Aboriginal people having jurisdiction to enact and enforce their own laws, the assimilation attempts of the residential schools continue. Only Aboriginal people themselves are able to determine what sentencing structures and case-specific factors need to be highlighted and reintroduced from their cultural past in order to allow for true healing of the Aboriginal people to take place.

Indigenous Legal Traditions – What are They?

Important Considerations before Analyzing Indigenous Legal Traditions

Oral Traditions

Before an analysis of Indigenous legal traditions can begin, it must be noted that up until only a few hundred years ago, most Aboriginal legal orders and traditions were passed down orally. Due to the oral nature of legal orders in traditional Aboriginal communities, the residential school system created a cultural disconnect, and a resulting loss of Native language and isolation from communities. A large number of the oral teachings from many Aboriginal communities were not passed down to the younger Aboriginal generation. While Aboriginal scholars such as John Borrows have gone to great lengths to rediscover, codify and rekindle lost Aboriginal legal traditions, one hundred percent historical accuracy cannot be verified. Almost

all of the written accounts of Aboriginal legal orders pre 1900 are by non-Aboriginal observers who rarely had any interest in exploring the complexities of Indigenous legal orders.[31] As such, these written accounts from non-Aboriginal observers, although not ideal, are the only written proof available to unify accounts from modern scholars such as John Borrows with recorded accounts from the past.

Multiple Groups With Multiple Legal Traditions

It is important to note that there are over 633 recognized distinctive Aboriginal groups in Ontario,[32] each with unique histories and cultural beliefs. Similar to how different provincial laws have overlapping legal themes, different Aboriginal groups have overlapping legal beliefs.[33] Since it is not possible to discuss every Indigenous legal tradition in detail, the essay will focus on the Iroquois, Cree and Anishinabek (Ojibway). Their exact legal orders will not be examined in detail.[34] The Iroquois were a patriarchal, agricultural nation while the Cree and Anishinabek were matrilineal and nomadic.[35] These two groups were chosen to demonstrate underlying principles of Indigenous legal traditions in very different socially structured groups.

Different Language Different Outlook

Many Indigenous legal languages[36] do not have words associated with criminal proceedings such as "trial", "guilty" or "bail". Nevertheless I have used these words to describe

[31] Michael Coyle "Traditional Indian Justice in Ontario: A Role for the Present?" (1986) 24:3 Osgood Hall LJ ch 4.
[32] Kathleen Lickers, (Lecture in Professor Coyle's Aboriginal Law Class, delivered at the Spencer-Niblett Law Building, Western University, 21 October, 2014), [unpublished].
[33] For example, a community rather than an individualistic approach. See *Supra* note 12 at 241-4.
[34] For a closer look at the Iroquois see: L.H. Morgan, "League of the Iroquois", (New York: Corinth Books, 1969) at 76 (originally published 1851).
[35] For a general description of the workings of Iroquois government, see 54-146; and *supra*, note 27 at 90-92. For the Anishinabek see "The Northern Ojibway and the Fur Trade: An Historical and Ecological Study", (Toronto: Holt, Rinchart & Winston, 1974).
[36] There are over 60 officially recognized Indigenous languages according to the 2011 Statistics Canada report. Some Aboriginal groups have introduced words such as "court" into their traditional languages. Even when

the Indigenous legal histories and traditions to make the concepts more readily understood by a non-Aboriginal audience.

What are "Indigenous Legal Traditions"?

Indigenous legal societies and beliefs were structured differently than European societies'. The structure of the social groups created tight, well defined social structures. Anti-social, counter-group behaviour such as stealing was dealt with through powerful social deterrent sanctions. For example, in some Aboriginal communities if someone was found to have stolen property of another tribe member, the wronged person *and their family* could remove all the possessions of the guilty person's *family* dwelling.[37] In traditional Aboriginal communities, criminal behaviour not only had direct consequences for the accused but could also have consequences for the accused's entire family. This created a strong incentive not to engage in criminal behaviour to not only prevent self-harm but also to prevent harm to one's family. This should be compared with the individualistic approach of the Canadian criminal law system where deterrence is created through harsh penal outcomes and punitive measures.

Indigenous Approaches to Crime

In such close knit communities sanctions that involved public shaming, were often strong enough threats to deter criminal conduct. For example, the Cree and Anishinabek people would use a distinctive garment to denote when a male had committed idolatry and a woman had her "hair cut from ear to ear"[38] as a public display for the same crime. Both punishments told the

---

European derived words are formally recognized, it is important to understand that for many Aboriginal communities the discussion of guilt and innocence is still a foreign one. For more information see: Statistics Canada, *Aboriginal Languages in Canada, 2011* (Ottawa: StatCan, December 2011).

[37] Dave Herron, "Traditional Aboriginal View of Justice and Law" Online: <http://www.spiritsd.ca/teachers/dave.herron.htm>.

[38] Benjamin Mussey & Co., *The traditional history and characteristic sketches of the Ojibway nation*, (Corhill, 1850) at 140. See also *supra* note 34.

entire community that the person had committed a wrong. The shame and embarrassment worked as both a punishment to the accused and a deterrent to any future potential transgressors.

Some nations, like the Iroquois, had more formalized legal structures. When a serious crime such as murder occurred, the League of Nations would gather and discuss a reasonable punishment. Although the default rule was that the wronged party was allowed to seek vengeance, negotiations often resulted in gifts being given in place of retributive justice.[39]

Unlike the Euro-Canadian legal landscape, traditional Aboriginal "courts" did not have the same rigid power hierarchies present in the current day court system. Rather, they were composed of community members.[40] Sentencing was done communally with active input not only from the victim and accused but family members and others who may have been harmed through the wrongdoers conduct.

