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The Case for Recognizing Indigenous Inherent Jurisdiction Over Criminal Justice Matters

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ABSTRACT

This paper explores the ethical imperative and policy potentials of recognizing Indigenous rights to self-determination in criminal matters. It does so by engaging with Indigenous resurgence theories in order to critique the current hegemony of jurisdiction in criminal law matters in Canada. Turning to the Indigenous rights framework set out in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), it then examines the possibilities for nested Indigenous jurisdiction over criminal matters within Canada's system of cooperative federalism. Finally, it turns to a concrete example in the Cree Nation of Eeyou Istchee's gradual expansion of influence over the administration of criminal justice on its territory. Drawing on this practical case, the author presents some policy recommendations for a gradual transition towards expanded Indigenous jurisdiction over local criminal matters as one step towards a broader process of decolonization through radical reform.

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I. Introduction

The over-representation of Indigenous people in Canadian prisons can properly be called a crisis. On average, one out of every three inmates is Indigenous, even though Indigenous people currently represent only four percent of the Canadian population.[1] This is but one example of the Canadian justice system's failure to adequately address the needs of Indigenous peoples and its prominent role in their ongoing oppression.

This paper explores the ethical imperative and policy potentials of recognizing Indigenous rights to self-determination in criminal matters. It does so by engaging with Indigenous resurgence theories in order to critique the current hegemony of jurisdiction in criminal law matters in Canada. Turning to the Indigenous rights framework set out in the *UN Declaration on the Rights of Indigenous Peoples* (*UNDRIP*),[2] it then examines the possibilities for nested Indigenous jurisdiction over criminal matters within Canada's system of cooperative federalism. Finally, it turns to a concrete example in the Cree Nation of Eeyou Istchee's gradual expansion of influence over the administration of criminal justice on its territory. Drawing on this practical case, the author presents some policy recommendations for a gradual transition towards expanded Indigenous jurisdiction over local criminal matters as one step towards a broader process of decolonization through radical reform.

II. Background and Theoretical Framework

A. *The Problem: Over-representation of Indigenous People in Canadian Prisons*

[1] See Department of Justice Canada, *Just Facts: Indigenous overrepresentation in the criminal justice system* (Ottawa: DOJ, Research and Statistics Division, 2019) at 3.

[2] 13 September 2007, UN Doc A/RES/61/295 [*UNDRIP*].

When Europeans first arrived in North America, they tended to interact with Indigenous nations on a nation-to-nation basis.[3] This nation-to-nation relationship was affirmed by the Royal Proclamation of 1763 and the Treaty of Niagara of 1764.[4] However, the Crown gradually usurped Indigenous sovereignty over the lands that make up present-day Canada through the colonial settlement process. Britain, and then Canada, adopted policies of assimilation and "civilization" that undermined Indigenous peoples' rights to self-determination.[5] With the passing of the *Indian Act* in 1876,[6] Canadian law has been increasingly used as an instrument of control and assimilation for the original inhabitants of this land. The legislation confined Indigenous peoples to reserves, depriving them of access to and jurisdiction over large portions of their traditional territories.[7] The *Indian Act* stripped Indigenous women of their status when they married non-Indigenous men, thereby impeding on inherent Indigenous jurisdiction over citizenship through this provision and several others.[8] It also authorized the creation of residential schools, whose dark legacy is now a well-known part of the history of Canada.[9] The colonial legacy of the *Indian Act* marginalizes

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[3] See John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1977) 155 at 158.

[4] See *ibid* at 161.

[5] See Brenda Gunn, "Moving beyond Rhetoric: Working toward Reconciliation through Self-Determination" (2015) 38:1 Dalhousie LJ 237 at 248.

[6] See *Indian Act*, RSC 1985, c I-5 [*Indian Act*].

[7] See *ibid*, ss 18–31. See also Bonita Lawrence, "Rewriting Histories of the Land: Colonization and Indigenous Resistance in Eastern Canada" in Martin J Cannon & Lina Sunseri, eds, *Racism, Colonialism, and Indigeneity in Canada* (Oxford: Oxford University Press, 2011) 68.

[8] See *Indian Act*, *supra* note 6, ss 3 (repealed), 5–7. See also Taiaiake Alfred and Jeff Corntassel, "Being Indigenous: Resurgences Against Contemporary Colonialism" in Martin J Cannon & Lina Sunseri, eds, *Racism, Colonialism, and Indigeneity in Canada* (Oxford: Oxford University Press, 2011) 139; Lina Sunseri, "Moving Beyond the Feminism Versus Nationalism Dichotomy: An Anti-Colonial Feminist Perspective on Aboriginal Liberation Struggles" in Martin J Cannon & Lina Sunseri, eds, *Racism, Colonialism, and Indigeneity in Canada* (Oxford: Oxford University Press, 2011) 154.

[9] See *Indian* Act, *supra* note 6 as it appeared in 1951, c 29, ss 113–22.

Indigenous peoples, subjecting them to assimilationist policies and depriving them of decision-making authority over their own affairs.

One reflection of the ongoing effects of colonialism in Canada is the stark overrepresentation of Indigenous people in Canadian prisons. In 2008-2009, Indigenous inmates represented 20 percent of the total population in federal institutions.[10] In 2017-2018, that figure rose to 28 percent. Over the same period, the percentage of Indigenous women in federal institutions rose from 32 percent to 40 percent.[11] In numerous decisions, the Supreme Court of Canada has called the overrepresentation of Indigenous people in the Canadian criminal justice system a "crisis."[12]

There are three main causes that can help explain this crisis: colonialism, socio-economic marginalization and culture clash.[13] It is clear that the socio-economic marginalization of Indigenous peoples is one impact of colonialism. The incommensurability of Canada's criminal justice system with Indigenous perspectives of justice is another manifestation of colonialism's ongoing effects.[14] This can also be seen in the prevalence of systemic racism within the institutions of policing and sentencing.[15] With regards to

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[10] See Department of Justice Canada, *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses* by Clark Scott (Ottawa: DOJ, Research and Statistics Division, 2019) at 8 [Scott].

[11] See *ibid*.

[12] See *R v Gladue*, [1999] 1 SCR 688 at para 64, 171 DLR (4th) 385*; R v Ipeelee* 2012 SCC 13 at para 62*; R v Sharma* 2022 SCC 39 at paras 3, 142, 183.

[13] See Scott*, supra* note 10 at 13.

[14] See Patricia Monture-Okanee & Mary Ellen Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" in Martin J Cannon & Lina Sunseri, eds, *Racism, Colonialism, and Indigeneity in Canada* (Oxford: Oxford University Press, 2011) 242.

[15] See Joyce Green, "From *Stonechild* to Social Cohesion: Antiracist Challenges for Saskatchewan" in Martin J Cannon & Lina Sunseri, eds, *Racism, Colonialism, and Indigeneity in Canada* (Oxford: Oxford University Press, 2011) 234 for a description of the practice of "Starlight Tours" whereby police officers drop Indigenous men or women several kilometers outside of town in the middle of winter, forcing them to walk home shoeless in sub-freezing temperatures. This practice came to light after the mediatized death of seventeen-year-old Cree university student, Neil Stonechild, in Saskatoon in 1990. See Karakatsanis J.'s dissent in *R v Sharma*, *supra* note 12 at para 115 ssq for a discussion of the discriminatory impacts of Canadian sentencing policy on Indigenous peoples.

policing, Indigenous communities are both over-policed and under-policed. This means that while Indigenous people are more likely to be stopped by police officers, their communities are often neglected when a need arises.[16] The recent tragedy at James Smith Cree Nation in Saskatchewan illustrates the lethal effects of the RCMP's slow response to violence on reserves.[17]

With regards to sentencing, Indigenous people often receive comparatively longer sentences than non-Indigenous offenders.[18] They are also more likely to be denied bail and to be held in remand or pre-trial detention.[19] One reason that Indigenous offenders may receive harsher sentences is that they are statistically more likely to breach bail or parole conditions, and therefore qualify as reoffenders.[20] This may trap some Indigenous people in a vicious cycle of reoffending, wherein their continued involvement with the criminal justice system and their ostracization from society leads to further criminalization. For some Indigenous scholars, this is strong evidence of the fundamental incompatibility of the Canadian criminal justice system with Indigenous worldviews. For Monture-Okanee and Turpel, "[t]he criminal justice system is constructed with concepts that are not culturally relevant to an aboriginal person or to aboriginal communities."[21] One example they point to is the central notion of "impartiality" in Canadian sentencing. The authors argue that many Indigenous people do not believe in impartiality. Rather, the authority of decision-makers in many Indigenous communities rests precisely on their intimate knowledge of the community and their lived experience.[22] Of course, Indigenous visions of justice and Indigenous legal systems are numerous and diverse; however, the authors insist that for many Indigenous peoples, justice involves

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[16] See Scott, *supra* note 10 at 2.

[17] See Alex Boyd, "Leaders praise RCMP efforts, but also question whether a local force might make a difference in the future", *Toronto Star* (8 September 2022), online: <thestar.com/news/canada/2022/09/08/chiefs-of-james-smith-cree-nation-speak-following-capture-death-of-saskatchewan-stabbing-suspect.html>.

[18] See Scott, *supra* note 10 at 2.

[19] See *ibid*.

[20] See *ibid*.

[21] Monture-Okanee & Turpel, *supra* note 14 at 243.

