



A Report on the Relationship between Restorative Justice and Indigenous Legal Traditions in Canada

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Executive Outline

This report is intended to help readers better understand restorative justice and Indigenous legal traditions on their own terms, as well as help readers understand the relationship between them. It will discuss restorative justice and Indigenous legal systems independently, and through this process, will demonstrate how they are both similar in several respects, yet also quite different in other respects. This report will highlight how most, if not all, Indigenous legal traditions contain principles and mechanisms that can be described as promoting community healing, reconciliation, and the reintegration of the offender. However, this does not mean Indigenous legal orders and restorative justice are the same (Chartrand 2013; Napolean and Friedland 2014; Napolean and Friedland 2016; Snyder 2014).

There are important features that make Indigenous legal traditions quite different from restorative justice processes, including how Indigenous legal traditions often use proactive/preventative strategies mediated through kinship networks (Gray and Lauderdale 2007), how they place a high importance on spirituality (Cameron 2005; Borrows 2010), and the historic use of punitive/retributive sanctions (Milward 2012; Napolean and Friedland 2014). While this report encourages readers to understand these approaches to justice as unique, this report suggests that there are opportunities for cross-cultural dialogue between advocates for restorative justice and Indigenous legal traditions, as well as opportunities to learn from each other's experiences and journeys.

The first section of this report will discuss restorative justice, and explore its underlying principles, as well as provide a brief sketch of various restorative justice programs that have been established in recent years. The second section of this report will discuss Indigenous legal systems on their own terms, but will pay close attention to the aspects of historic Indigenous legal systems that can be described as "criminal law". The third section of this report will briefly discuss the international and domestic support Indigenous legal traditions have received in recent years. This includes reaffirmation from the United Nations, as well as the Canadian Truth and Reconciliation Commission, which discusses how Indigenous legal traditions can contribute towards reconciliation. Despite this international and domestic support, the fourth section of this report will describe the status of Indigenous legal traditions in Canada. While this section will emphasize the limited opportunities Indigenous legal traditions have been given to deal with legal matters compared to restorative justice processes, it will also discuss future considerations, and particularly how Indigenous legal traditions will likely have to be adjusted to meet contemporary realities, including contemporary human rights standards. The fifth and final section of this report will discuss the evolving relationship between restorative justice and Indigenous legal traditions, and what these changing dynamics might mean.

Restorative Justice

Principles and Processes

Although there is no universal definition of restorative justice, it can be generally understood as an approach to crime and conflict that brings the victim, the offender, members of the larger community, and oftentimes professional service providers together into a non-hierarchical setting in order to

collectively address a harm that was committed and to set a path towards reconciliation between all relevant parties (Cameron 2005; Milward 2008). Drawing on notions of human interrelatedness, restorative justice sees crime and conflict as a breakdown of interpersonal relationships (Archibald and Llewellyn 2006). Therefore, restorative justice processes are supposed to restore, repair, and heal those relationships through meaningful and democratic input from all parties involved (Archibald and Llewellyn 2006; Tomporoski *et al.* 2011). These processes are meant to produce a sense of responsibility in the offender after they have heard how their actions and behaviour have affected the victim and larger community. This, in turn, is supposed to initiate a desire within the offender, but also within the victim and community, to begin the tough work of healing and restoring relationships, and rebuilding the community's well-being (Canadian Resource Centre for Victims of Crime 2011). Restorative processes are not meant to restore interpersonal relationships to where they were before the conflict took place. Rather, restorative justice processes should be seen as forward/future looking in the sense they try to bring individuals, understood as relational human beings, into a position where they are capable of entering into equal and healthy interpersonal relationships again without relying on criminal justice sanctions (Archibald and Llewellyn 2006).