Sentencing Outcome and Goals: Canadian System and Aboriginal System Compared

The goal of sentencing was similar in many ways to Canadian law and yet different. Section 718 of the *Canadian Criminal Code* reads as follows;

> "The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
> (a) to denounce unlawful conduct;
> (b) to deter the offender and other persons from committing offences;
> (c) to separate offenders from society, where necessary;
> (d) to assist in rehabilitating offenders;
> (e) to provide reparations for harm done to victims or to the community; and
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community."[41]

[39] *Ibid*.
[40] *Ibid*.
[41] *Supra* note 4.

Section 718 can be boiled down to specific deterrence, general deterrence and rehabilitation. Specific deterrence refers to a sentence that is designed to prevent an individual from committing the same or a different crime again in the future. General deterrence refers to sentencing perpetrators of crime in such a way as to deter other people in society from committing the same crime. Rehabilitation is the idea that sentencing an offender causes them to take a "time out" and reflect on what it is that they have done. In theory, programs and support are supposed to be in place to help the offender rehabilitate from their crime and become a contributing member of society.[42] Although not an explicit goal of Canadian sentencing, retribution for the victim against the accused is arguably another goal of criminal sentencing outcomes in Canada. One only has to peruse the *Criminal Code of Canada* to see that numerous offences have minimum sentences attached to a conviction for that crime. Minimum sentences usually attach to crimes that society sees as more violent and more worthy of punishment.[43]

Aboriginal sentencing goals have a different focus. Rehabilitation is a core goal in Aboriginal sentencing structures just as it is a goal in Canadian criminal sentencing structure. However, instead of focusing on future deterrence of crime, the focus of Aboriginal sentencing is the current reparation and healing of the community. Whereas the Canadian criminal system is designed to use monetary or physical isolation to punish the convicted, Aboriginal sentencing forces the victim to fix what they have done within the community (i.e no isolation).

[42] For more information on Canadian sentencing principles see "Sentencing in Canada" (1999 J Howard Soc) and *Ibid*.

[43] See AJ Ashworth, "Is the Criminal Law a Lost Cause*?*", (2000) 116 Law Q Review, 225–56 and Michael Hirst, *Jurisdiction and the Ambit of the Criminal Law*, (London: Oxford Press, 2003). for a more thorough discussion of criminal sentencing principles.

Indigenous Legal Traditions, Canadian Legal Traditions and the Residential School System

With the large difference in sentencing principles between the two cultures and the harm caused by the residential schools it is no wonder that Aboriginal people are overrepresented in the criminal law system in Canada. If Aboriginal people were given formal criminal jurisdiction, they would be able to incorporate the healing elements within their legal structures into their proceedings. Rather than being subjected to a Euro-Canadian criminal system with legal outcomes foreign to their own and perpetuating the legacy of residential schools, Aboriginal communities could apply their own legal beliefs and structures in a way that could heal the whole community. It was the Canadian government that initially created the policies and procedures that forced Aboriginal people into the residential school system where they were subjected to systemic abuse. The same Canadian government is not in the best position to then turn around and claim to be able to determine the best solutions to heal the harm created by the residential school system. Instead of continued isolation and forced "assimilation" of Aboriginal people into the Canadian criminal sentencing regime, Aboriginal communities could determine the legal processes and outcomes that best allow for their communities and the accused to heal and grow. The Canadian government has an excellent opportunity to rectify the wrong they created with the residential school system. It is within the government's power to pass legislation that would allow the Aboriginal people to apply their own legal beliefs and processes to criminal wrongdoing.

The Current Criminal Justice System – Why it is Not Working for Aboriginal People

As far back as the 1960's the Canadian government recognized the deleterious effects of the criminal justice system on Aboriginal people.[44] Numerous government reports from the 1960's until now[45] have called for change. Despite all the lip-service paid to Aboriginal people, I argue that the changes made by the government to date have not addressed the underlying problem with the current criminal system as it relates to Aboriginal offenders.

When an Aboriginal person is arrested for a criminal offence in Canada[46] they are initially taken into custody like any other non-Aboriginal offender.[47] In a large city like Toronto, Ontario, specialized "Gladue courts"[48] courts are in place for Aboriginal offenders. The personnel associated with these courts, including the judiciary, have specific knowledge and training in order to give full effect to section 718.2(e) and the *Gladue* decision. They are trained to consider Aboriginal offenders' unique heritage when hearing and sentencing criminal cases involving Aboriginal people. In addition to having specially trained legal staff the court also employs staff such a social workers to work with the Aboriginal offenders, staff not usually found in a court house setting. The specialized non-legal staff-meet with the Aboriginal offender,

---

[44] *Supra* note 12 at 35.
[45] *Ibid*.
[46] The federal criminal process is laid out by the *Criminal Code* and is the same in every province. Minor things such as the time an offender is held before a bail hearing may change due to personnel restraints but the basic procedures are the same. Toronto, Ontario was used as an example due to the large city size and resultant resources to fund specialized training in Aboriginal needs. Smaller, more rural areas often have judges who must fly in to hold court. In such remote communities, Aboriginal people held on bail are removed from their communities for an even longer period than Aboriginal people who are in the criminal justice system in a more urban setting.
[47] *Supra* note 4.
[48] *Supra* note 6. This case clarified the requirements under section 718.2(e) of the *Criminal Code*. Justice J Cory and Iacobucci JJ writing for the majority stated at paragraph 75 that taking section 718.2(e) and the section it falls under as a whole, its purpose is "to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders. Section 718.2 (e) requires that sentencing determinations take into account the unique circumstances of aboriginal peoples." The intricate workings and mechanisms of *Gladue* courts are outside the scope of this paper. For more information about Gladue courts see: Department of Justice Canada, Gladue *Practices in the Provinces and Territories* (Ottawa: Research and Statistics Division, 2013).