[22] See *ibid*.

centering community healing alongside the rehabilitation and reintegration of offenders. Intimate knowledge of community dynamics is of fundamental importance in this process and therefore, in many cases, processes of community justice are best adapted to reconciling victims and perpetrators of criminal acts. In these contexts, the authority of outsider judges, defense lawyers and prosecutors may be viewed as illegitimate and inappropriate.

B. Indigenous Jurisdiction Over Criminal Law Matters as a Solution?

There seems to be a fundamental disconnect between the guiding principles of Canadian criminal justice (impartial adjudication and sentencing based on the principles of retribution, deterrence, and rehabilitation) and local approaches to criminal justice according to Indigenous worldviews. If this is the case, then a major key to combatting the overrepresentation crisis is allowing Indigenous nations to exercise their inherent jurisdiction[23] over justice in their communities.

Such an approach would be in line with the arguments advanced by Indigenous scholars and activists who advocate for recognition of Indigenous self-determination. The work of Taiaiake Alfred, Glen Coulthard, John Borrows, Aaron Mills and Leanne Betasamosake Simpson, among others, is particularly powerful in laying the theoretical groundwork that supports a case for Indigenous jurisdiction over criminal justice, and inherent Indigenous jurisdiction over local affairs more generally.

The Indigenous resurgence movement, headed by intellectual figures such as Taiaiake Alfred, Glen Coulthard, Leanne Betasamosake Simpson and John Borrows, advocates for Indigenous self-determination guided by traditional cultural values. As Taiaiake Alfred puts it, Indigenous resurgence is about

[23] In this paper, I use the term "inherent jurisdiction" to refer to Indigenous ancestral rights to self-governance that are rooted in pre-contact sovereignty. The term has been used elsewhere by Prof. Dayna Scott to refer to jurisdictional conflicts over land management. See e.g. Dayna Scott, "The Environment, Federalism, and the Charter" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press) 493.

"recovering what will make self-determination real."[24] For Taiaiake Alfred, Indigenous self-government will be meaningless if the structures of local government simply mimic the colonial framework. What is needed is a revival of Indigenous cultural values – the language, ceremonies, practices, laws, land-based pedagogy and spirituality that are the particular heritage of each Indigenous nation across present-day North America.[25] The revival of these values will in turn guide self-determination beyond mere reconciliation with the colonial order and towards true decolonization.[26]

Much of the literature on this topic is skeptical of reconciliation as a means to achieve decolonization. Glen Coulthard, for instance, argues that reconciliation cannot achieve its aim of mutual and reciprocal recognition in the Canadian liberal political framework.[27] Drawing on an analysis of Hegel's master-slave dialectic[28] and the work of Frantz Fanon,[29] Coulthard demonstrates that the liberal politics of recognition reassert colonial power dynamics by rendering Indigenous peoples dependent on Canada's recognition of their rights.[30] Here, a hierarchical dynamic persists wherein Indigenous peoples can only exert their inherent right to self-determination insofar as the Canadian State accepts to relinquish some of its power. For Coulthard, reconciliation-as-recognition contradicts Indigenous self-determination by rejecting sovereignty. Indeed, the

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[24] Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford: Oxford University Press, 1999) at 11.

[25] See Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Toronto: University of Toronto Press, 2005). See also Leanne Betasamosake Simpson, *Dancing on Our Turtles Back: Stories of Nishnaabeg Recreation, Resurgence, and New Emergence* (Winnipeg: Arbeiter Right Publishing, 2011) at 22–23.

[26] See Taiaiake Alfred, "On Reconciliation and Resurgence" (2022) 2:1 Rooted 76.

[27] See Glen Coulthard, *Red skin, white masks: rejecting the colonial politics of recognition* (Minneapolis: University of Minnesota Press, 2014) at 26.

[28] See Georg Wilhelm Friedrich Hegel, *The Phenomenology of Spirit*, translated by Michael Inwood (Oxford: Oxford University Press, 2018).

[29] See Frantz Fanon, *Black Skin, White Masks*, translated by Richard Philcox (New York: Grove Press, 2008).

[30] See Coulthard, *supra* note 27 at 31.

reconciliation discourse may even be dangerous insofar as it serves to placate Indigenous leaders who should be pursuing more radical claims for Indigenous sovereignty.[31]

For many adherents to the resurgence movement the aim is not reconciliation with the Canadian State, but rather the decolonization of Canadian institutions, including existing legal and political frameworks and the current distribution of land and resources. While this may seem radical to current beneficiaries of Canada's settler-colonial system, many Indigenous scholars insist that this is the only way to meaningfully address the ongoing legacies of colonialism.[32] What this dismantling of colonial structures would entail in practice would necessarily vary from place to place. Some argue that it might resemble the treaty frameworks that governed relationships between Indigenous nations and settlers in the 17th and 18th centuries.[33]

One example of such a treaty is the Two Row Wampum, an agreement reached between the Haudenosaunee confederacy and Dutch settlers in the early 1600s. The belt depicts two purple rows running alongside each other. Each row represents a boat – a canoe for the Haudenosaunee way of life, laws, and people, and a Dutch ship for European law, religion and people. As the Wampum illustrates, each boat is to travel down the river of life side by side in respect and non-interference.[34] The Two Row Wampum is a living treaty: a legal document that dictates how

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[31] See Avigail Eisenberg, Jeremy HA Webber, Andrée Boisselle, Glen Coulthard, eds, *Recognition versus self-determination: dilemmas of emancipatory politics* (Vancouver: UBC Press, 2014). See also Glen Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada." (2007) 6 Contemp Pol Theory 437.

[32] See Eve Tuck & K Wayne Yang, "Decolonizing is not a metaphor" (2012) 1:1 Decolonizing: Indigeneity, Educ & Soc'y 1. See also Taiaiake Alfred, "Restitution is the Real Pathway to Justice for indigenous Peoples" in Gregory Younging & Mike Degagné, eds, *Response, Responsibility, and Renewal* (Ottawa: Aboriginal Healing Foundation, 2009) 179.

[33] See Aaron Mills, "What Is a Treaty? On Contract and Mutual Aid" in Michael Coyle & John Borrows, eds, *The right relationship: reimagining the implementation of historical treaties* (Toronto: University of Toronto Press, 2017) 219.

[34] See Onandaga Nation, "Two Row Wampum – Gasweñdah", (last visited 6 November 2022), online: *onandaganation.org* <onondaganation.org/culture/wampum/two-row-wampum-belt-guswenta/>.

two nations will live together in peace. It is a binding instrument of international law that can be called upon to frame dispute resolution when issues arise.[35]

The Two Row Wampum is but one example of many nation-to-nation agreements that governed how Indigenous peoples and settlers interacted with each other prior to the exercise of British sovereignty over present-day Canada, and the exclusion of Indigenous self-determination. Scholars of Indigenous legal traditions, including John Borrows and Aaron Mills, are working tirelessly to revitalize Indigenous legal systems and advocate for their recognition within the institutions and frameworks of Canadian law.[36] In line with the resurgence framework, these scholars of Indigenous legal traditions argue for a revitalization of Indigenous culture, laws, traditions and spirituality that would guide Indigenous self-determination and inform decolonial struggles.

In the context of jurisdictional struggles, the resurgence scholarship can be combined with theories of decolonization to paint a picture that is appropriately unsettling in the most literal sense. [37] Decolonization requires unsettling existing power structures by giving land and power back so that Indigenous peoples may govern their land and themselves on their own terms, and according to their own traditions. Needless to say, decolonization is a process. It will need to unfold over several generations and be negotiated and renegotiated at multiple levels by all concerned parties. But decolonization is the only path towards meaningfully addressing the poverty, criminalization and

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[35] See *ibid*.

[36] See John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010). See also Aaron Mills, *Miinigowiziwin: All That Has Been Given for Living Well Together* (DCL Thesis, University of Victoria Faculty of Law, 2019); Gordon Christie, "Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions" (2007) 6:1 Indigenous LJ 13 for a critical discussion of some of the dangers surrounding the revitalization movement, including the risks of Indigenous laws being co-opted by Canadian legal institutions as a veneer of legitimacy on colonial exercises of power.

[37] See Eve Mackey, *Unsettled Expectations: Uncertainty, Land and Settler Decolonization* (Halifax & Winnipeg: Fernwood Publishing, 2016). See also Eva Mackey, "Unsettling Expectations: (Un)certainty, Settler States of feeling, Law, and Decolonization" (2014) 29:2 Rev can dr et société 235.

disenfranchisement that besieges many Indigenous nations in Canada. It will require that settlers engage with the decolonization process by educating themselves and foregoing some of their privileges in order to cede both land and power to Indigenous nations in order to respect historical treaty obligations.[38] It will also require undertaking radical reforms to existing Canadian political, economic and legal institutions. Not only is decolonization the only effective means to address the poverty, disenfranchisement, and ongoing oppression of many Indigenous people across Canada, it is also an imperative of Canada's international human rights obligations.

C. *Indigenous Self-determination as a Fundamental Human Right*

On 13 September 2007, 143 member states of the United Nations voted to ratify the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*).[39] Canada was one of four countries, alongside the United States, Australia, and New Zealand, to vote against the *UNDRIP*. Among its main concerns were the rights the *UNDRIP* grants in matters of free, prior and informed consent over development projects on Indigenous territories, and rights to self-determination.[40] In 2016, Canada reversed course and endorsed the *UNDRIP* without qualification, accepting that the ratification of the *UNDRIP* was fundamental for advancing reconciliation.[41] On 21 June 2021, the Canadian government enacted the *United Nations Declaration on the Rights*

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[38] See Leanne Betasamosake Simpson, *Noopiming: The Cure for White Ladies* (Toronto: House of Anansi Press, 2020) for an evocative metaphorical exploration of the implications of decolonization in Canada's multicultural society. See also Leanne Betasamosake Simpson & Robyn Maynard, *Rehearsals for Living* (Toronto: Knopf Canada, 2022) for broader reflections on the implications of decolonization for racialized settlers in Canada and the intersections of anti-racist struggles for Black and Indigenous people in Canada.

