In support of free-standing Indigenous legal systems
Comparisons of US tribal courts and Canadian First Nations courts

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**Abstract:** US and Canadian approaches to tribal legal orders have taken different paths, and here I argue that the Canadian model should move towards free-standing Indigenous courts as they currently exist in the United States. The Canadian approach has focussed on the issue of over-incarceration of Indigenous prisoners, but even newer efforts have stopped short of recognising at least partial criminal and civil jurisdiction. The Canadian approach fails to support Indigenous jurisdiction and community rebuilding and leaves Indigenous peoples vulnerable to non-Indigenous judges, who fail to accommodate Indigenous approaches to justice. Early attempts at shared jurisdiction have been naïve regarding Indigenous internal social processes and the struggle over what constitutes proper cultural practices. My data come from my own work with Coast Salish tribes, where I have studied tribal histories and legal practices on both sides of the international border as well their views of federal policy in both Canada and the United States.

**Keywords:** Canada, comparison, free-standing courts, jurisdiction, tribal courts, tribal law, United States

In my view, Indigenous communities should have space to re-establish for ‘modern times’ meaningful justice/legal practices without hindrance. Support for this position comes from the comparisons of experiences of Coast Salish tribal courts in the United States and several flawed, half-measures undertaken in Coast Salish territory in Canada. For comparative purposes, I restrict my analysis to the Indigenous groups known collectively as the Coast Salish based on linguistic and cultural affinity between tribes/bands on both sides of the US–Canadian border in British Columbia and Washington state. The emergent justice practices of the Coast Salish communities of Washington State
and British Columbia vary widely. I consider three distinct Coast Salish justice initiatives: a Washington State tribal court, a now-defunct BC diversionary justice programme and another currently operating but not restricted to Coast Salish people, and efforts by a BC tribal council to establish a ‘House of Justice’ and related diversionary programmes. All three initiatives employ the rhetoric of culture and tradition but vary in the attention given to the local play of power (particularly the role of elders and inter-family competition) and concern for community diversity, as revealed in both the practices of justice and the narratives concerning justice.

All three communities are concerned with buffering their members from the intrusion of the state. However, their differential success in doing this reflects their inclination to take seriously their response to internal political processes. To further develop this position, I revisit insights gained from my participation in the conceptualisation of one Canadian Coast Salish initiative, which consisted in the study of Coast Salish tribal courts in the United States and their codes and constitutions, and my analysis of framing and evaluation documents (Miller 2001). I also point to a few highlights of the extensive literature on tribal law and tribal courts beyond the Coast Salish. For example, Samuel Brakel’s American Bar Association publications of 1976 and 1979 were early but not particularly positive studies. Work by Navajo Nation Chief Justice Robert Yazzie and his colleague James Zion (1995), Judge Tom Tso (1989), and Frank Pommersheim (1995) were influential in pointing to the positive possibilities for tribal courts. Law professor Rennard Strickland (1975) was an early advocate for considering tribal legal traditions. Professor of law Michael Jackson, the author of a report (Government of Canada 1996) on Indigenous justice issues in Canada, noted the positive developments in tribal courts in the United States, and Larry Nesper’s (2007) paper connected tribal courts to the emergence of a tribal state. John Borrow’s work (e.g. 2017) on both American and Canadian Indigenous law is highly influential, particularly in the use of storytelling in Indigenous practice. A psychologically oriented paper was written by Kathryn LaFortune and Violet Rush (2019). Justin Richland, an anthropologist building from his experiences as a Hopi tribal court judge, has authored two books on tribal courts (2008, 2015). And the US Bureau of Indian Affairs (n.d.) maintains a website regarding tribal courts, while Matthew Fletcher (2020) has published an overview on these courts.
The US experience

Over the last several decades, more than one hundred US Indian tribes have established their own tribal courts and, consequently, have produced and continue to revise their own law codes (American Bar Association 2016). The Coast Salish communities of Puget Sound have produced tribal codes which organise a series of social relationships and which entail rights and responsibilities. In doing so, these communities are addressing their own current circumstances and, to a degree, their own historic and cultural experiences. Those rights assigned to individuals do not simply emanate from the Western legal imagination or from existing arrangements within state and federal law. Rather, they also reflect underlying Salish world views as interpreted for the present-day, and, as such, go beyond simple repudiations of traditional culture (see Miller 1997: 123). Each tribe has created its own processes to compose a legal code, but there are several ways whereby such a code is ordinarily created. One route is through the tribal law committees, whose work is to consult with code-writers in making recommendations to the Tribal Council. The Council can then refine the language and vote to accept or reject the proposed legislation. It is particularly at the committee level that notions of folk law have high significance. The Tribal Council, composed of elected representatives of the enrolled members, can pass legislation on its own initiative or vote on suggestions coming directly from the membership or from other sources. Finally, the general membership of the tribe can instruct the Tribal Council to prepare legislation by vote at the annual general membership meetings (Miller 1995: 148–149).