and make personalized recommendations for rehabilitation to the presiding judge or master over the case.[49] Most judges follow the recommendations of the non-legal staff whenever possible.[50]

It is evident from the above example that the government recognizes the disproportionate number of Aboriginal people in the criminal system and is attempting to remedy it. However, despite the *Gladue* factors and resulting requirements having been around for more than 10 years now, Aboriginal offenders still make up nearly 20% of the Federal inmate population. Despite the best intentions of the government and their attempts to implement programs to reduce the incarceration rates of Aboriginal offenders I argue this approach is still missing a key element that Aboriginal ability to self-govern would solve: community.

Even with Gladue courts, offences with minimum jails sentences still require a judge to impose at minimum amount of jail time. Even if personal issues are considered, such as an offenders willingness to enter a drug treatment program prior to jail, the Criminal Code still requires periods of incarceration where an offender must be isolated from their Native community (physically or psycho-socially). This isolation continues the disconnect of Aboriginal people from their families and values that had as its inception the residential school system and the current continuing cycle of isolation and criminal behaviour. In the words of Rose-Marie Blair-Smith from the Council of Yukon Indians "[I]t is hard to plan for release when you are 1000 miles away from home".[51] Even when an Aboriginal offender is released on probation rather than given jail time, certain restrictions are normally in place such as designated check in times with a probation officer. These restrictions limit where and how they are able to return to and interact within their own communities. They often have to check in with parole officers and tell them whenever they go from one location to another. Some important activities in the

[49] *Ibid*; *Supra* note 10.
[50] *Ibid*.
[51] Correctional Services Canada, *The Report of the Task Force on Federally Sentenced Women*, vol III (Yukon: Women Offender Programs and Issues).

Aboriginal communities that have significant cultural importance may not be deemed important enough by a parole officer to allow an Aboriginal person to attend. This further isolates the Aboriginal person from their community. Not surprisingly, the Aboriginal offender often times returns to some previous behavioural pattern such as alcohol abuse as a way to cope. As discussed, alcohol abuse is connected with increased crime rates. If the offender begins abusing again, it is only a matter of time before another criminal offence occurs and the Canadian criminal justice system becomes involved and the process repeats itself. I argue that providing Aboriginal communities the jurisdiction and ability to self-govern would finally put an end to the cycle of isolation, drugs abuse and resulting criminal behaviour.

Government Reports that Indicate Autonomous Aboriginal Jurisdiction as the Way Forward to Reducing Aboriginal Overrepresentation in the Canadian Criminal Justice System

Government Recognition of Aboriginal Criminal Jurisdiction as a Way Forward - Law Commission's

The Aboriginal Justice Implementation Commission of Manitoba put out a report titled "The Justice System and Aboriginal People".[52] One major issue the commission identified is the failure of the current criminal justice system to address the need of Aboriginal people. A second major issue the report identifies is the rural nature of most Aboriginal communities. With populations too small to make it fiscally feasible for the Queen's Bench court or judges to sit in rural areas with high Aboriginal populations, Aboriginal offenders charged with crimes that require a hearing by the Queen's Bench end up removed from their communities for extended

[52] The Aboriginal Justice Implementation Commission, *The Justice System and Aboriginal People* (Manitoba: Aboriginal Justice Implementation Commission, 1999) Volume 1.

periods of time.[53] After outlining further issues with the system, the Manitoba Inquiry on Aboriginal Justice goes on to recommend "the creation of an Aboriginal justice system" arguing that unless the creation of an Aboriginal Justice system "goes forward, the problems of inequality and injustice will continue to plague [the Canadian] justice system".[54]

Theory in Practice – What Actually Happened when Aboriginal People were given more Criminal Law Authority

In 2011 the Office of Strategic Planning and Performance Management, a division of the Department of Justice Canada, put out its final report titled "Aboriginal Justice Strategy (AJS) Evaluation".[55] The report examined case studies of 13 community-based justice programs from 2010-2011.[56] The community programs that were implemented in the AJS study did not give complete decision making autonomy to the Aboriginal people involved. However, Aboriginal beliefs and cultures where incorporated into the decision making process wherever possible. When legislation allowed for leniency, sentencing was done to try and best follow traditional Aboriginal legal outcomes such as reparation to the community rather than punitive Canadian approaches such as fines.[57]

Despite the restrictions of the AJS and inability to fully apply Aboriginal traditions to every criminal behavior, at the conclusion of this study it was clear that the community-based justice programs had resulted in lower rates of recidivism, finding "a significant difference

[53] *Supra* note 51. Aboriginal people from rural areas are often denied bail because the distance of their Native reserve from the nearest sitting of the Queen's Bench, coupled with lower socio-economic status make it unlikely they will arrive for their court date. Often times these Aboriginal offenders simply do not have the means to travel to their court dates.
[54] *Supra* note 52.
[55] Office of Strategic Planning and Performance Management, *Aboriginal Justice Strategy Evaluation Final Report* (Evaluation Division, 2011).
[56] *Ibid* at ii.
[57] *Ibid* at 21.

between rates of re-offending of AJS-funded programs participants and a comparison group".[58] Lower recidivism rates mean less Aboriginal people in the Canadian criminal justice system and an overall reduction in the number of incarcerated Aboriginal people.