[39] See *UNDRIP*, *supra* note 2.

[40] See Gunn, *supra* note 5 at 243.

[41] See Department of Justice Canada, "Government of Canada introduces legislation respecting the United Nations Declaration on the Rights of Indigenous Peoples" (3 December 2020) online: *Canada.ca* <canada.ca/en/department-justice/news/2020/12/government-of-canada-introduces-legislation-respecting-the-united-nations-declaration-on-the-rights-of-indigenous-peoples.html>.

of Indigenous Peoples Act[42] (*UNDRIP Act*). This piece of domestic legislation seeks to harmonize all federal laws with the obligations generated by Canada's ratification of the *UNDRIP*. [43]

Articles 3-5 of the *UNDRIP*[44] affirm the rights of Indigenous peoples to self-determination, and protect the right to autonomy and self-government over local affairs. Article 5, in particular, protects the right to strengthen the distinct political, legal, economic, social and cultural institutions of Indigenous peoples, while retaining the right to participate fully in the political, economic, social and cultural life of the State. Article 18 also provides that Indigenous peoples have the right to "maintain and develop their own decision-making institutions", and article 34 further recognizes a right to "maintain a justice system in accordance with their legal traditions."[45] These provisions support the principles of decolonization and the prioritization of Indigenous self-determination as a fundamental human right.

Some commentators have noted that the scope of articles 3 and 4 of the *UNDRIP* is constrained by article 46(1),[46] which states:

> Nothing in this Declaration may be interpreted as implying for any State, people group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing, or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.[47]

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[42] SC 2021, c 14 [*UNDRIP Act*].

[43] See Department of Justice Canada, "Addressing systemic racism against Indigenous peoples in the justice system: Government of Canada investments and initiatives" (30 June 2021) online: *Canada.ca* <canada.ca/en/department-justice/news/2021/06/addressing-systemic-racism-against-indigenous-peoples-in-the-justice-system-government-of-canada-investments-and-initiatives.html>.

[44] See *UNDRIP*, *supra* note 2, arts 3–5.

[45] *Ibid*, arts 18, 34.

[46] See for example Timo Koivurova, "From High Hopes to Disillusionment: Indigenous Peoples' Struggle to (re)Gain Their Right to Self-Determination" (2008) 15:1 Intl J Minority & Group Rights 1 at 11-12.

[47] *UNDRIP*, *supra* note 2, art 46(1).

However, interpreting articles 3 and 4 in light of article 46(1) may simply emphasize that Indigenous peoples' right to self-determination is better understood as a right "substantially (and perhaps preferably) achieved through forms of autonomy, not limited to self-government and autonomy."[48] By this, Métis legal scholar Brenda Gunn means that Indigenous rights to self-determination as asserted in the *UNDRIP* do not necessarily have to be exercised in terms of an exclusive sovereignty over territory and governance. Rather, Indigenous self-determination should include both internal and external aspects and can be nested within existing State regimes, according to the desires and objectives of individual Indigenous nations. [49] Importantly, Indigenous rights to self-determination as enshrined in the *UNDRIP* do not necessarily mean rights to secession. This is important because it means that the recognition of Indigenous self-determination can be reconciled with the Supreme Court of Canada (SCC)'s jurisprudence on self-determination in the Canadian context. In *Reference Re Secession of Quebec*, the SCC recognized that the right to self-determination is a fundamental principle of international law and is necessary for the full and effective enjoyment of other human rights.[50] Quebec's right to unilateral secession was denied by the SCC on the basis that the Quebecois people enjoy full "access to government" and therefore their existence as a culturally distinct nation is not threatened.[51] The same cannot be said for Indigenous peoples in Canada. As a result, Indigenous rights to self-determination must be recognized and upheld by Canadian law. The exercise of these rights can and should be accommodated within Canada's framework of cooperative federalism.

The Royal Commission on Aboriginal Peoples provided for three different models of governance that could be adapted to the needs and objectives of different Indigenous communities throughout Canada.[52] The first is the nation model, which would

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[48] Gunn, *supra* note 5 at 246.

[49] See *ibid*.

[50] *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 114.

[51] *Ibid* at para 136.

[52] See *Report of the Royal Commission on Aboriginal peoples: Looking Forward, Looking Back,* vol 1 (Ottawa: Supply and Services, 1996); *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2

grant Indigenous nations autonomous status with certain sovereign rights over their territory and the governance of that territory. The second is the public government model, wherein a public government represents both Indigenous and non-Indigenous people on a particular territory. The third is a community interest model, which would allow Indigenous governments to exercise jurisdictional authority over particular areas of community interest, such as education, health, justice, and social services.[53] These models offer a flexible and adaptive framework for thinking about Indigenous self-governance in different contexts, including for urban or non-land based Indigenous peoples.[54] As the Canadian government works to implement the *UNDRIP*, these models could prove exceedingly useful for reimagining the configuration of existing political institutions so as to respect articles 3-5 of the *UNDRIP*.

Indeed, as per the *UNDRIP Act*, the Canadian government will have to revise all federal laws to ensure that they do not impede on these rights, and all other laws set out in the *UNDRIP*. In its first annual report on the implementation of the *UNDRIP Act*,[55] the Department of Justice identified a number of priority areas to be elaborated in its upcoming action plan. Primary among them is adopting a "distinctions-based approach" to implementing the *UNDRIP*. In the words of the federal government, this involves being "mindful of the distinctions or differences between First Nations, Inuit and the Métis and to keep in mind the diversity of Indigenous peoples and individuals in Canada, including taking a Gender-Based Analysis Plus or intersectional approach."[56] As part of this "distinctions-based" approach, the

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(Ottawa: Supply and Services, Canada, 1996); *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol 3 (Ottawa: Supply and Services Canada, 1996); *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol 4 (Ottawa: Supply and Services Canada, 1996); *Report of the Royal Commission on Aboriginal Peoples: Renewal: A Twenty-Year Commitment*, vol 5 (Ottawa: Supply and Services Canada, 1996) [Canada, *Royal Commission Reports*].

[53] See Gunn, *supra* note 5 at 255.

[54] See *ibid*.

[55] See Department of Justice Canada, *Annual progress report on implementation of the United Nations Declaration on the Rights of Indigenous Peoples Act* (Ottawa: DOJ, June 2022).

[56] *Ibid* at 17.

report also emphasizes the importance of implementing *UNDRIP* obligations to respect rights affirmed in treaties, agreements and other constructive agreements. To highlight its commitment to these obligations, the Department of Justice points to two Modern Treaty and Self-Governing First Nations Forums held in 2017 and 2019, which it insists promoted government-to-government relationships between the Government of Canada and Modern Treaty and Self-Governing First Nations.[57] The report also indicates that ongoing consultations are underway with Indigenous Nations and communities in order to prepare the Action Plan that will identify priority areas and a framework for the harmonization of Canada's federal laws with the *UNDRIP*.[58]

Although it is too early to tell how the *UNDRIP Act* will reshape the relationship between Indigenous peoples and the Canadian government, the harmonization of Canada's federal laws with the *UNDRIP* could provide a new legal framework favouring government accountability. With the *UNDRIP* enshrined in Canadian law, Indigenous peoples will be able to call on domestic courts to ensure that Canada is meeting its international human rights obligations. However, it is unclear at this time to what extent the harmonization process will truly decolonize power hierarchies between Indigenous governments and the Canadian state.

Several questions will have to be answered as the Department of Justice works to align federal laws with the *UNDRIP*. If Indigenous jurisdiction over local affairs is to be expanded in accordance with articles 3-5, 18, and 34 of the *UNDRIP*, how will the federal government negotiate power-sharing agreements? Will these agreements take the shape of modern treaties? If so, what support will the federal government provide to Indigenous nations to ensure sufficient financing for local services? What attention will be paid to Indigenous resurgence critiques in this process?

Given the shape of Canadian federalism, it is unclear how problems of overlapping jurisdiction will be addressed in the decolonization of Canadian institutions. With regards to Indigenous governance over the administration of justice,

[57] See *ibid* at 15.

[58] See *ibid* at 25.

Canada's constitutional division of powers poses considerable difficulties for the realization of Indigenous rights to self-determination in this area. The next two sections will identify some of the particular challenges that may arise in the expansion of Indigenous jurisdiction over the administration of criminal justice. First, the author offers an overview of Canada's current approach to jurisdiction in the criminal justice matters. The second section will highlight some of the central challenges to decolonizing Canada's criminal justice system. In so doing, the author examines some areas of promising reform and explores what further steps could be taken to address the decolonial/Indigenous resurgence critiques discussed in section B.

D. Canada's Current Approach to Jurisdiction in Criminal Law Matters

Under Canada's current framework, jurisdiction over criminal law matters is shared between the Federal government, the provinces (with certain powers delegated to municipalities) and some Indigenous governments. As per the constitutional division of powers, the Federal government has exclusive authority to legislate over all criminal matters.[59] This includes not only the *Criminal Code*[60] but also legislation prohibiting activities that threaten the health and public safety of Canadians.[61] Provinces have exclusive authority over the administration of justice.[62] This means that provinces govern the constitution, organization, and maintenance of courts in both civil and criminal matters. In Quebec, depending on the type of offense, criminal matters may be heard either before the Court of Quebec's criminal and penal division or before the Superior Court of Quebec. Some regulatory offenses, such as traffic violations, may also be heard before municipal courts, since the province can

[59] See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(27), reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

[60] RSC 1985, c C-46 [*Criminal Code*].