In practice, restorative justice programs across Canada are fairly pragmatic. They deal with both youth and adult offenders and address a range of offences. They usually arise within a community or are organized by social groups and organizations due to the belief that the existing justice system is not working well for their community. A common concern is that when the justice system sends offenders to jail it only makes them better criminals when they are reintegrated back into the community. Many restorative justice programs are community based although many receive funds from government agencies on a case-by-case basis. Many Aboriginal communities have initiated restorative justice programs because of the program funding available and the willingness of police and justice personnel to participate. These programs can be broken down into the following categories: victim-offender mediation, family group conferencing, and a number of "circle" programs (Canadian Resource Centre for Victims of Crime 2011). There is no single model or approach and restorative justice initiatives can vary a great deal and be quite flexible which can be a strength.

Since restorative justice programs entered the Canadian and international scene in the 1970s, victim-offender mediation has been one of the most effective and most widely used program models in Canada (Tomporowski *et al.* 2011). This model tends to bring the victim and offender together with a trained mediator to discuss the crime, and develop an agreement that resolves the incident. However, there are usually no other representatives from the community. The setting is supposed to be a safe and structured environment for the victim so that they are able to articulate how the offender's actions affected them, while the offender is given the opportunity to make apologies and hear how they can make reparations (Canadian Resource Centre for Victims of Crime 2011). Victim-offender mediation can occur at any stage of the criminal justice process, from pre-charge police diversions, to years into an offender's prison sentence. Depending on when, or at what stage, mediation takes place, will usually determine what kinds of reparations are acceptable (Canadian Resource Centre for the Victims of Crime 2011). It is important to note that since participation in this process is voluntary for both the victim and offender, and the fact the mediator has no real power to enforce agreements, the success of victim-offender mediations depends on the genuine willingness of the participants to move forward and restore relationships (Archibald and Llewellyn 2006).

Family group conferencing is based upon the Maori and Samoan tradition of involving extended families in resolving conflicts. It has been adopted as the primary means of dealing with young offenders in New Zealand. In Canada, mediators, or facilitators, assist accused persons and their families to meet with victims, police, and others to discuss and resolve the incident. Most initiatives have focused on young offenders, but some communities are using this model with youth and adults in a process that is called community justice conferencing (Tompsonowski *et al.* 2011).

Lastly, the models most frequently used by Indigenous communities are sentencing circles, releasing circles, and healing circles, which are based upon the cultural traditions of certain Indigenous nations, particularly from western Canada, where families, Elders, and disputants meet to discuss and resolve criminal conflict. Participants sit in a circle and pass a “talking stick” or “talking feather” to each speaker so that everyone has a chance to speak and be heard, which reflects the Indigenous principle of including all voices. The different “circle” models mentioned above are all procedurally different, and are applied at different stages of the criminal justice process.

For example, sentencing circles, which arguably have the most impact on the administration of justice since they are able to recommend a sentence to a sentencing judge, also tend to include the most state participants. Judges, prosecutors, and defense lawyers are usually present during discussions, with judges usually having the discretion to decide to follow the community’s recommendation or not (Cameron 2005). Releasing circles also include state actors, but usually come together in prison after an offender has served part of their sentence, and are up for parole (Canadian Resource Centre for Victims of Crime 2011). Healing circles are the most ceremonial of the “circle” models, and come together at the end of the criminal justice process when the offender is about to re-enter the community after having served their sentence/gone through treatment. Part of the cultural traditions of western Plains First Nations cultures, healing circles encourage community participation, and are supposed to signify the closing of the conflict. Participants are allowed to express themselves, and talk about their personal healing journeys in a way that touches on how they dealt with the underlying factors that led to them getting in trouble in the first place, thus bringing their experience “full circle” (Canadian Resource Centre for Victims of Crime 2011; Tomporowski *et al.* 2011).

Legislation and Policy

The various restorative justice programs mentioned above exist largely as policy initiatives, although they have solid foundations in law. Section 718.2 (e) in the *Criminal Code of Canada* states, “[A]ll available sanctions other than imprisonment that are reasonable should be considered for offenders, with specific attention being paid to Aboriginal offenders.” The *Youth Criminal Justice Act*, which came into effect in 2003, also includes restorative justice principles, and emphasizes offender accountability, rehabilitation, and reintegration (Tompsonowski *et al.* 2011). The international community has come to see restorative justice as a legitimate approach to the administration of criminal justice. In 2003, the United Nations Department of Economic and Social Affairs (DESA) recognized the importance of restorative justice as another way to address crime and conflict beyond traditional criminal justice methods. In 2016, the United Nations Department of Economic and Social Affairs adopted a resolution concerning restorative justice in criminal matters.