One of the main reasons the AJS was noted to have made the significant achievements it did was due to the ability of communities to address the underlying issues contributing to criminal behaviour, namely "mental illness, substance abuse and poverty".[59] As discussed, mental illness, substance abuse and poverty are harms that have resulted from the residential school system and are ongoing issues to this day. Despite the limitations of the AJS study, it is clear that giving Aboriginal communities more criminal law authority reduces recidivism rates which will ultimately a reduction of Aboriginal people in the Canadian criminal justice system. This study shows that Aboriginal communities which are provided with more autonomy to govern their own internal criminal proceedings are able to reduce crime rates in a way all the *Gladue* courts in the country cannot replicate. I argue this is due in large part to the intangible healing that communities are able to implement when the rigid Euro-Canadian system takes a step back in Aboriginal communities. Since every community's experiences from the residential school system was different, what every community requires to heal is therefore different. What the AJS study proves is that the "less is more" approach will reduce overrepresentation of Aboriginal people in the Canadian criminal justice system. The less the Canadian government interferes and tells Aboriginal people what should or will be done, the more healing Aboriginal communities will be able to accomplish and the more Aboriginal offenders will stay out of the Canadian criminal justice system.

[58] *Ibid* at iii.
[59] *Ibid* at 32.

Government Recognition of Aboriginal Authority over Criminal Matters Outside of the AJS Communities

Current Criminal Jurisdiction of Aboriginal Communities

Despite the success of the AJS and recommendations from the lengthy report by the Aboriginal Justice Implementation Commission in Alberta, the policies of the Aboriginal Affairs and Northern Development office (the main office dealing with Aboriginal affairs within the Government of Canada) do not reflect full Aboriginal jurisdiction in criminal law. Their policy[60] entitled "Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government"[61] recognizes that there may be circumstances where "the…negotiated rules of priority [between the Federal, Provincial and Aboriginal laws and levels of government] may provide for the paramountcy of Aboriginal laws",[62] but explicitly states that laws with an "overriding national or provincial importance will prevail over conflicting Aboriginal laws.[63] One of the "rules of priority" the government lays out is the "maintenance of national law and order and substantive criminal law, including: offences and penalties under the Criminal Code and other criminal laws". Although this policy also states that there may be "certain criminal laws" that have a substantial enough connection with Aboriginal culture to warrant negotiation of the *prima facie* override of Federal criminal authority, it is clear that giving Aboriginal groups jurisdiction over criminal law enforcement within their communities is something the Canadian Federal government is not willing to do nor is it seen as a necessity at the present time.

I argue that this stance taken by the current Federal government on Aboriginal criminal jurisdiction is incorrect. The AJS study has already shown the community-based Aboriginal

[60] Up-to-date as of November 2014.
[61] The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government Policy, Aboriginal Affairs and Northern Development Canada 2014.
[62] *Ibid* at Part I - Application of Laws.
[63] *Ibid*.

justice systems, even when limited in power and scope, lead to reduced recidivism rates of the program participants. Reduced recidivism of Aboriginal people leads to fewer Aboriginal people in the Criminal justice system as a whole and meaningful, community level healing to begin and continue.

Why the Current System is Extremely Harmful – A Rural Perspective

It is important to note that nearly 50% of Aboriginal people live in rural settings.[64] When an Aboriginal person from a rural community is accused of a crime and held for trial, they are sent to the nearest detention centre often many hours away from the Aboriginal person's home community. Section 718.2(e) of the *Criminal Code* and related case law only requires the consideration of "Aboriginal factors" when *sentencing* an Aboriginal offender. The *Criminal Code* is silent about the treatment of Aboriginal people upon arrest or being held in pre-trial custody. To date, no case law has discussed whether unique Aboriginal factors should be considered from the first moment an Aboriginal person begins dealing with the Canadian criminal law system. The rural and impoverished setting of many Aboriginal offenders means they are less likely to be released on bail due to the perceived risk the accused will fail to show up for their trial.[65]

Given the tendency for an Aboriginal accused to be held in custody longer before trial and the lack of unique Aboriginal factors that are considered prior to sentencing, Aboriginal offenders are more often alienated for longer periods of time from Native communities and support systems when arrested and charged with a criminal offence.[66] The current procedure in place for all Canadian accused only furthers the alienation and isolation practices initiated by the

[64] Aboriginal Affairs and Northern Development, *Aboriginal Demographics from the 2011 National Household Survey* < https://www.aadnc-aandc.gc.ca/eng/1370438978311/1370439050610> (Ottawa: NHS, 2011).
[65] *Supra* note 51.
[66] *Supra* note 4.

government with the residential school system. Instead of Aboriginal communities being able to determine how and when a trial should occur, and working out ways to deal with underlying issues of drug abuse and mental illness that continue from the residential school system and lead to increased criminal behaviour, the current system subjects the Aboriginal offenders to further isolation, a practice started in Canada by the residential school system. The Canadian criminal law system fails to fully take into consideration their unique circumstances or cultural practices in pre-sentencing which leads to further isolation of Aboriginal people from their own communities and support systems thus perpetuating the isolation and harms resulting from the residential school system. The cycle of isolation continues and so does the overrepresentation of Aboriginal people in the Canadian criminal justice system.