[61] See *Reference re Validity of Section 5 (a) Dairy Industry Act* [1949] SCR 1, [1949] 1 DLR 433. See also *Reference re Firearms Act (Can.)* 2000 SCC 31; *Reference re Assisted Human Reproduction Act* 2010 SCC 61; *Reference re Genetic Non-Discrimination Act* 2020 SCC 17.

[62] See *Constitution Act, 1867*, *supra* note 59, s 92(14).

delegate jurisdiction to municipal courts by virtue of its powers under s 92(14) of the *Constitution Act, 1867* and section 1 of the Quebec *Courts of Justice Act*.[63]

The *Criminal Code* sets out two spheres of exclusive jurisdiction. Section 469 of the *Criminal Code* grants Superior Courts exclusive jurisdiction over a number of crimes including treason,[64] sedition,[65] and murder.[66] Section 553 of the *Criminal Code* grants provincial courts exclusive jurisdiction over crimes including theft, bookmaking, or fraud under $5,000, and probation violations.[67] All other crimes not specified in sections 469 and 553 of the *Criminal Code* allow the accused to choose whether they would like the trial to take place before a Superior Court judge with a jury, a Superior Court judge without a jury, or a Provincial Court judge without a jury.

In some provinces, specialized "problem-solving" courts have been set up to divert some offenders with particular needs from the criminal justice system.[68] Some examples of specialized courts include Drug Treatment courts, which target the particular needs of persons with substance abuse problems, or Mental Health courts, which seek to help offenders with severe mental health problems.[69] Specialized courts tend to center the needs of offenders and operate according to principles of restorative justice and rehabilitation.[70] However, these specialized courts have varying requirements that must be met before they can hear a case. Some courts will only accept offenders who have already entered a guilty plea, and many only accept offenders charged with less serious crimes, such as simple drug possession.[71] A specialized mental health court in the Yukon, the Yukon

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[63] c T-16, s 1.

[64] See *Criminal Code*, *supra* note 60, s 47.

[65] See *ibid*, s 61.

[66] See *ibid*, s 235.

[67] See *ibid*, s 733.1(1).

[68] See Curt T Griffiths & Alison J Cunningham, *Canadian criminal justice: a primer*, 4th ed, (Toronto: Nelson Education, 2011) at 149.

[69] See *ibid*.

[70] See *ibid* at 150

[71] See *ibid*.

Community Wellness Court, excluded any persons charged with sex crimes or violent offences despite the prevalence of mental health disorders among many so-called "high-risk" offenders.[72]

In Canada, Indigenous courts tend to fall within this category of specialized, "problem-solving" courts. In Toronto, the Ontario Court of Justice has established Gladue Courts that deal with bail hearings, remands, trials and sentencing. Judges, prosecutors, defence lawyers and court staff are all trained in Gladue principles,[73] and the courts tend to prioritize alternatives to imprisonment at sentencing.[74] Other Gladue Courts across Canada have also sought to blend Indigenous legal traditions with the institutions of Canadian criminal justice. The Tsuu T'ina First Nation Court in Alberta, for instance, integrates aspects of the Tsuu T'ina peacemaker process – a restorative justice practice that seeks to bring victim and offender, and their respective families together.[75] The Nunavut Court of Justice is also broadly referred to as a Gladue Court, although it has been subject to scholarly critique for its failings to fully center Inuit legal traditions within the administration of justice.[76]

Beyond Gladue Courts, some Indigenous nations have alternative justice programs in place that permit them to work with prosecutors in order to identify cases that can be diverted into

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[72] *Ibid* at 151.

[73] In 1996, Parliament added s 718.2(e) to the *Criminal Code*. This sentencing provision was interpreted by the Supreme Court of Canada in *R v Gladue*, *supra* note 12, as requiring judges to give special consideration to an offender's systemic and background factors in order to reach a proportionate sentence. "Gladue training" here refers to special training programs that sensitize lawyers, judges and court workers to the systemic and background factors that contribute to the disproportionate involvement of Indigenous people with the criminal justice system.

[74] See Griffiths & Cunningham, *supra* note 68 at 152.

[75] See Department of Justice Canada, *Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System* (Ottawa: DOJ, 16 October 2018) at 4.

[76] See Jeannette Gevikoglu, *Sentenced to Sovereignty: Sentencing, Sovereignty, and Identity in the Nunavut Court of Justice* (LLM Thesis, University of Victoria Faculty of Law, 2011). See also Kara Brisson-Boivin, "Standardizing 'Corrections': The Politics of Prison Expansionism and Settler Colonial Representations of Punishment in Nunavut" (2018) *Annual Review of Interdisciplinary Justice Research* vol 7 372.

community justice programs. The Cree Nation of Eeyou Istchee has one such program. Low-risk offenders may be redirected into the Alternative Measures Program, where they will be judged by the Community Justice Community, a collective of local Elders who will apply restorative justice principles to determine an appropriate sentence for the offender. These types of programs have promise for expanding local jurisdiction over some criminal matters, treating offenders according to local law and custom, and encouraging their reintegration into the affected community.

Given the scale of the over-incarceration crisis, the Federal government has vowed to take measures to increase the availability of alternative justice frameworks that correspond with the culture and values of individual Indigenous nations.[77] However, in most cases, only offenders having committed the least serious infractions will be admissible to these programs. While the aim of this limitation is most likely to prioritize public safety in Indigenous communities, it also has the effect of severely limiting Indigenous jurisdiction over the administration of justice in their communities. If the aim of these programs is to address the over-incarceration crisis by diverting Indigenous offenders out of the criminal justice system and into culturally-appropriate rehabilitative programming, the limited jurisdiction of Indigenous courts and alternative justice programs complicates their potential reach.

As the operation of Gladue Courts demonstrates, most of the current efforts to combat the overrepresentation of Indigenous people in the criminal justice system operate at the sentencing or corrections phases. Gladue reports – pre-sentencing reports that present sentencing judges with information about an offender's particular personal and systemic attenuating circumstances, and possible sentencing alternatives – are available to any Indigenous offender appearing before any criminal court. All Indigenous offenders have the right to request the production of a Gladue report,[78] and sentencing judges must take the particular circumstances of an Indigenous offender's life and the systemic

[77] See Department of Justice Canada, *supra* note 43.

[78] See *Criminal Code*, *supra* note 60, s 718.2(e).

impacts of colonialism into consideration when determining an appropriate sentence.[79]

Gladue reports and the corresponding rights for sentencing accommodations for Indigenous offenders at section 718.2(e) of the *Criminal Code* have been in effect since 1996. In two Supreme Court decisions, the judiciary has insisted on the imperative of considering attenuating circumstances in sentencing Indigenous offenders. And yet, the overrepresentation of Indigenous people in Canadian prisons continues to rise.[80] Despite the Supreme Court of Canada's insistence that all sentencing judges must take into account the background and systemic factors of Indigenous offenders in order to determine a proportionate sentence and combat the over-incarceration crisis, the uptake on Gladue reports across Canada has been disappointing.[81] Part of the problem lies with inconsistencies in the way judges exercise their discretion to assign alternative sentencing options.[82] This may be a reflection of barriers to cultural understanding and judicial hesitancy to trust in alternatives to incarceration.

In the field of corrections, the hegemony of punitive justice also continues to loom large, despite some minor tinkering around the edges. Perhaps the most significant advancement in incorporating Indigenous perspectives into corrections has been the creation of Healing Lodges.[83] These facilities, for the most part financed by Correctional Services Canada (CSC) and run by Indigenous organizations, welcome offenders with a low security clearance ranking into a sort of group home where they can serve part or all of their sentence. Healing lodges offer culturally-appropriate programming to Indigenous offenders from diverse backgrounds, including healing circles led by local Elders, sweat

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[79] See *R v Gladue*, *supra* note 12.

[80] See Department of Justice Canada, *supra* note 1.

[81] See Alexandra Hebert, "Change in Paradigm or Change in Paradox? *Gladue* Report Practices and Access to Justice" (2017) 43:1 Queen's LJ 149.

[82] See David Milward & Debra Parkes, "*Gladue*: Beyond Myth and Towards Implementation in Manitoba" (2011) 35:1 Man LJ 84.

[83] See Correctional Service of Canada, *An Examination of Healing Lodges for Federal Offenders in Canada*, by Shelley Trevethan, Nicole Crutcher & Christopher Rastin (Ottawa: CSC, Research Branch, November 2002).

lodges, and other ceremonies.[84] This allows Indigenous offenders to (re)connect with their culture and reflect on the path before them when they are released from detention. Healing lodges show considerable potential for reducing reoffending and facilitating reintegration, but most of the facilities are chronically underfunded.[85] Once again this reflects the marginal role that reforms such as *Gladue* reports and healing lodges play in the larger hegemony of Canadian criminal justice.

Although these reforms show some potential for more proportional sentencing and better reintegration statistics post-incarceration, they do not address the root problem of Indigenous over-representation in the Canadian criminal justice system. Gladue reports play an important role in sensitizing judges to the particular circumstances of an individual offender, but the criminal justice system remains adversarial and punitive in nature. Healing lodges allow some respite from the dehumanizing experience of detention, but they still require Indigenous offenders to pass through the Canadian corrections system. Since there are only a handful of healing lodges across Canada, placement in one of these institutions often still involves a process of displacement and estrangement from the individual offender's home community, language and culture.