Court Cases

The Supreme Court of Canada reaffirmed the legitimacy of restorative justice in *R. v. Gladue*, and again in *R. v. Ipeelee*. While the facts and entire judicial history of both decisions are beyond the scope of this report, what is important about these decisions, especially the *Gladue* decision, is how the Supreme Court legitimized the use of restorative justice processes, and encouraged the government to consider alternatives to incarceration, especially when sentencing Aboriginal offenders. The Supreme Court came to this conclusion by interpreting the newly established s. 718.2 (e) of the *Criminal Code of Canada*, suggesting this provision to mean that a duty is imposed on sentencing judges to look at an Aboriginal offender's personal circumstances and familial history before determining a sentence, so that the sentence is able to better address those underlying factors that brought the offender into conflict with the law in the first place. The Supreme Court reaffirmed this in *R. v. Ipeelee*, restating that it was the intention of the Supreme Court of Canada in *Gladue* that sentencing judges always consider s. 718.2 (e) when they are sentencing an Aboriginal offender, regardless of the severity of the offence.

Indigenous Legal Traditions

Creating the Context: The Necessity and Complexity of Indigenous Legal Traditions

According to Indigenous legal scholars, prior to the imposition of Western law on Indigenous people, Indigenous legal traditions were important organizing forces that shaped behaviour, guided relationships, and addressed conflict in Indigenous societies (Borrows 2006; Borrows 2010; Napoleon and Friedland 2014). As Val Napoleon and Hadley Friedland suggest, Indigenous communities had to create laws that could prevent, or at least minimize, conflict that arises when human beings live together. Moreover, communities also needed to be able to address the conflict and pain after an incident occurred, which usually took the form of a sanction. Much like contemporary Canadian sentencing goals, Indigenous legal sanctions were not necessarily punitive/retributive, since they were also motivated by notions of healing, reconciliation, and reintegration, and if need be, they demonstrated deterrence and denunciation (Milward 2012). In other words, Indigenous legal systems were a source of complex proactive and reactive mechanisms that attempted to produce and maintain a stable and predictable social world for Indigenous communities.

However, it is not enough to say Indigenous legal traditions were/are simply a series of proactive and reactive mechanisms. This takes away from the complexity and richness of Indigenous legal systems, which were flexible and adaptable to changing circumstances, emphasized personal and community balance, and did not compartmentalize different sections of law in the same way Western legal systems do (Chartrand 2015). Most Indigenous legal systems are/were not sorted into different areas of law like the Canadian legal system, where there are clear distinctions between criminal law, contract law, tort law, constitutional law, etc. which is reflected in how these areas of law are taught at law schools, as well as how they are generally implemented and practised by lawyers. Instead, a common theme

throughout most Indigenous legal traditions across Canada is the idea of law being interconnected and intertwined (Chartrand 2013). While there might be different sources of law within each Indigenous legal tradition (i.e. creation stories, oral traditions, customs, positive/man-made law), these different sources of law do not change the fact the laws are/were all deeply interconnected (Borrows 2010). For example, the well-being of an Indigenous community largely depended on maintaining and fostering interpersonal relationships within the community, but it also depended on how the community maintained its relationship with the land, water, and animal worlds. Therefore, community well-being was maintained through “family law”, “criminal law”, “law of obligations”, and even “environmental law”, although these were not thought of as different spheres of law, or separate legal responsibilities. Instead, they were thought of as part of a person’s kinship network/responsibilities (Borrows 2010). Therefore, kinship was law.