I argue that the only way to truly move forward from the harms of the residential schools is to give Aboriginal groups the jurisdiction over their own criminal proceedings. Instead of Aboriginal people being forced through yet another Euro-Canadian institution (the criminal system) that does not fully address their unique needs caused in large part by the legacy of the residential school system, formally recognizing and allowing Aboriginal people to govern their own affairs will allow for meaningful healing. If Aboriginal people are going to rebuild their communities they have to be able to make rules for their own people and deal with accused in their own culturally-sensitive way. In the words of John Borrows, a well-known Canadian legal professor and Aboriginal legal scholar; "if aboriginal justice is not given its meaning by Aboriginal peoples, how can it claim to be truly Aboriginal?"[67]

What might this Aboriginal jurisdiction look like in practice? A look to our neighbours to the south sheds some light on the answer.

[67] *Supra* note 12 at 14.

Jurisdiction for Aboriginal People to Self-Govern and Create Laws – A Look at the US Tribal Court as a Guide

A Brief History of the Tribal Court System in the US

When the US declared sovereignty from Britain following the American Revolution in 1776, the American courts declared Indians as a "domestic dependent nationhood". In the eyes of the American government, this left Aboriginal people as neither full citizens of America nor complete aliens. Given this unique legal status of Aboriginal people's American citizenship at the time of confederation, the American government passed the "Code of the Laws of the United States of America". This Act recognized Aboriginal legal autonomy for all Indian people who were deemed to live in Indian Country. The current definition of Indian Country is:

> "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same".[68]

When the European settlers in America freed themselves from British rule and created the United States, the Aboriginal people retained the rights to govern their own affairs (including criminal proceedings), own their own lands and enter into treaties, with some restrictions.[69] At

[68] 18 U.S. Code Chapter 53 §1151.

[69] *Supra* note 52. Justice Marshall was careful to limit Indian rights and jurisdiction to their own lands. With respect to crime, the American courts have subsequently held that Tribal Law does not apply to non-Aboriginal people who commit crimes on reserves. See the case of *Oliphant v Suquamish Indian Tribe* (1978) 435 U.S. 191 and the article by Nell Newton, "Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts" (1997/1998) 22:2 Am Indian L Rev 285.

the culmination of a trilogy of cases[70] and as a landmark decision for the time, Chief Justice Marshall in *Worcester v. Georgia*[71] held that Indian nations were to be viewed and treated as sovereign nations.

Following these decisions and with the enactment of the *Indian Appropriation Act of 1871*[72] passed by Congress, the form of interactions between Native tribes and the American government changed. Independence of Aboriginals formerly recognized by the Congress was narrowed.

The sovereignty of Aboriginal Tribal Courts was confirmed by the Supreme Court in 1883 in *Ex Parte Crow Dog*.[73] In this case a member of the Brulé band of the Lakota Sioux shot and killed a Lakota chief named Spotted Tail. The Tribal court heard the case and in keeping with Aboriginal law, ordered the necessary reparation payments be given to the wronged family. However an Indian agent reported the murder to the Federal authorities and Crow Dog was indicted by a federal grand jury for murder under the District of Dakota Territory laws on September of 1881. He was sentenced to be hanged.[74]

The case was ultimately appealed to the Supreme Court. Justice Stanley Matthews, writing for the majority, held that the District Court did not have jurisdiction to hear matters that had already been tried at a Tribal Court without a clear expression of Congress to the contrary.[75] The Supreme Court determined that the state had improperly asserted its jurisdiction in a matter

[70] A discussion of the trilogy of cases is outside of the scope of this paper. See: *Johnson v M'Intosh* (1823) 21 U.S. 543; 21 U.S. (8 Wheat.) 543; 5 L. Ed. 681; 1823 U.S. LEXIS *293* and; *Cherokee Nation v Georgia* (1831) 30 U.S. 1 8 L. Ed. 25; 1831 U.S. LEXIS 337 for more information.
[71] *Samuel A. Worcester v. Georgia* (1832) 31 U.S. 515 (ct); 8 L. Ed. 483 at 560–61.
[72] Also known as the "Appropriation Bill for Indian Affairs". It was passed by Congress on February 27, 1851. It is available at http://memory.loc.gov/cgi-bin/ampage and found in ch. 14, 9 Stat. 574.
[73] *Ex parte Crow Dog* (1883), 109 U.S. 556 at 568–69.
[74] *Ibid*.
[75] *Ibid* at 109, citing *United States v. Joseph*, 94 U. S. 614, 94 U. S. 617 (ct).

where the Sioux tribe had correct jurisdictional authority and overturned the trial court's decision.[76]

This decision made it clear that the common law assumption in the US at the time was that Tribal courts had full jurisdiction over criminal matters that occurred between two Indians in Indian country. This common law presumption was quickly overruled with the addition of the *Major Crimes Act* that is discussed in more detail below.

What Happened after *Crow Dog* - Tribal Court Jurisdiction in the US Currently

When can Indian Jurisdiction be Infringed[77] *and Who do Tribal Courts Have Jurisdiction Over?*

The answer is complex. In the six states governed by Public Law 280 (PL 280) criminal matters that occur on reserves are brought by the State to their respective state court. In non-PL280 States criminal matters that fall under the *Major Crimes Act* are brought before the Federal Court. Under both regimes Native Tribes often have internal constitutions and rules that govern criminal law.

The Modern Major Crimes Act – When do Tribal Courts Have Criminal Law Jurisdiction?

As a response to the court's decision in *Crow Dog*, Congress passed the *Major Crimes Act*. This Act originally listed seven serious felonies that were deemed to be under federal jurisdiction. As of 2014, this *Major Crimes Act* lists 15 serious offences that fall under federal jurisdiction and reads:[78]

> (a) "[a]ny Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter,

[76] *Supra* note 73 at 572.
[77] This refers to when the courts have ruled the American government has superior jurisdiction. This overriding power is often disputed by Aboriginal groups.
[78] *The Major Crimes Act*, 18 U.S.C. § 1153 at 679.

> kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States"

Crimes that occur in Indian country that are not captured by the *Major Crimes Act* fall under the Tribal courts' jurisdiction.

Public Law 280 (PL280) - When do Tribal Courts Have Criminal Law Jurisdiction?

PL280 is a federal law that codified the *McClanahan v Arizona State Tax Commission* case. The purpose of the law is to establish "a method whereby States may assume jurisdiction over reservation Indians".[79] The Act[80] has been applied in California, Minnesota,[81] Nebraska,[82] Oregon,[83] Wisconsin,[84] and, Alaska.[85] There are also an additional eight states that are said to have "optional jurisdiction" over Indian Country. The details of the optional states and their jurisdiction is outside the scope of this paper.[86]

Practically speaking, PL280 shifted the limited criminal jurisdiction prescribed by the *Major Crimes Act* that the Federal government had over Indian country to a very broad criminal

[79] *McClanahan v Arizona State Tax Commission* (1972) 411 U.S. 164; 93 S. Ct. 1257; 36 L. Ed. 2d 129 at para 19.
[80] Public Law 83-280 (18 U.S.C. § 1162(a), 28 U.S.C. § 1360).
[81] Except for Red Lake Nation. *Ibid*.
[82] Jurisdiction over the Winnebago and Omaha Reservations has been returned to Federal jurisdiction. See: Ada Melton and Jerry Gardner, "Public Law 280: Issues and Concerns o for Victims of Crime in Indian Country", online: (2010) <http://www.aidainc.net/Publications/pl280.htm>.
[83] Except the Warm Springs Reservation. *Supra* note 80. Federal jurisdiction has been partially retroceded over the Umatilla Reservation. *Ibid.*
[84] Federal jurisdiction has been retroceded over the Menominee Reservation in connection with the *Menominee Restoration Act*. H.R. 10717 (93rd): Menominee Restoration Act (Public Law 93-197).
[85] PL 280 states that "the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended." *Supra* note 80.
[86] See *supra* note 82 for more information.

jurisdiction that the applicable States could take through legislative enactment.[87] PL280 did not require States to claim authority over the criminal law jurisdiction but rather allowed for the option to do so. More recently, many PL280 States have begun to reclaim criminal jurisdiction in limited areas[88] that they had opted to leave in the hands of Tribal courts when PL280 was initially enacted. The state of Tribal court jurisdiction in PL280 States is currently unclear and frequently changing. Given the current uncertainty, PL280 States are not the best model for Canada to emulate in allowing Canadian Aboriginal peoples to assume responsibility for criminal law.

Figure 1: Comparison of PL280 and non-PL280 states.[89]

	States without PL 280	States with PL 280
Tribal	Over Indians, subject to limits in Indian Civil Rights Act (ICRA)	Over Indians, subject to limits in Indian Civil Rights Act (ICRA)
Federal	Over major crimes committed by Indians (Major Crimes Act); Over interracial crime: Indian v. non-Indian (General Crimes Act); Over special liquor, gaming, and other offenses; otherwise, same as Off-Reservation	Same as Off-Reservation
State	Only over crimes committed by non-Indians against other non-Indians	Over Indians and non-Indians generally, with exceptions found in Public Law 280

Non-PL280 States that fall under *The Major Crimes Act* – Negotiating Jurisdiction

As with any court system that operates within a defined boundary, conflicting jurisdiction is bound to arise. The issue is the same for Tribal courts. What happens when a non-Aboriginal person commits a crime in Indian country? What happens when a non-Aboriginal person is the

[87] The exact wording gives the jurisdiction over criminal law of the respective state "to the same extent that such State has jurisdiction over [criminal] offenses committed elsewhere within the State". Public Law 83-280 (25 U.S.C. § 1321(a)).
[88] *Supra* note 82.
[89] *Ibid*.

victim of a crime in Indian country? What if two Aboriginal people are involved from different Aboriginal communities and thus different Tribal court systems?

The answer to jurisdiction is simplified in the table[90] to the right;

Offender	Victim	Crime	Criminal Jurisdiction	Law	Authority
Non-Indian	Indian	Any	Federal	Federal	General Crimes Act
Non-Indian	Non-Indian	Any	State	State	
Indian	Any	Major	Federal/Tribal concurrent	Federal/Tribal concurrent	Major Crimes Act
Indian	Non-Indian	Non-major	Federal/Tribal concurrent	State	General Crimes Act
Indian	Indian	Non-major	Tribal	Tribal	

Bringing it Home – How US-Style Tribal Courts would Fit in Canadian Judicial Organization

It is important to note that discussion of formal recognition of Aboriginal legal orders in this section should not be interpreted to mean that Aboriginal legal authorities require Canadian recognition in order to exist or for Aboriginal legal orders to be valid law. Formal recognition by the Canadian government of Aboriginal legal orders is the most expedient way to move the process of healing forward in Aboriginal communities. The formal recognition of Aboriginal legal authority sends a clear message to Aboriginal communities that the government understands the ongoing harms caused by the residential school system and is willing to give Aboriginal communities the space they need to implement legal proceedings designed to best heal their respective communities.

[90] Matthew Handler, "Tribal Law And Disorder: A Look at a System of Broken Justice in Indian Country and the Steps Needed to Fix It" (2009) 75 Brook. L. Rev. at 261.