Seven of the eight Coast Salish tribes in Puget Sound, Washington, are members of a consortium of fifteen tribes, the Northwest Intertribal Court System (NICS), and the eighth, originally an NICS tribe, now has its own court system. The NICS was established in 1979 following fishing litigation (United States v Washington, 1974) that upheld the treaties of the mid-nineteenth century. This gave Indians of Washington State rights to half of the salmon catch in state waters, thereby creating a need for fish and game codes and a legal setting for the prosecution of violators. The NICS courts and the one outlier operate under the provisions of the tribal codes and constitutions and federal law, and each tribe’s court holds jurisdiction over civil, criminal, traffic, and fisheries issues involving both Indians and non-Indians (the term used in law). Federal law, especially the Major Crimes Act of 1885, muddies the issue of jurisdiction by restricting or creating concurrent jurisdiction with
Indian courts in important criminal areas, including murder and other violent crimes. Current federal case law continues to shift the boundaries between tribal and state and federal law.

The Upper Skagit Court was established following the landmark legal decision, *United States v Washington* in 1974. The tribe has acted on their legal jurisdiction under US law by gradually expanding the repertoire beyond resource regulation, and it now includes zoning, felony, and other legal issues within the system. The activities of the tribal justice system, including the court session, are today carried out almost exclusively on the reservation. The tribe employs its own judge and court officials, a circumstance that has arisen after several years of sharing resources with other local tribes within a legal services consortium. Tribal members and tribal employees have developed and fine-tuned tribal codes in order to both manage their relations with the outside and regulate activities within their own territories. For example, tribal code exists in areas in which the latter do not purportedly have jurisdiction under US law, but to which local authorities acquiesce. This includes the release of tribal members incarcerated in county jail in order to attend funerals or the prosecution of major crimes in the event the federal court fails to act. The tribe has paid particular attention to defining the legal relationships between components of the community: relations between families, between families and the tribe itself, and between the tribe and the legal individual within a universe of families, as I have pointed out elsewhere (Miller 1997).

The Upper Skagit tribal code has incorporated significant features of historical Coast Salish justice, in what I call here ‘folk law’. Folk systems of law in the Coast Salish region included, and, to a degree, continue to include, a variety of sanctions, especially restitution in the form of negotiated payments, ostracism and even violent recrimination. Public ceremonies of various sorts were also employed in the process of public debate and resolution of disputes and crimes. These ceremonies included potlatches, summer dances of spirit-powers (notably, in some areas, *sxwayxwey*, which cleanses insults), and formalised fights. But underlying these institutions is a cultural emphasis on the avoidance of conflict through proper training (glossed as ‘advice’), fear of shamanistic retaliation, the practice of avoidance, the fissioning of villages to dampen conflict, and deference towards senior leaders (elders) noted for their ability to model conflict-avoidance behaviour and to express cultural values in formalised oratory. Indirect social control and, ordinarily, an absence of physical coercion rather than regulations and sanctions were the hallmarks of these systems. These practices stemmed
from a desire to restore the community rather than from abstract notions of punishment and deterrence (Miller 1995: 145).

A critical feature of the administration of justice is the process of ‘sorting-out’, in which court officials examine community problems brought to them and provide a range of options for resolution. These options are as diverse as feasting between families and adversarial criminal prosecution. This ‘sorting-out’ appears to diminish the problem of the translation of conflicts into legally definable cases that plague local-level courts in the mainstream society and that appear to deny justice. This process has the effect, optimally, of providing a timely resolution to resolvable problems and of allowing disputants to employ processes and seek remedies from within the repertoire of culturally sanctioned traditions, or of seeking to redefine themselves and their adversaries as litigants within a formal adversarial system. It also allows disputants to simmer down and potentially find their satisfaction in merely lodging a complaint or having a grievance heard. The critiques coming from opposite corners that tribal courts are either not Indigenous (cultural) enough or not efficient (similar to mainstream courts) enough are both potentially addressed in this model. In effect, culture is not made problematic; there is no particular struggle over culture and its relationship to justice (Miller 2003).