Proactive and Preventative Strategies: Kinship as Law

While Indigenous legal traditions certainly contained laws that prohibited violence, especially laws prohibiting gendered and sexual violence, (Deer 2015) these sites of law that prohibited certain actions are not where one should begin a discussion of Indigenous law, even Indigenous “criminal law”. Instead, it is important to first be aware that Indigenous societies did not have a centralized enforcement agency, like the contemporary Canadian criminal justice system, that could enforce the law through specialized police forces (Borrows 2010; Chartrand 2013). While there were Elders and other respected leaders of the community that might get involved in weighing evidence and judging the truth of an incident, (Milward 2012) for the most part, law in communities was lived (i.e. individuals aspired to always fulfill their kinship responsibilities) and enforced in decentralized kinship networks. Indeed, kinship was a crucial feature of Indigenous legal traditions, (Borrows 2010; Chartrand 2013; Napoleon and Friedland 2014) since it produced a series of legal obligations and responsibilities towards others in one’s family, clan, and larger nation, while also causing those same clan/family members to remind and support individuals to fulfill their kinship obligations. In other words, kinship was multidirectional, in that it shaped the behaviour of individuals, as much as it informed and shaped the behaviour of the collective.

With respect to the origins of kinship, as mentioned earlier, there are many sources of law that Indigenous legal traditions look to in trying to produce a stable social environment. A common source across most Indigenous legal traditions is an Indigenous society’s creation story, which generally holds historical knowledge about the land, but also prescribe teachings and values, especially the significance of reciprocal (i.e. kinship) relationships. For example, the Haudenosaunee creation story depicts the way animals helped Sky Women when she fell from the Sky World, first cradling her in the wings of birds so she did not crash into the water on earth, to placing her on the back of a giant turtle so she had somewhere to stay, to helping her plant vegetables in dirt and mud that an otter fetched from the ocean floor. While this story continues to describe the creation of the world, the important values to take away from even this short excerpt is the importance of relationships and helping others, which produces obligations towards those that helped you. According to the Haudenosaunee worldview, it should also be noted that since animals and plants helped Sky Women when she first came to this earth, and helped her raise her children, humanity’s obligations extend to the animal and plant worlds (Cousins 2004),

which is actually a common value found in all Indigenous societies in Canada (Borrows 2010; Chartrand 2013).

Since kinship has its roots in the “original instructions” given to human beings, but is also supported in man-made law, kinship was a serious site for moral and legal guidance, although kinship produced proactive actions more than it prohibited actions. In other words, in the face of decentralized power networks that emphasized creating and maintaining good relationships (Chartrand 2013), kinship can be described as legally requiring individuals to act and carry themselves in a way that ensured good relations, rather than prohibiting certain actions. However, the idea of “requiring” good relations and good conduct not only misses very explicit laws prohibiting certain acts, especially sexual violence (Cousins 2004; Deer 2015), but more importantly, it misses the cultural institutions and practices that surrounded kinship obligations, including childrearing practices, storytelling, and ceremonies, which all worked together to naturalize positive interpersonal conduct (Napolean and Friedland 2014). Much like an Indigenous nation’s creation story informed the importance of kinship, an Indigenous society’s creation story also underlined those cultural practices that shaped a person’s childhood, which in turn ensured an individual grew up into adulthood with an awareness and understanding of their kinship responsibilities. However, kinship could not always guarantee one would live up to what was expected of them.

Responding to Anti-Social Behaviour and Violence

At this point, it is important to restate that Indigenous legal traditions, via kinship networks, attempted to produce a stable and predictable social environment for community members in the face of inevitable conflict. When kinship responsibilities were ignored, or failed to shape someone’s behavior, various legal responses were activated in order to restore community balance, promote safety, (Chartrand 2013; Napolean and Friedland 2014) and if necessary, demonstrate deterrence and denunciation (Milward 2012). Sanctions were therefore multifaceted and tried to achieve multiple goals, although the harshness of potential sanctions, especially those sanctions that attempted to demonstrate deterrence and denunciation, were held in check by important qualifications. Considering that historically, Indigenous communities generally did not have police, sanctions were usually enforced by family members, extended family members, or members of the same clan. This meant healing, reconciliation, and reintegration were priorities, if not the first response. As Val Napolean and Hadley Friedland point out, even if the person had committed a serious offence, the first response was not to inflict pain or seek vengeance, since the offender was also a family and community member, and someone that was loved (2014). However, this does not mean that offender reintegration and healing always prevailed over individual or community safety.