Canadian Recognition[91] *of Aboriginal Jurisdiction*

The first place that Aboriginal rights of self-government have arguably been recognized is in section 35(1) of the *Charter* which states "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed".[92] Legal scholars such as John Borrows argue that the invocation of Aboriginal "rights" automatically trigger the Crown's "duties". One duty arguably imposed on the Crown in *R v Sparrow*[93] is a duty to recognize limits on the Crown's power. The SCC held that restraint on Crown powers was sometimes necessary when interpreting section 35(1) of the *Charter.*[94] The combination of section 35(1) of the *Charter* and the Supreme Court`s interpretation in *R v Sparrow* in effect places a duty on the Crown to recognize Aboriginal rights.

There is already jurisprudence from the Supreme Court of Canada that arguably recognizes some degree of Aboriginal autonomy and right to self-government. Justice McLachlin stated in *R v Van Der Peet*[95] that "Aboriginal rights find their source not in a magical moment of European contact, but in the traditional laws and customs of the Aboriginal people in question".[96] This implies that the highest court of Canada recognizes that Aboriginal people have an inherent

[91] It is important to make sure that recognition is not equated with existence. Formal recognition by the Canadian government of Aboriginal legal traditions and authority in the criminal law context does not alter the inherent traditions or make their underlying principles any less relevant to the respective Aboriginal group. Arguably, the very existence of Canadian policies such as *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (*supra* note 61) indicates that the Canadian government already recognizes the existence of Aboriginal legal orders and realizes that formal recognition of these Aboriginal legal orders is required to some extent.

[92] [*The Charter*], *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11

[93] [*Sparrow*] [1990] 1 SCR 1075.

[94] A detailed analysis of the *Charter* and its application to Aboriginal rights of self-government is outside the scope of this paper. See *supra* note 12 at 177-215.

[95] [*Van der Peet*], [1996] 2 SCR 507.

[96] *Ibid.* at para 247.

right to govern themselves. The government of Canada has published a policy that explicitly states that "the inherent right of self-government is a section 35 right [of the *Charter*]".[97]

There is also case law however that suggests that the Crown and the courts are unwilling to fully recognize Aboriginal jurisdiction. In *R v Gladstone*[98] the court held that infringements of Aboriginal rights are allowed based on a "public interest standard". This approach had been criticized and rejected by a unanimous Supreme Court in *Sparrow* as being "so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights".[99] The court in *Gladstone* did not explain why they accepted the "public interest standard" or why it was no longer seen as too vague to have meaning as had been indicated in *Van Der Peet*.

Aboriginal Courts in Canada – Potential Integration and Foreseeable Difficulties

Integration with the Current Canadian Legal System

How Could Aboriginal Jurisdiction over Criminal Law be Implemented?

Parliament would need to pass a law delegating criminal jurisdiction of Aboriginal people on Indian reserves to Aboriginal peoples. A legal framework would need to be put into place that allowed for the creation of Tribal courts. A set of transitional provisions would be added to the *Criminal Code* as the Tribal courts are implemented. The enacting legislation could contain a provision allowing for smaller and remote Aboriginal communities to create a unified Tribal court with criminal law jurisdiction over multiple Aboriginal communities. Instead of each group

[97] *Supra* 61 at Part I – Policy Framework.
[98] [*Gladstone*], [1996] 2 SCR 723, 137 DLR (4th) 648; [1996] 9 WWR 149; 109 CCC (3d) 193; 50 CR (4th) 111; 200 NR 189; 23 BCLR (3d) 155; [1996] SCJ No 79 (QL); [1996] 4 CNLR 65
[99] *Supra* note 93 at para 90.

applying distinct Indigenous laws, the unified Aboriginal communities could work together to determine a unified legal strategy that repairs the harms caused by the residential schools. The option for multiple communities coming together to create a Tribal court recognizes the resource limitations faced by rural communities in Canada. Nearly 70% of inhabited reserves in Canada have a population of 500 people or less.[100] Reserve communities that contain such small populations probably do not have the resources to be able to afford maintaining a permanent, on reserve court. A provision allowing for multiple Indigenous groups to create a unified Tribal court recognizes the fiscal reality of most Aboriginal groups.

Each Aboriginal group that created an independent Tribal court or a unified Tribal court with other Indigenous groups would then be required to formally discuss how traditional Indigenous traditions should be updated and implemented to best heal the underlying and continuing alcohol abuse, mental illness and criminal activity that results from the legacy of the residential school system. Any specialized support workers that will be required to properly implement the holistic healing in the Aboriginal Tribal courts such as sweat lodges, spiritual ceremonies and mental health workers can be identified. A unique "criminal code" for each Tribal court could be written, with the ability to refer to the Euro-Canadian criminal law where appropriate. Each community, regardless of size, could form a Council comprised of community members to make decisions on behalf of the community similar to the League of Nations of the Iroquois.[101]

Who Would be Eligible for the Indigenous Courts?

Difficulties would certainly arise if the Canadian government formally recognized Indigenous judicial authority. Would the group-specific Indigenous laws be location specific,

[100] *Supra* note 64.
[101] *Supra* note 34.

only applying on Native reserves? What about Aboriginal people off of reserves or non-Aboriginal people living on a reserve? How would the law apply? What happens when a non-Aboriginal person and an Aboriginal person are involved in a dispute? Whose legal orders are followed? Does the severity of the criminal offence matter? These are difficult issues that would need to be worked out over time.

The easiest way to define Aboriginal judicial authority would for Indigenous legal orders to apply on reserve lands. Although criminal law is a federal matter, the idea of jurisdiction specific laws with criminal-like sanctions tried in provincial courts is common in Canada and therefore a recognizable concept for Euro-Canadians. Due to its familiarity it will be more easily accepted by the non-Aboriginal Canadian public. In addition, this concept has been adopted by the US Tribal courts in non-PLO states and seems to be working well. A large body of case law has already developed in the US that Canada would be able to draw on.