The Canadian experience

A Canadian Coast Salish example concerns the Stó:lō Nation, which is composed of about five thousand people organised into some nineteen bands along the lower Fraser River of British Columbia. As I have discussed elsewhere, the nation’s justice initiatives arose in the 1990s out of three primary motivations. These are to create a justice programme that could be put into place following treaty negotiations with the provincial and federal governments and thereby assert Stó:lō rights and title, to implement Stó:lō cultural practices as they pertain to justice, and to begin a process of restoring communities to a state of health, viewed holistically. Initial efforts included a study of Stó:lō people in incarceration, the creation of a House of Elders and a House of Justice to serve as advisers in the process, and a search for appropriate, interim, diversionary practices that could benefit members and families (Miller 2003: 144–147). This involved a small-scale application of a widely popularised and diffused New Zealand Māori family counselling model. In addition, as the nation took over service delivery, including educational,
child welfare and health services, efforts were made to incorporate current Stó:lō concepts of justice. Efforts were underway to consider how to create a code for a tribal system that would integrate Stó:lō cultural concepts.

In 1999, a diversionary justice programme was initiated, following an earlier aborted attempt, and was named Qwi:qwelstom, ‘the Halq’emeyləm word used to describe “justice” according to the Stó:lō worldview. According to the Qwi:qwelstom: Stó:lō Alternative Justice, 2001, literature, it reflects a “way of life” that incorporates balance and harmony. Qwi:qwelstom is supported as an Aboriginal Justice Program that provides a means by which the Stó:lō people are achieving self-determination and self-governance as protected by Section 35 of the Canadian Constitution.’ (Stó:lō Nation Justice Programs n.d.). The programme, officially under the direction of the above-mentioned House of Justice and more immediately under an elders council with indirect expertise in traditional forms of justice (no member had participated directly while growing up), was created to address problems within the Canadian criminal justice system. Thirty-five facilitators underwent training in order to carry out ‘circles’ for any of three different stages of the prosecution process: (1) replacing the trial process; (2) making sentencing recommendations; and (3) assisting in the reintegration of offenders back into their communities.

Cases were to be referred from a variety of sources, including the mainstream police (RCMP), the Crown Counsel, probation officers, community members and self-referrals. Cases were taken into the diversionary programme when the offender expressed remorse; when the community showed a willingness to deal with the offender; when resources were available to the offender, victim and family members; and depending on ‘where the offender is in his/her own journey of healing’, among other criteria (Stó:lō Nation Justice Programs n.d.).

The director of the project emphasised that Qwi:qwelstom was a ‘forum for balance, harmony, healing of all affected parties’ (Victor 2001). The core metaphor for the project was ‘justice as healing’ (Stó:lō Nation Justice Programs n.d.). A carefully constructed special issue of the tribal newspaper, Sqwelqwel's ye Stó:lō, entitled ‘Xyolhemeylh’ (1998), addressed criticism of the nation’s health and family services programme while describing a potential reorganisation and centralisation of tribal service delivery. The special issue also advanced the idea of ‘listening to the Nation’s elders’, several of whom were quoted in support of restructuring as a form of ‘working together’. A programme of ‘runners’ was announced to facilitate the delivery of information from
the tribal headquarters to the bands in order to replicate the Indigenous practice of sending messengers to announce potlatches and other major events. Meanwhile, privately, an elder who had served on a House of Justice corrections feasibility study questioned whether justice initiatives should occur at the nation level or at the individual band level.

The special issue provided a two-page statement of ‘traditional law’, with the headline ‘Traditional Stó:lō People conduct their lives according to the Seven Laws of Life: Health, humility, happiness, understanding, generations, forgiveness, generosity’ (Sqwélqwels ye Stó:lō: 6). Cultural traits said to be shared with many other native cultures were detailed: (1) spirituality – ‘[r]eflected in direct communications with the Creator’; (2) respect; (3) sharing of knowledge; (4) old ways –’[r]eflected in practices such as custom adoptions’; (5) listening, with the notation: ‘What is meant for you, it will stay with you’ (Ibid.).