Indigenous peoples are diverse and their legal systems varied. However, many Indigenous scholars insist that in order to address the over-incarceration crisis in Canada, a radical rethinking of the criminal justice system is both urgent and necessary. [86] Indigenous jurisdiction over criminal matters occurring on Indigenous territories (territorial jurisdiction), and over matters involving Indigenous people (personal jurisdiction) would ensure that Indigenous nations exert control over criminal matters concerning their citizens. It would not be out of step with the approaches taken in other countries, including the United

[84] See *ibid* at 11.

[85] See *ibid* at 49. See also Leticia Gutierrez, Nick Chadwick & Kayla A Wanamaker, "Culturally Relevant Programming versus the Status Quo: A Meta-analytic Review of the Effectiveness of Treatment of Indigenous Offenders" (2018) 60:3 Can J Corr 321.

[86] See Monture-Okanee & Turpel, *supra* note 14 at 243.

States and Colombia.[87] Canadian courts and legislators must work in collaboration with Indigenous nations in order to find ways to respect Indigenous rights to self-determination by expanding Indigenous inherent jurisdiction over criminal justice matters within the nested framework of a reimagined federalist system.

E. Promises and Challenges in Decolonizing Jurisdiction in Canada's Federalist Framework

In the United States, certain crimes fall under federal jurisdiction if they have been committed by a Native American on tribal lands.[88] This allows for the extension of Indigenous jurisdiction through tribal laws and adjudication through tribal courts for some criminal offenses.[89] Would it be possible to extend Indigenous jurisdiction over criminal law matters in Canada through an exercise of the federal heads of power in sections 91(27) and 91(24) of the *Constitution Act 1867*?

As discussed above, the federal government has exclusive authority to legislate over criminal law matters, while the provinces have exclusive authority over the administration of justice. The federal government also has exclusive jurisdiction over Indigenous affairs under section 91(24) of the *Constitution Act 1867*. If the federal government were to issue legislation dictating that any crime committed on Indigenous title lands were to fall under the jurisdiction of the Indigenous nation governing those lands, the law would likely be challenged in the courts for encroaching on the provincial head of power under section 92(14) *Constitution Act 1867*. The courts would have to conduct a pith

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[87] See Department of Justice Canada, *Exploring Indigenous Justice Systems in Canada and Around the World: Report on the conference hosted by the Department of Justice Canada* (Ottawa: DOJ, 15 May 2019) at 20.

[88] See *ibid* at 16.

[89] Tribal Courts in the United States are mostly governed by the Code of Federal Regulations 25 CFR 11. Tribal Courts can try criminal misdemeanor cases involving Native Americans that occurred on lands defined as "Indian Country" under 18 U.S. Code, section 1511. Felonies that are federal crimes will be heard in Federal court, while cases involving non-Native Americans will be heard by the relevant state court. See US Department of the Interior, Indian Affairs, "Tribal Court Systems" (last visited 30 November 2022), online: *bia.gov* <bia.gov/CFRCourts/tribal-justice-support-directorate>.

and substance analysis to determine the true character of the law and attribute it to a particular head of power. Even if the impugned law or provision was found to be sufficiently related to the federal head of power in criminal matters, or in matters relating to Indigenous affairs at section 91(24), then the court would still have to examine whether there were "ancillary" effects on provincial jurisdiction. These effects would have to be deemed reconcilable with the objectives of the federal law for the doctrine of cooperative federalism and the double aspect doctrine to allow for a nested exercise of power and for the law to be found *intra vires* on the whole. This does not account, of course, for any wrangling over jurisdictional challenges to specific provisions.

Gunn argues that, "the constitutional division of powers may need to be reconsidered to explicitly recognize Indigenous peoples as a third order of government."[90] She rejects the pretention that the complexity of the constitutional amendment process should justify government failures in this regard.[91] She argues that, "[e]ven if constitutional recognition within the division of powers in the *Constitution Act, 1867* is not feasible, there should be reconsideration of the scope of self-government under section 35(1) of the *Constitution Act, 1982*."[92] Her argument has proved prescient in that regard.

In the *Reference to the Court of appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*, the Quebec Court of Appeal recognized that section 35 of the *Constitution Act 1982* enshrines an inherent right to Indigenous self-governance over matters pertaining to child welfare.[93] Examining the jurisprudence, the Court of Appeal concluded that section 35 includes the right to self-governance over matters pertaining to the ancestral rights of Indigenous peoples. This right is not without limits; the federal and provincial governments may encroach on s. 35 rights but only after justification in line with the doctrine of the Honour of the Crown and the test laid out by the Supreme Court's decision in

[90] Gunn, *supra* note 5 at 255.

[91] See *ibid*.

[92] *Ibid*.

[93] 2022 QCCA 185 at para 364 [*Indigenous Children Reference*].

Sparrow.[94] However, in its 220-page decision, the Quebec Court of Appeal was categorical in its assertion that the division of powers set out in the *Constitution Act 1867* did not eliminate Indigenous ancestral rights, including the right to self-government.[95] On the contrary, the Court finds that Indigenous ancestral rights to exercise authority over child welfare far precede Canada's constitutional framework. As a result of an affirmation of this right in s. 35, any Indigenous regulation in this sphere is to take precedence over federal and provincial legislation in the case of an incompatibility, with derogations to the right only permitted by a rigorous application of the *Sparrow* test and a proven adherence to the principles of the Honour of the Crown.[96]

Based on the Quebec Court of Appeal's decision, and the evolution of the Supreme Court's jurisprudence on the matter, it would appear that Canadian constitutional law is expanding to recognize Indigenous jurisdiction as a nested jurisdiction over certain matters that pertain directly to Indigenous ancestral rights. Furthermore, since Canada's ratification of the *UNDRIP*, there appears to be increasing political will at the federal level to ensure that Indigenous rights to self-governance and self-determination become the lode star guiding the Government of Canada's relationships with Indigenous peoples.[97] The Quebec Court of Appeal also made reference to the *UNDRIP* in its assertion of Indigenous jurisdiction over child welfare matters.[98] Could the recognition of the right to self-governance be extended to include matters related to criminal law and the administration of justice in Indigenous nations?

At this stage, the answer to this question remains unclear. Recognizing an ancestral right to Indigenous self-governance in criminal law matters would certainly be more controversial than a

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[94] See *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73; *R v Sparrow* [1990] 1 SCR 1075, 70 DLR (4th) 385. See also Richard Stacey, "Honour in Sovereignty: Can Crown Consultation with Indigenous Peoples Erase Canada's Sovereignty Deficit" (2018) 68:3 U Toronto LJ 405.

[95] See *Indigenous Children Reference*, *supra* note 93 at para 428.

[96] See *ibid* at para 497.

[97] See Department of Justice Canada, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* (Ottawa: DOJ, 2018).

[98] See *Indigenous Children Reference*, *supra* note 93 at paras 506–13.

recognition of a right to self-governance in child welfare. Many questions would surely arise. Could Indigenous nations issue their own criminal codes, as per their traditional laws? Would these codes supplement the federal *Criminal Code*, and if so, who would apply the federal laws – Indigenous governments as delegates of the federal government, or representatives of Canada? To whom would these laws apply, and where would they apply? To citizens of the Indigenous nation, wherever they are? To any person violating Indigenous law on Indigenous territory? Who would control the administration of justice? Who would finance it and how?

Even a cursory examination of these questions reveals the deep complexities that would dog the recognition of an ancestral right to self-governance in criminal law matters. Any Court would surely be wary of the effects that the recognition of such a right would have on the fabric of Canadian federalism. That said, the Quebec Court of Appeal has opened a crack in the traditional separation of powers, allowing for the possibility of increased self-governance for Indigenous nations within the framework of cooperative federalism. It is not beyond the realm of imagination that pockets of expanded jurisdiction over criminal matters could follow.

In 1991, the Colombian constitution was amended to include article 246, which reads: "The authorities of the Indigenous Peoples may exercise their jurisdictional functions, within their territorial space, in accordance with their own norms and procedures, as long as these are not contrary to the Constitution or the laws of the Republic."[99] Scholars of legal pluralism have long argued that law cannot be monopolized by State institutions.[100] Rather, law and justice are exercised through many processes. Indigenous nations have rich and complex laws and legal systems, and they have always exercised these laws in

[99] "Colombia's Constitution of 1991 with Amendments through 2015" (last modified 27 April 2022), online (pdf): *ConstituteProject.org*, translated by Max Planck Institute <constituteproject.org/countries/Americas/Colombia>.

[100] See Jeffrey Ansloos, "Peace like a Red River: Indigenous Human Rights for Decolonising Reconciliation" in H Devere, K Te Maihāroa, J Synott, eds, *Peacebuilding and the Rights of Indigenous Peoples* in *The Anthropocene: Politik–Economics–Society–Science*, vol 9 (Cham, Switzerland: Springer 2017) at 68.

order to govern themselves, their citizens, and their territories.[101] With the growing political and legal recognition of Indigenous rights, Indigenous justice is becoming more "visible" to the Canadian State. Canadian legal institutions must now be adapted in order to coordinate with Indigenous legal orders, rather than to resist or coopt them in order to maintain current hierarchies of power and jurisdiction. This will require a decolonial approach to reconciliation that acknowledges the harms of colonialism for both Indigenous and non-Indigenous people in Canada, and the central role that both parties have in developing harmonious relationships going forward.[102] The Colombian constitution demonstrates that legal recognition of nested jurisdictions is possible. The challenge for Canada will be to determine how power-sharing can be negotiated and settled in law in a manner that respects and promotes inherent rights to Indigenous self-determination.