Crimes that occurred on the reserve would be handled by an internal Indigenous court. Everyone on the reserve would be subject to the same laws regardless of their Aboriginal status. This is similar to how Ontario's provincial laws apply to someone who lives in Alberta and encounters a legal problem when they are in Ontario. When a crime between two Aboriginal people from the same band occurs off of their Native reserves, the Canadian' courts could be obligated to refer the case, at the request of the offender and victim, to be heard on their respective reserve. Issues that occurred between tribes could be dealt with in a similar way to the American Tribal court system where formalized Band Councils get together and discuss where a particular trial should take place and whose laws should apply.[102] When the issue relates to two Aboriginal people from different reserves, the band Council could determine which laws the

[102] *Ibid*.

accused would be tried under similar to the way Iroquois Grand Council would discuss serious crimes when they occurred between members of two villages.[103]

When a crime occurred off reserve between an Aboriginal and non-Aboriginal offender, a provision could be added to the *Criminal Code* requiring mediation to occur between the Aboriginal and non-Aboriginal offender to determine which criminal justice system the alleged criminal offence would be tried under regardless of the severity of the crime. When a non-Aboriginal person committed a crime on a reserve, the precedent set by the Supreme Court of the United States in *Oliphant v Suquamish Indian Tribe*[104] could be followed. It held that Tribal courts did not have jurisdiction over non-Aboriginal offenders who committed crimes in Indian country. This could be followed in Canada where Canadian courts would have legal jurisdiction over non-Aboriginal offenders. Likewise, crimes committed on reserve by Aboriginal people against a non-Aboriginal victim could be tried by the Aboriginal court.

Once Tribal courts similar to those in the US have been implemented in Canada all criminal matters that occurred on Native lands could be referred to the Canadian Tribal courts and the transition sections added to the *Criminal Code* could be repealed.

Why Canadian Tribal Courts would Reduce Aboriginal Overrepresentation in the Canadian Criminal Justice System

With the latitude for Aboriginal people to implement and conduct hearings into criminal matters in their own communities and with the appropriate amount of sensitivity paid to each Aboriginal person's unique history, it is not difficult to extrapolate that the same outcome from the 13 AJS communities will be repeated across the country. Instead of programs designed to deal with Aboriginal people involved in criminal behaviour at the time of sentencing, these

[103] *Ibid*.
[104] *Supra* note 69.

Tribal courts would have the opportunity to set up a justice system that deals with the underlying issues faced by Aboriginal communities as a result of the residential school system.

Conclusion

Aboriginal overrepresentation in the criminal justice system continues.[105] It is clear that current legislation such as section 718.2(e) of the *Criminal Code* and the *Gladue* requirements are not addressing the issue. I argue the overrepresentation of Aboriginal people in the Canadian criminal justice system is a symptom of the cultural devastation and personal harms the residential school system caused to Aboriginal communities in Canada. As a result, I argue that the best way to heal the harm caused by the residential school system and reduce incarceration rates of Aboriginal people in Canada is to formally recognize Indigenous legal traditions and jurisdiction in the area of criminal law and allow Aboriginal people convicted of crimes to be subject to this newly recognized legal order.

It is now acknowledged by the Canadian government that the residential school system systemically destroyed Aboriginal culture through rules that forbade Aboriginal children to speak their own language. It is also acknowledged by the Canadian government that survivors of the residential school system were routinely subjected to sexual, physical and emotional abuse. Numerous studies have linked childhood abuse, mental illness, alcohol abuse, poverty and criminal behaviour. Given the abuse residential school survivors were subjected to and the community factors such as poverty and drug abuse that resulted from the residential school system, it is easy understand why overrepresentation of Aboriginal people in the Canadian criminal law system is a symptom rather than an independent problem. Since the government created the conditions that led to the current state of the Aboriginal people it is ludicrous to

[105] *Supra* note 1.

believe the Canadian government is in the best position to fix what it has done in the past. Aboriginal people need to be given the opportunity to apply their own legal traditions in order to be able to determine what initiatives are necessary to begin healing their own communities.

Looking at traditional Indigenous legal traditions and how they differ from Canadian principles of justice it is not difficult to see why the Canadian criminal law system is not working for Aboriginal people. The Canadian law looks at an offender as an isolated individual whereas Indigenous traditions look at the offender from a communal perspective. Indigenous legal traditions emphasize healing of the community and the individual while the Canadian legal system emphasizes deterrence and punishment of the accused.

The US tribal court system offers a blueprint for implementation of Indigenous Tribal courts in Canada. Implementation of Canadian Tribal courts would allow Aboriginal groups to determine the type of legal processes that would best heal their communities and stop the continuing legacy of harm created by the residential school system. Aboriginal groups could set up their own rules, hearings, procedures and sentencing structures that best reflect their own community needs and values. Continuing legacies from the residential school system such as substance abuse, mental illness and poverty could be dealt with in ways the current Canadian criminal justice system does not allow. In addition, by allowing Aboriginal accused to remain in their communities, the isolation of Aboriginal people from their communities that began with the residential school system will no longer continue.

In conclusion, by formally recognizing Indigenous legal traditions and jurisdiction in the area of criminal law and by allowing Aboriginal people convicted of crimes to be subject to this newly recognized legal order, the harm caused by the residential school system will begin to heal and incarceration rates of Aboriginal people in Canada will be reduced.