The accompanying text described the Stó:lō concept of ‘doing things in a good way’ (actions that are conscientious, polite, kind and respectful), and noted that the elder or helper assists couples to resolve family conflict by ‘[s]peaking the truth to both members of the family without offending the feelings of either of them’ (Ibid.). The elder or helper in this case will carefully balance the harsh truth (crude reality) with a softer version of the same truth (perceived reality) while still maintaining the integrity of the truth.

In traditional ways, conflict resolution and problem-solving are achieved by assisting two or more parties to talk to each other and to listen to each other until an understanding and consensus is built:

The traditional helper will focus on containing the level of anxiety, animosity, and anger from all parties so that each person can gradually see each other’s position. The traditional process may also include STORY TELLING [uppercase in original] . . . . the story told by the helper resembles the conflict experienced by the listeners and the listeners clearly see their own conflicts being unfolded in front of them. Often, the traditional helper will use his/her own life experience as an example so as to assist the “clients” to feel more comfortable with the helping experience . . . . the traditional helper [thereby] acknowledges his/her own humanity including faults in character . . . . The words selected by the helper are usually spoken from the heart rather than from the mind. Compassionate words that carry the unequivocal message of care allow the listener to become relaxed and more open to the healing words of the speaker. (Ibid.)

This presentation introduced the idea of a ‘traditional helper’ as a central figure. The presentation of ‘traditional law’ was couched within the consensus/healing discourse, and overlaps with the ‘wellness’ language of social services. A Xyolhemeylh editorial, for example, presents
Maslow’s hierarchy of human needs in explaining the process of healing. Significantly, the editorial emphasises the role of storytelling and the use of elders’ personal narratives as examples. This account of Aboriginal justice infuses ideology, including twentieth-century Western healing rhetoric, with the realities of prior Indigenous practice and has significant implications for the real world, particularly the community debates about justice. By 2001, Stó:lō justice initiatives were driven by a variety of ideas coming from within the communities that compose the nation and from outside. Some community members were fearful of the consolidation of authority within the nation. The nation paradoxically advocated Stó:lō traditional practices while importing systems from New Zealand with federal government encouragement and contemplating ideas from the Canadian prairies. In this case, the absence of real legal jurisdiction allowed efforts to become waylaid by competing cultural and ideological views which provided little help in adjudicating real legal issues.

The ways in which the issue of culture is addressed remains one of the points of distinction. Upper Skagit has largely managed to avoid the trap of promoting elderhood, as I show in the next example, due to the consideration that elders, too, are socially positioned within their communities and that they participate in relations of power. Nevertheless, they employ an elders council in tribal court in several ways. And, while Upper Skagit, in common with other Indigenous communities, places an emphasis on the resolution of social problems, they have not relied on an Edenic discourse as a way of distancing themselves from the mainstream. Indeed, they barely need to, unlike their relatives in Canadian Coast Salish tribes, which lack direct criminal and civil jurisdiction.

The failed South [Vancouver] Island Justice Project is still described as a model of diversionary justice by legal scholars and court officials. Briefly, this was a project created in 1988 with nine Vancouver Island Coast Salish tribes as a diversionary justice plan. This was submitted by the South Island Tribal Council with support from law faculty members from the University of British Columbia and the judiciary. The idea was to create an elders council and pair it with the court at each stage of justice delivery in criminal and family cases. The texts generated by the project viewed justice as created by Xals, the Creator, which was to establish guidelines, a practice which created rigidity. The programme collapsed under its own weight and due to the inability or disinclination of programme developers to understand that Indigenous communities are places of conflict and that justice concerns, in part, the resolution
of conflict (Miller 2001). Ultimately, the idea of a separate Indigenous justice system was disavowed by the Indigenous participants.

A problem for this project was that it put women who had been sexually assaulted under the guidance of elders from other families, who had perpetrated the assault. Indeed, some members of the legal and academic communities presumed that prior justice practices remained wholly intact within communities and confused the resolution of a problem with ‘culture’, as if an existing template provided an unambiguous answer to carrying out the practice of justice. Strangely, this example reveals the way in which Indigenous communities become complicit with outside authority in promoting an image of Indigenous society as cultural automaton, that is, the idea that people simply live in conformity with cultural norms, thereby avoiding conflict. In the long run, though, this complicity emerges as a means of domination in that communities that fail to directly address the mundane issues of carrying out justice, in their rush to repudiate the outside and promote a sense of an Edenic past, delay the necessary work of furthering community sovereignty. This need not be the case, however. Thus, as noted elsewhere, community redemption, restoration and sovereignty lie in addressing the commonplace details of life and in discovering and acknowledging what has worked in the past and what can work in the present (see Miller 2003: 145–148).