In Canada, we are still a long way from a criminal justice system where Indigenous nations can enact their own laws, and adjudicate them through their own court systems on their territories. However, the *James Bay and Northern Quebec Agreement* and its subsequent agreements, Canada's first modern treaties, have been ground-breaking in granting jurisdiction over many matters, including health, education and justice, to its signatory Nations. The next part of the paper will examine the jurisdictional framework governing criminal justice matters in the Cree Nation of Eeyou Istchee. Drawing on this example, the author will offer some conclusions and policy recommendations for extending Indigenous jurisdiction over criminal law matters in accordance with the *UNDRIP Act* and provincial legislation.

III. Case Study: The Cree Nation's Department of Justice and Correctional Services

A. *History and Architecture of the JBNQA and subsequent agreements*

[101] See *ibid* at 72.

[102] See *ibid* at 73.

In the 1970s, the Quebec government, led by Premier Robert Bourassa, undertook a major project to build several hydroelectric dams in the James Bay region.[103] Bourassa had the ambition of creating energy sovereignty for Quebec, but he neglected to consult with First Nations and Inuit communities whose territory he sought to usurp.[104] In 1972, the Cree and the Inuit took legal action, seeking an injunction against the project. On 15 November 1973, Justice Albert Malouf of the Quebec Superior Court ruled in favour of the plaintiffs.[105] The Quebec Court of Appeal quickly overturned the historic ruling, [106] but Justice Malouf's decision was enough to bring the Quebec government to the negotiating table. The resulting agreement, the *James Bay and Northern Quebec Agreement* (*JBNQA*),[107] was signed on 11 November 1975 by the Grand Council of the Crees, the Northern Quebec Inuit Association, the Government of Canada, the Government of Quebec and three Quebec crown corporations (Hydro-Quebec, the James Bay Development Corporation and the James Bay Energy Corporation).[108] The *JBNQA* redefined land management and granted expansive rights of self-governance to the Cree and the Inuit. With the passing of the *Constitution Act 1982,* the rights set out in the *JBNQA* were constitutionalized by section 35.

Despite the strength of this legal instrument, the Quebec government and the federal government have not always been forthcoming in their commitment to honour the constitutionalized rights set out in the *JBNQA*. As a result, numerous subsequent agreements have been reached to reiterate and expand the rights set out in the original *JBNQA*.[109]

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[103] See Yanick Turcotte, "James Bay and Northern Quebec Agreement" (3 July 2019), online: *The Canadian Encyclopedia* <thecanadianencyclopedia.ca>.

[104] See *ibid*.

[105] See *Chef Robert Kanatewat et al. c Société de développement de la Baie James et al.*, [1974] RP 38 (CSQ).

[106] See *Société de développement de la Baie James c Kanatewat*, [1975] CA 166.

[107] See *James Bay and Northern Quebec Agreement*, 11 November 1975, online: *Cree Nation Government* <cn.gov> [*JBNQA*].

[108] See Turcotte, *supra* note 103.

[109] See *Northeastern Quebec Agreement*, 31 January 1978, online: *Government of Canada* <rcaanc-

The *JBNQA 1975* was an agreement centered on the use and control of land. Emerging from long and arduous negotiations between multiple parties, the historic agreement did away with the existing framework of reserves imposed by the *Indian Act*. Quebec sought to establish its sovereignty over the northern regions of the province, while the Cree and the Inuit sought to obtain land rights so that they could maintain their traditional livelihoods and self-govern their communities. In exchange for the negotiated rights, the *JBNQA* extinguished all Cree and Inuit claims, rights, titles and interests in the land and territory subject to the agreement.[110]

B. The Cree Nation's Jurisdictional Authority in Criminal Law Matters and Correctional Services

In 1975, section 18 of the *JBNQA* granted the Cree certain powers over the administration of justice on their territory. Subsequent agreements, most notably the 2008 *Agreement concerning a New Relationship between the Government of Canada and the Cree of Eeyou Istchee* (the "*New Relationship Agreement*") and the 2017 *Agreement on Cree Nation Governance between the Crees of Eeyou Ischee and the Government of Canada* (the "*Governance Agreement*"), clarified certain aspects of the law-making authority of the central Cree Nation government, and the governments of each of the nine Cree nations of Eeyou Istchee. Despite expanded powers to the Cree Nation governments to enact laws in certain areas relevant to

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cirnac.gc.ca/eng/1407867973532/1542984538197> [*NEQA*]. See also *Agreement concerning a new relationship between le Gouvernement du Québec and The Crees of Québec*, 7 February 2002, online: *Cree Nation Government* <cn.gov> [*Paix des Braves*]; *Agreement concerning a new relationship between the Government of Canada and the Cree of Eeyou Istchee*, 21 February 2008, online: *Cree Nation Government* <cn.gov> [*New Relationship Agreement*]; *Agreement between the Crees of Eeyou Istchee and Her Majesty the Queen in right of Canada concerning the Eeyou Marine Region*, 7 July 2010, online: *Cree Nation Government* <cn.gov>; *Agreement on governance in the Eeyou Istchee James Bay Territory between the Crees of Eeyou Istchee and the Gouvernement du Québec*, 24 July 2012, online: *Cree Nation Government* <cn.gov>; *Agreement on Cree Nation governance between the Crees of Eeyou Istchee and the Government of Canada*, 18 July 2017, online: *Cree Nation Government* <cn.gov> [*Governance Agreement*].

[110] See *JBNQA*, *supra* note 107, s 2.1

public safety, the *JBNQA* and subsequent agreements leave unaltered the Canadian government's powers over criminal law matters (s 91(27) *Constitution Act 1867*) and, to a large extent, the government of Quebec's powers over the administration of justice (s 92(14) *Constitution Act 1867*).

From the outset it must be noted that the *JBNQA* preserved the Quebec Minister of Justice's authority over the administration of justice in Eeyou Istchee.[111] The agreement allowed for certain concessions to render justice more accessible to Cree people, including the assertion that judges in the judicial district of Abitibi must be "cognizant with the usages, customs and psychology of the Crees."[112] Additional provisions allowed for training Cree court workers[113] and other members of the community to facilitate knowledge of the justice system,[114] and the dispensing of certain services in the Cree language.[115] The *JBNQA* also allowed for Cree justices of the peace to deal with infractions related to by-laws adopted locally.[116] Other measures, relating to the construction and management of correctional facilities north of the 49th parallel would later prove particularly contentious.[117]

In 2008, the *New Relationship Agreement* sought to resolve several longstanding issues between the Cree and the federal government. In exchange for additional financing and expanded rights of self-governance, the Cree government agreed to dismiss several ongoing lawsuits against the Government of Canada. Among the litigious issues were questions surrounding the non-implementation of *JBNQA* provisions that guaranteed the construction of detention facilities above the 49th parallel and the staffing of institutions in the judicial district of Abitibi with members of the Cree nations. In sections 7.19 and 7.20 of the *New Relationship Agreement*, the Cree Nation government agreed to drop all legal proceedings and to never institute any new

[111] See *ibid*, s 18.0.1

[112] *Ibid*, s 18.0.7

[113] See *ibid,* s 18.0.17

[114] See *ibid*, 18.0.33

[115] See *ibid*, ss 18.0.23, 18.0.28,

[116] See *ibid*, s 18.0.9

[117] See *ibid*, ss 18.0.26, 18.0.27, 18.0.29.

proceedings concerning the *JBNQA* rights surrounding establishment and operation of detention facilities as referred to in sections 18.0.26, 18.0.27, and 18.0.29 of that agreement. The result was that the Cree Nation Department of Justice and Correctional Services would receive funding under the *New Relationship Agreement* to implement those provisions. In return, it relinquished any rights to sue the Government of Canada for further financial support in establishing detention and rehabilitation facilities on Cree territory, training Cree staff at detention facilities in the judicial district of Abitibi and funding the construction and operation of a detention facility above the 49th parallel.[118]

The *New Relationship Agreement* also included a provision to ensure the implementation of s 18.0.19 of the *JBNQA* as it pertains to amendments to the *Criminal Code* and the *Canada Evidence Act*. The changes make these federal instruments more appropriate to the circumstances, usages, customs and way of life of the Crees and the particular difficulties of the administration of justice in the judicial district of Abitibi.[119] However, the power to amend the legislation and indeed to legislate in all criminal matters for the Cree and the whole of Canada remains firmly with the federal government.

The 2017 *Governance Agreement*, signed between the federal government and the Cree Nation, provides that the Cree Nation governments may enact Cree laws and enforce them on their territory in matters related to the administration of the affairs and internal management of the Cree Nations. These matters are limited however to certain specific spheres of activity, such as access to information, the regulation of buildings, the protection of the environment, the definition and control of nuisances, taxation for local purposes, and matters of public order and safety as they pertain to fire departments, firearms, the keeping of animals, curfews, and the prohibition of alcohol. [120] The prosecution of offences under Cree law in these areas may be heard by the Court of Quebec, or by Cree justices of the peace,

[118] See *New Relationship Agreement*, *supra* note 109, ss 4.3(a), 4.4.

[119] See *ibid,* s 5.10.

[120] See *Governance Agreement*, *supra* note 109, s 6.2

as provided for in s 18.0.9 of the *JBNQA*.[121] The *Governance Agreement* also expands the authority of the justices of the peace in order to allow them to adjudicate offenses related to particular sections of the *Criminal Code*: 179 (vagrancy), 265 (common assault), 348 (breaking and entering), 445 (injuring or endangering animals) and 445.1 (cruelty to animals).[122]

This carefully negotiated framework for the administration of justice and the jurisdictional authority of the Cree Nation on its territory results in a complex matrix, where most criminal matters, including the administration of justice, and the operation of correctional services, are subject to overlapping provincial and federal jurisdiction. Cree laws can regulate and even criminalize certain behaviours referred to in section 6.2 of the *Governance Agreement,* but they cannot alter any aspect of the *Criminal Code* or exert any influence over provincial decisions related to the administration of justice on Cree territory.

Despite these constraints to Cree jurisdiction over criminal matters, the Cree Nation Department of Justice and Correctional Services (DOJCS) has been gradually expanding its influence by providing various services to Cree citizens involved with the criminal justice system. They provide interpretative services, explaining the justice system and its procedures in the Cree language. They also provide training to Gladue writers who prepare Gladue reports for the accused at the sentencing phase. The DOJCS also offers culturally-appropriate services to victims of criminal acts through an adapted version of the provincial CAVAC program. They liaise with corrections personnel in provincial and federal facilities and provide rehabilitative services for offenders returning to their communities. For some relatively benign crimes, the DOJCS can also redirect offenders out of the criminal justice system and into community justice programs. In these programs, offenders who plead guilty meet with Elders and community members who discuss adapted strategies for restorative justice that will meet the needs of both the victim and the accused.

The DOJCS works tirelessly to innovate. In addition to the services described above, they are also seeking to build facilities financed by the *JBNQA* and the *New Relationship Agreement*.

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[121] See *ibid*, ss 4.19–4.20.

[122] See *ibid*, s 4.20(a).

These facilities include shelters for women facing domestic violence, rehabilitation centres for youth with substance abuse issues, and housing for community-members returning from prison. All of these facilities are to be located on Category I and IA lands, and will be subject to the full jurisdictional authority of the Cree Nations. These initiatives allow the Cree Nation to infuse Cree culture and values into the criminal justice and corrections systems. Crucially, the DOJCS works closely with the Cree Health Board to integrate justice and health considerations in their approach to crime prevention and offender rehabilitation. They also work closely with the Cree School Board to provide preventative programming to at-risk youth.

C. *Lessons for the Broader Potential of Indigenous Justice in Criminal Law Matters and Recommendations for Policy Reform*

The Cree Nations of Eeyou Istchee, under the centralized authority of the DOJCS, are exploring innovative approaches to reduce criminality in their communities. Although they continue to operate under the shadow overarching colonial system, as it relates to federal and provincial jurisdiction in the enactment of criminal laws and the adjudication of crimes under these laws, the DOJCS is nevertheless making major strides in addressing some of the harmful effects of the Canadian criminal justice system. Its approach can be informative for advancing policy recommendations that might more effectively address the Indigenous over-incarceration crisis besieging Canada.

First, the Cree Nation's DOJCS demonstrates the power and importance of subsidiarity. Especially in relation to Indigenous communities, local communities must have a say in the rehabilitation, reintegration and treatment of perpetrators of crimes in their midst. With the passing of the *UNDRIP Act*, the federal government has committed to increase Indigenous self-governance over local matters. Criminal law matters must figure in self-governance frameworks.

Second, the DOJCS demonstrates that cultural values must be central to criminal justice processes. Even if the provincial and federal governments do not delegate the administration of justice or law-making authority to Indigenous nations in a near future, the institutions of criminal justice will continue to perpetuate injustices

for Indigenous people as long as these institutions remain foreign to Indigenous values, beliefs and culture. Gladue Courts, Gladue reports and healing lodges are a start, but all three must receive increased funding and benefit from broader implementation to be truly effective.

Third, Canadian courts must be open to innovate and expand both the recognition of Indigenous laws on equal footing as Canadian laws, and the recognition of Indigenous jurisdiction in new areas. The Quebec Court of Appeal's decision opens the door to an expansive recognition of self-governance rights under s. 35(1) of the *Constitution Act, 1982*, but such recognition remains dependent on how *Canadian* courts interpret what is central and integral to distinctive to the pre-contact traditions of Indigenous peoples.[123] In order to fully recognize Indigenous peoples rights to self-determination, Canadian courts must be willing to take a far more expansive view of self-governance rights under s. 35(1). They must also be willing to incorporate Indigenous law, and Indigenous legal institutions on equal footing with Canadian law.[124] Canada's ratification of the *UNDRIP* and the implementation of the *UNDRIP Act* offer further potential avenues for increasing rights to self-governance. The DOJCS, and the Cree Nation of Eeyou Istchee more generally, demonstrate that negotiated power-sharing agreements can benefit both Indigenous peoples and non-Indigenous Canadians. Decolonizing Canadian institutions will require looking to modern treaty agreements, such as the *JBNQA*, and daring to go even further.

IV. Conclusion

This paper has sought to reflect on the potential and the promises of decolonizing the Canadian criminal justice system through recognition of Indigenous rights to self-determination. Engaging with the Indigenous resurgence literature creates a theoretical framework where the reconciliation paradigm can be critiqued and set aside in favour of a more radical decolonial

[123] See Gunn, *supra* note 5 at 249. See also *R v Van der Peet*, [1996] 2 SCR 507 at para 44, 137 DLR (4th) 289.

[124] See Gunn, *supra* note 5 at 257.

perspective. Understanding decolonialism as the return of land and power to Indigenous peoples forces us to consider what Indigenous self-determination would entail – for criminal law matters and for many other aspects of Indigenous peoples' political, social, economic, and cultural revitalization – and whether such a thing would be possible within the current federalist framework.

Our examination of Canada's commitments under the *UNDRIP*, and evolutions in the recent jurisprudence, suggest that there is political will to expand Indigenous self-governance rights within Canada's federalist framework. It is unclear for the moment whether this gradual expansion of rights will amount to a true decolonization of Canadian institutions, but the Cree Nation's experience of power-sharing post-*JBNQA* suggests that building on notions of treaty to reshape the Crown's relationship with Indigenous peoples in Canada can provide a starting point from which reform can proceed. The fundamental point will be centering decolonialism and Indigenous self-determination in all legislative initiatives involving Indigenous nations. Decolonialism can be gradual, but it must proceed.

Seen from this lens, addressing the over-representation of Indigenous peoples in Canadian prisons is but one piece of a larger puzzle. To remedy this problem, and the many other injustices that Canada's legal and political institutions have meted upon Indigenous peoples, Canada must decolonize. That is, it must give back land and power, one agreement at a time, until justice and balance are restored.

Bibliography

TREATIES

Agreement between the Crees of Eeyou Istchee and Her Majesty the Queen in right of Canada concerning the Eeyou Marine Region, 7 July 2010, online: *Cree Nation Government* <cn.gov>.

Agreement concerning a new relationship between le Gouvernement du Québec and The Crees of Québec, 7 February 2002, online: *Cree Nation Government* <cn.gov>.

Agreement concerning a new relationship between the Government of Canada and the Cree of Eeyou Istchee, 21 February 2008, online: *Cree Nation Government* <cn.gov>.

Agreement on Cree Nation governance between the Crees of Eeyou Istchee and the Government of Canada, 18 July 2017, online: *Cree Nation Government* <cn.gov>.

Agreement on governance in the Eeyou Istchee James Bay Territory between the Crees of Eeyou Istchee and the Gouvernement du Québec, 24 July 2012, online: *Cree Nation Government* <cn.gov>.

James Bay and Northern Quebec Agreement, 11 November 1975, online: *Cree Nation Government* <cn.gov>.

Northeastern Quebec Agreement, 31 January 1978, online (pdf): *Government of Canada* <rcaanc-cirnac.gc.ca/eng/1407867973532/1542984538197>.

United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, UN Doc A/RES/61/295.

LEGISLATION

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, s 91(27), reprinted in RSC 1985, Appendix II, No 5.

Criminal Code, RSC 1985, c C-46.

Courts of Justice Act, c T-16.

Indian Act, RSC 1985, c I-5.

UNDRIP Act, SC 2021, c 14.

JURISPRUDENCE

Chief Robert Kanatewat et al. c Société de développement de la Baie James et al., [1974] RP 38 (CSQ).

Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73.

R v Gladue, [1999] 1 SCR 688, 171 DLR (4th) 385.

R v Ipeelee, 2012 SCC 13.

R v Sharma, 2022 SCC 39.

R v Sparrow, [1990] 1 SCR 1075, 70 DLR (4th) 385.

R v Van der Peet, [1996] 2 SCR 507, 137 DLR (4th) 289.

Reference re Assisted Human Reproduction Act, 2010 SCC 61.

Reference re Firearms Act (Can.), 2000 SCC 31.

Reference re Genetic Non-Discrimination Act, 2020 SCC 17.

Reference Re Secession of Quebec, [1998] 2 SCR 217, 161 DLR (4th) 385.

Reference re Validity of Section 5 (a) Dairy Industry Act [1949] SCR 1, [1949] 1 DLR 433.

Reference to the Court of appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families, 2022 QCCA 185.

Société de développement de la Baie James c Kanatewat, [1975] CA 166.

GOVERNMENT DOCUMENTS

Correctional Service of Canada, *An Examination of Healing Lodges for Federal Offenders in Canada*, by Shelley

Trevethan, Nicole Crutcher & Christopher Rastin (Ottawa: CSC, Research Branch, November 2002).