Canada today: Gladue courts

Coast Salish bands in British Columbia, Canada, have no free-standing Indigenous courts with significant civil and criminal jurisdiction as do the Coast Salish and other tribal groupings in the United States. But there are ‘Aboriginal courts’, and the following is a description of how they operate. If one pleads guilty and identifies as Aboriginal (Indigenous), then one may be eligible to have a bail hearing or sentencing hearing in a BC First Nations / Indigenous court. A defendant might be referred there by a judge, a Crown lawyer or a defense lawyer, but this possibility remains a choice for the defendant, who is required to have pled guilty. These Indigenous courts, then, are merely crime-sentencing courts and use restorative justice practices which focus on ‘balancing rehabilitation, accountability, and healing’. Sometimes called ‘Gladue Courts’, they engage elders, judges, the defendant’s lawyer and the defendant’s family in an effort to restore ‘mental, physical, spiritual, and emotional health’ BC Legal Services Society (2011). The underlying
idea is that the judge works with the Indigenous wrongdoer to avoid jail. The judge, meanwhile, is instructed to consider the background and needs of the wrongdoer, consider the Gladue Report (described below), if there is one, in sentencing, and any forensic examination of the wrongdoer. Those involved in this process, including social workers, victims and community members, may speak or remain as silent observers in court, but they have a chance to be heard. Because there are many diverse Indigenous groups in Canada, the claim is made that there is an effort to reflect local culture.

One of these new courts, the First Nations court in New Westminster, BC, is located in Coast Salish territory in a municipality adjacent to Vancouver. This court began operations in November, 2006, and sits once a month to hear two or three cases. Cases are not limited to Coast Salish people but can include any of the Indigenous peoples in the region. To date, the court has only dealt with summary conviction orders and has limited itself to hearing youth and family matters. The court hearings are held in a conference room around a large table with the judge, Crown and defense counsels, court workers, and drug and alcohol counselors. Children are welcome and are provided toys. The charge is read aloud, the guilty plea is entered, and everyone around the table has a chance to speak.

Gladue Reports are written by professional report writers and concern the cultural and social backgrounds of the Indigenous defendant in addition to issues with alcohol and drugs, if indicated. More formally, it is a type of pre-sentencing and bail-hearing report that a Canadian court can request when considering sentencing an offender of Aboriginal background under Section 718.2(e) of the Criminal Code. The report is intended to give the judge a holistic view of the circumstances under which the wrongdoer has come before the court. This system of reports has resulted from a decision of the Canadian Supreme Court, in a domestic violence case concerning a Cree woman named Jamie Gladue, stating that Indigenous backgrounds and the history of colonialism must be taken in account in rendering a sentence in order to ensure equity before the law. Gladue, then, refers to the special considerations in sentencing (BC Legal Services Society 2011). I consider an example of how this might go in practice below.

First Nations courts can convene elders panels, members of which can ask the youth about themselves, what happened leading up to the arrest and, in brief, ‘their side of the story’. Instead of taking a youth to jail or a residential school, the effort can be to restore families and to rely on local knowledge of the ancestral language and culture. The
healing plan created in this process might include going to a sweat lodge (a spiritual practice), detox or an alcohol/drug abuse programme. While the wrongdoer is held accountable, the approach emphasises encouragement and emphasises progress demonstrated by the wrongdoer in recognising their own behaviour and the effects of their behaviour on the community. In some instances, there is a (traditional) blanket ceremony after progress has been made. Elders wrap the wrongdoer with a blanket, which then gives ‘heart and strength’ to continue on improving. These practices are thought to have the additional benefit of educating judges and lawyers about Indigenous legal perspectives.

In brief, this is as far as Canadian jurisprudence has gotten in considering Indigenous peoples’ own legal practices, although this appears to be about to shift a little. Media reports (Mulgrew 2022) pointing to the problem of the over-incarceration of Indigenous people indicate that this issue might soon be addressed in new ways. The problem of over-incarceration is considerable: ‘By 2008, Aboriginal people made up three percent of the Canadian population, but they formed 18 percent of the federal inmate population for men, and 24 percent of the federal inmates’ (BC Legal Services Society 2011: 3). Legal reporter Ian Mulgrew writes that the Canadian Federal Justice Minister David Lametti, BC Attorney General David Eby, and Doug White, a member of a Coast Salish band on Vancouver Island (Snuneymuxw First Nation) and the Chairman of the BC First Nations Justice Council, have begun talks and have signed a tripartite memorandum of understanding and funding for Indigenous Justice Centres. This group is exploring taking a ‘positive step towards re-establishing their own legal systems in the hope of reducing . . . the number of Indigenous adults in prison and children in government care’ (BC Legal Services Society 2011: 3). British Columbia and First Nations created a strategy which ‘called for 43 actions along two tracks for transformation – the reformation of the current legal system, and restoration of Indigenous traditions and structures’ (BC Legal Services Society 2011: 3). Canada has promised $28.6 million over five years to support Community Justice Centre pilot projects in three provinces: British Columbia, Manitoba and Ontario. The aim is to replace traditional Canadian courtrooms with community settings offering multiple social services. There is no mention of releasing jurisdiction for Indigenous cases with Indigenous litigants to the communities themselves, and the dollar figures are wildly inadequate to make serious transformations.
The case of the fishing boat seizure

I will use one account regarding the prosecution of a First Nations man for purported illegal fishing to illustrate another side of the problems inherent in the Canadian approach. An Indigenous man had been arrested by federal officials while fishing, and his boat was seized. A Gladue Report had been prepared by an Indigenous Gladue reporter. However, the judge refused to consider the Gladue Report. I had been established as an expert. However, my expert report regarding the band and their fishing rights was not accepted. This was without explanation, a development which mystified the lawyer for the defendant. These are public records. Meanwhile, access to the valuable fishing boat was withheld and its location was unknown. The boat was a major asset of the family and was understood to be left unmaintained and presumably in drydock somewhere. The lack of consideration of my expert testimony further demonstrated the approach that this court took to recognising rights.

There is a significant connection between this case and these new Indigenous courts. The defendant and his family hoped to transfer the case from the local court to the Indigenous court in New Westminster which I have previously described. However, this met with an adversarial response as communicated to me by the defendant’s lawyer, where it was suggested it would do no good for such a transfer. The family was led to believe that the judge might also preside over the case again in the New Westminster Indigenous court and gave up their attempt to move the case. This is the sort of perception which might arise in relation to jurisdictional overreach in these new courts. This is also where BC Indigenous courts exist, within and under the larger provincial and national systems.


Cree Legal scholar David Milward has studied the ways in which obstacles to free-standing Indigenous legal systems might be overcome, arguing for legal syncretism (2012: 5). I follow his view here that Aboriginal justice initiatives in Canada are limited, confined to cases where a litigant pleads guilty. Further, Canadian legislators, judges and other officials are only willing to go so far in accommodating Aboriginal ap-
proaches to justice (Milward 2012: 31). Milward notes that Indigenous peoples have inherent rights to cultural practices under Section 35 (1) of the Canadian Constitution, under treaty, and one might add that, if this book were published a few years later, under the terms of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which has been accepted in law in British Columbia.

In particular, Milward considers Indigenous concepts and practices in light of the Canadian Charter of Rights and Freedoms. He notes: ‘I will suggest that Aboriginal communities can design their own court systems in a culturally sensitive manner. The judge’s role would for the most part be restricted to ensuring that participants do not behave in a coercive or exploitative fashion, thus addressing recent critiques that have been directed against restorative justice and Aboriginal justice critiques alike’ (2012: 31). Milward proposes that Indigenous courts can be established which would protect women from predation, mitigate punitive measures, build on Indigenous practices, address the conflicts between collective rights and individual rights, and help balance power differentials and the subsequent problem of domination by large families in some locations. Thus, Milward points to serious difficulties facing small communities trying to regulate themselves. But these problems are surmountable and for good reasons, in that tribal courts underlie and advance sovereignty.

The Canadian Department of Justice’s own evaluation of their efforts to work with Indigenous peoples on this issue makes the following observations:

There remains a need for programs and services that offer culturally appropriate, alternative means to better protect victims in Indigenous communities and to help steer offenders toward more productive and healthy lives. The AJS is designed for that purpose, and there is considerably more demand for community-based justice program funding than the AJS currently has available. The AJS is well aligned with federal government and departmental priorities to play an active role in helping to implement the Truth and Reconciliation Commission of Canada recommendations, several of which pertain directly to eliminating Indigenous overrepresentation and resourcing alternative justice strategies. In addition, the federal government is committed to improve the criminal justice system by an ‘increased use of restorative justice processes and other initiatives to reduce the rate of incarceration amongst Indigenous Canadians’. There is agreement among federal, provincial and territorial justice officials that there is a legitimate and important role for the federal government as the lead in supporting community-based justice programs in Indigenous communities’. (Government of Canada 2016: iii)
Canada’s self-evaluation of its Aboriginal Justice Strategy (AJS), begun in 1991, lists inadequate funding and inadequate and poor relations between officials of Canada and the communities as obstacles to the programme. Federal programmes are often short-term and disappear before buy-in occurs. The document points out that the AJS must align with federal policies (in this case of those of the ruling Liberal Party), an obstacle to a clear progressive policy. This report reveals that many police and Crown attorneys will not refer wrongdoers to existing programmes because these programmes ‘are considered of low quality’ (Government of Canada 2016: 35). The creative programming that has occurred includes crime prevention, pre-charge diversion, alternate sentencing, wilderness camps to teach spiritual values, reintegration to community and others (Government of Canada 2016: 30). Alternate programmes are accessed by 9,000 people per year, a very low figure for the entire Indigenous population of Canada. The Department of Justice wants a ‘fair, relevant, and accessible Canadian justice system’ (Government of Canada 2016: 28), but a major goal is cost-saving (117–123). But the issue remains that this is a system built on the practice of referrals and diversion from the Canadian legal structure of policing, courts and related institutions rather than a focus on a free-standing Indigenous-led and Indigenous-operated system. This sort of system would include Indigenous courts with civil and criminal jurisdiction, so that there would be no trailing attachment of Canadian jurisdiction, with Indigenous judges, court officials, case law, intertribal appeals courts and their own tribal code and policing. Although the AJS document states that cultural appropriateness is important (Government of Canada 2016: 30), it is unfortunately, in my view, based on a limited and incomplete model.

Other issues persist, of course, and these include jurisdictional problems of Indigenous jurisdiction over non-Indigenous people on their territories and reserved lands, over their own tribal citizens off-reserve, and jurisdiction over Indigenous peoples from other bands/tribes on their own lands. These all can be worked through. Milward makes clear that Canada just does not aim high enough.

**Conclusion**

This review has considered that the problem of the Canadian model is that it is too limited, and limits sharing jurisdiction over civil and criminal law with Indigenous communities which are recognised under the
Constitution and which have rights under the UNDRIP to their own cultural, including legal, practices. Canada still needs to work with and lend support to Indigenous nations to build capacity to operate free-standing systems. This includes much greater financial support. In addition to free-standing band legal systems, as the Coast Salish in the United States have, there can be inter-band appeals courts established within the same culture groups which are composed of more than one group with federal recognition, for example, the Cree. The US practice has its own problems, which I have not elaborated here, and the legal grounds on which the current tribal courts, following the US Supreme Court decisions under Justice Marshall of two-hundred years ago, does not exist under Canadian law. But these US tribal courts exist, and these courts help regulate important resources and tribal communities.

Indigenous justice systems should be established in order to enhance sovereignty, to allow a full expression of cultural values and practices, and to more generally allow Indigenous peoples to escape the shadow of colonialist impacts on their societies and bodies. This Canadian approach represents a continued inability to let go, to release the government’s hold over Indigenous peoples, and it also lacks imagination about what the future might bring. The other problem is that the approach advocated here by Canada is, paradoxically, built upon the supposition that, after a century and a half of denying Indigenous communities access to their own historical practices, these justice systems remain intact and ready to be re-engaged. They are not, but they can be rebuilt.

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Notes

2. An illustration of the difficulties faced by Indigenous communities newly tasked with creating tribal justice systems, including courts, occurred when I was asked to speak to a United States Coast Salish tribal council about historic practices. This community had newly received federal recognition. Councillors expressed real fear and concern about establishing a court which could potentially see their own relatives as litigants.
3. Terminology has continued to change. Indigenous people, the current preferred term, were referred to as Aboriginal until quite recently and before that as Indians. The Canadian Constitution and federal legislation continue to refer to Indians. Indigenous people of Canada are divided into First Nations, Metis and Inuit, although sometimes the boundaries between these categories are porous. In the United States, Indigenous people are sometimes called Native Americans, although the term Indian continues in daily use. Canadian practice is to refer to nations (sometimes capitalised), reflecting historical, cultural and social patterns of affiliation, and bands, reflecting current relations with Canada.

References