Department of Justice Canada, *Annual progress report on implementation of the United Nations Declaration on the Rights of Indigenous Peoples Act* (Ottawa: DOJ, June 2022).

——, *Exploring Indigenous Justice Systems in Canada and Around the World: Report on the conference hosted by the Department of Justice Canada* (Ottawa: DOJ, 15 May 2019).

——, *Just Facts: Indigenous overrepresentation in the criminal justice system* (Ottawa: DOJ, Research and Statistics Division, 2019).

——, *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses* by Clark Scott (Ottawa: DOJ, Research and Statistics Division, 2019).

——, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* (Ottawa: DOJ, 2018).

——, *Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System* (Ottawa: DOJ, 16 October 2018).

——, "Addressing systemic racism against Indigenous peoples in the justice system: Government of Canada investments and initiatives" (30 June 2021), online: *Canada.ca* <canada.ca/en/department-justice/news/2021/06/addressing-systemic-racism-against-indigenous-peoples-in-the-justice-system-government-of-canada-investments-and-initiatives.html>.

——, "Government of Canada introduces legislation respecting the United Nations Declaration on the Rights of Indigenous Peoples" (3 December 2020), online: *Canada.ca* <canada.ca/en/department-justice/news/2020/12/government-of-canada-introduces-legislation-respecting-the-united-nations-declaration-on-the-rights-of-indigenous-peoples.html>.

Report of the Royal Commission on Aboriginal peoples: Looking Forward, Looking Back, vol 1 (Ottawa: Supply and Services, 1996).

Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, vol 2 (Ottawa: Supply and Services, Canada, 1996).

Report of the Royal Commission on Aboriginal Peoples: Gathering Strength, vol 3 (Ottawa: Supply and Services Canada, 1996).

Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities, vol 4 (Ottawa: Supply and Services Canada, 1996).

Report of the Royal Commission on Aboriginal Peoples: Renewal: A Twenty-Year Commitment, vol 5 (Ottawa: Supply and Services Canada, 1996).

SECONDARY SOURCES: ARTICLES

Alfred, Taiaiake, "On Reconciliation and Resurgence" (2022) 2:1 Rooted 76.

——, "Restitution is the Real Pathway to Justice for indigenous Peoples" in Gregory Younging & Mike Degagné, eds, *Response, Responsibility, and Renewal* (Ottawa: Aboriginal Healing Foundation, 2009) 179.

Alfred, Taiaiake & Jeff Corntassel, "Being Indigenous: Resurgences Against Contemporary Colonialism" in Martin J Cannon & Lina Sunseri, eds, *Racism, Colonialism, and Indigeneity in Canada* (Oxford: Oxford University Press, 2011) 139.

Ansloos, Jeffrey, "Peace like a Red River: Indigenous Human Rights for Decolonising Reconciliation" in H Devere, K Te Maihāroa, J Synott, eds, *Peacebuilding and the Rights of Indigenous Peoples* in *The Anthropocene: Politik–Economics–Society–Science*, vol 9 (Cham, Switzerland: Springer 2017).

Borrows, John, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1977) 155.

Brisson-Boivin, Kara, "Standardizing 'Corrections': The Politics of Prison Expansionism and Settler Colonial Representations of

Punishment in Nunavut" (2018) *Annual Review of Interdisciplinary Justice Research* vol 7 372.

Christie, Gordon, "Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions" (2007) 6:1 Indigenous LJ 13.

Coulthard, Glen, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada." (2007) 6 Contemp Pol Theory 437.

Green, Joyce, "From *Stonechild* to Social Cohesion: Antiracist Challenges for Saskatchewan" in Martin J Cannon & Lina Sunseri, eds, *Racism, Colonialism, and Indigeneity in Canada* (Oxford: Oxford University Press, 2011) 234.

Gunn, Brenda, "Moving beyond Rhetoric: Working toward Reconciliation through Self-Determination" (2015) 38:1 Dalhousie LJ 237.

Gutierrez, Leticia, Nick Chadwick & Kayla A Wanamaker, "Culturally Relevant Programming versus the Status Quo: A Meta-analytic Review of the Effectiveness of Treatment of Indigenous Offenders" (2018) 60:3 Can J Corr 321.

Hebert, Alexandra, "Change in Paradigm or Change in Paradox? *Gladue* Report Practices and Access to Justice" (2017) 43:1 Queen's LJ 149.

Koivurova, Timo, "From High Hopes to Disillusionment: Indigenous Peoples' Struggle to (re)Gain Their Right to Self-Determination" (2008) 15:1 Intl J Minority & Group Rights 1.

Lawrence, Bonita, "Rewriting Histories of the Land: Colonization and Indigenous Resistance in Eastern Canada" in Martin J Cannon & Lina Sunseri, eds, *Racism, Colonialism, and Indigeneity in Canada* (Oxford: Oxford University Press, 2011) 68.

Mackey, Eva, "Unsettling Expectations: (Un)certainty, Settler States of feeling, Law, and Decolonization" (2014) 29:2 Rev can dr et société 235.

Mills, Aaron, "What Is a Treaty? On Contract and Mutual Aid" in Michael Coyle & John Borrows, eds, *The right relationship: reimagining the implementation of historical treaties* (Toronto: University of Toronto Press, 2017) 219.

Milward, David & Debra Parkes, "*Gladue*: Beyond Myth and Towards Implementation in Manitoba" (2011) 35:1 Man LJ 84.

Monture-Okanee, Patricia, & Mary Ellen Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" in Martin J Cannon & Lina Sunseri, eds, *Racism, Colonialism, and Indigeneity in Canada* (Oxford: Oxford University Press, 2011) 242.

Scott, Dayna, "The Environment, Federalism, and the Charter" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press) 493.

Stacey, Richard, "Honour in Sovereignty: Can Crown Consultation with Indigenous Peoples Erase Canada's Sovereignty Deficit" (2018) 68:3 U Toronto LJ 405.

Sunseri, Lina, "Moving Beyond the Feminism Versus Nationalism Dichotomy: An Anti-Colonial Feminist Perspective on Aboriginal Liberation Struggles" in Martin J Cannon & Lina Sunseri, eds, *Racism, Colonialism, and Indigeneity in Canada* (Oxford: Oxford University Press, 2011) 154.

Tuck, Eve & K Wayne Yang, "Decolonizing is not a metaphor" (2012) 1:1 Decolonizing: Indigeneity, Educ & Soc'y 1.

SECONDARY SOURCES: MONOGRAPHS

Alfred, Taiaiake, *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford: Oxford University Press, 1999)

——, *Wasáse: Indigenous Pathways of Action and Freedom* (Toronto: University of Toronto Press, 2005).

Borrows, John, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

Coulthard, Glen, *Red skin, white masks: rejecting the colonial politics of recognition* (Minneapolis: University of Minnesota Press, 2014).

Eisenberg, Avigail, Jeremy HA Webber, Andrée Boisselle, Glen Coulthard, eds, *Recognition versus self-determination:*

dilemmas of emancipatory politics (Vancouver: UBC Press, 2014).

Fanon, Frantz, *Black Skin, White Masks*, translated by Richard Philcox (New York: Grove Press, 2008).

Gevikoglu, Jeannette, *Sentenced to Sovereignty: Sentencing, Sovereignty, and Identity in the Nunavut Court of Justice* (LLM Thesis, University of Victoria Faculty of Law, 2011).

Griffiths, Curt T & Alison J Cunningham, *Canadian criminal justice: a primer*, 4th ed (Toronto: Nelson Education, 2011).

Hegel, Georg Wilhelm Friedrich, *The Phenomenology of Spirit*, translated by Michael Inwood (Oxford: Oxford University Press, 2018).

Mackey, Eve, *Unsettled Expectations: Uncertainty, Land and Settler Decolonization* (Halifax & Winnipeg: Fernwood Publishing, 2016).

Mills, Aaron, *Miinigowiziwin: All That Has Been Given for Living Well Together* (DCL Thesis, University of Victoria Faculty of Law, 2019).

Simpson, Leanne Betasamosake, *Dancing on Our Turtles Back: Stories of Nishnaabeg Recreation, Resurgence, and New Emergence* (Winnipeg: Arbeiter Right Publishing, 2011).

——, *Noopiming: The Cure for White Ladies* (Toronto: House of Anansi Press, 2020).

Simpson, Leanne Betasamosake & Robyn Maynard, *Rehearsals for Living* (Toronto: Knopf Canada, 2022).

SECONDARY SOURCES: OTHER

Alex Boyd, "Leaders praise RCMP efforts, but also question whether a local force might make a difference in the future", *Toronto Star* (8 September 2022), online: <thestar.com/news/canada/2022/09/08/chiefs-of-james-smith-cree-nation-speak-following-capture-death-of-saskatchewan-stabbing-suspect.html>.

"Colombia's Constitution of 1991 with Amendments through 2015" (last modified 27 April 2022) online (pdf): *ConstituteProject.org*, translated by Max Planck Institute <constituteproject.org/countries/Americas/Colombia>.

Onandaga Nation, "Two Row Wampum – Gaswéñdah" (last visited 6 November 2022), online: *onandaganation.org* <onondaganation.org/culture/wampum/two-row-wampum-belt-guswenta/>.

US Department of the Interior, Indian Affairs, "Tribal Court Systems" (last visited 30 November 2022), online: *bia.gov* <bia.gov/CFRCourts/tribal-justice-support-directorate>.

Yanick Turcotte, "James Bay and Northern Quebec Agreement" (3 July 2019), online: *The Canadian Encyclopedia* <thecanadianencyclopedia.ca>.