For example, in historic Haudenosaunee society, witchcraft was considered a very serious criminal offence, since it gave a person too much power, and could lead to them causing harm, and/or neglect their kinship responsibilities (Cousins 2004). If someone was accused of practising witchcraft, the first response would be to determine the truth of the accusation (Borrows 2010). If there was truth to the accusation, then community and family members would confront the person and ask them to stop, while also determining the accused’s willingness to stop. Depending on the accused person’s

response(s), the community could perform healing ceremonies to counteract their power (if they were willing to give up practising witchcraft), to watching them and observing their behaviour with the hope of eventually performing ceremonies (if they were reluctant, and/or seemed disingenuous about stopping practising witchcraft), to banishment and/or execution (if they continued to cause harm and refused to stop practising witchcraft) (Cousins 2004).

In Anishinabek society, the Wetiko, or Wendigo, was thought to be a cannibalistic spirit that could inhabit human beings and make a person do things they normally wouldn't, like murder and/or eat members of their family/community (Borrows 2010; Napoleon and Friedland 2014). If a community member was thought to be turning into a Wetiko, or was possessed by a Wetiko, the community's response depended on the offender's actions, the possibility of them being healed, and/or whether they represented a serious threat to themselves and the community. Like witchcraft, healing and reintegration were first responses, which was achieved through a combination of careful interventions, supervision, and ceremonies. However, if healing was unlikely, making offender reintegration impossible, then it was likely the person would be executed to ensure the safety of the community (Borrows 2010; Napoleon and Friedland 2014; Snyder *et al.*, 2014).

Many Indigenous societies created explicit laws prohibiting sexual and gendered violence, so sanctions could be especially harsh as a way to demonstrate deterrence and denunciation, as well as hold the offender responsible for their actions (Deer 2015; Milward 2012). Unlike Canadian criminal justice practices, but much in line with Indigenous philosophies and kinship practices, the victim of sexual violence had an important role in determining the offender's sanction and punishment (Deer 2015; Milward 2012). The rationale for centering the victim in the entire process was to restore balance in their life, as well as restore balance in the rest of the community, since sexual and gendered violence was an especially despised crime, and was thought to disrupt the community's moral balance. The most common sanction used in response to instances of sexual violence was corporal punishment (Milward 2012) although some Indigenous societies were known to use banishment and execution, primarily when there were concerns for broader public safety (Milward 2012).

Support for Indigenous Legal Traditions

Indigenous legal traditions have received both international and domestic support for their recognition, revitalization, and full integration and implementation alongside the legal systems of nation-states. While there are numerous sources to draw upon, the most significant resources demonstrating this support are the United Nations Declaration on the Right of Indigenous Peoples, and the Canadian Truth and Reconciliation Commission's Calls to Action. Both of these documents describe the place and role of Indigenous people in international and Canadian politics. That is, these documents envision a decolonized world, and provide a clear path to achieve that vision, where Indigenous peoples are treated with respect and dignity, which means having their cultural, spiritual, social, political, economic, and legal institutions protected and respected (Anaya 2007).

The United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is an important document that provides a framework for states in the international community to look towards, and use it to ground changes in their relationship with Indigenous peoples within their borders. UNDRIP begins from the position that Indigenous people represent unique populations, and are worthy of having their cultural and political institutions protected by international and domestic law. UNDRIP fulfills this role at the international level, since it outlines how states like Canada should act towards Indigenous people, including, among other things, a call for states to recognize and implement Indigenous legal traditions.

The first UNDRIP provision that supports Indigenous legal traditions is Article 3, which says Indigenous peoples have the right to self-determination. While this Article does not explicitly mention Indigenous legal traditions, the right to self-determination is an all-encompassing right that includes the right to exercise Indigenous legal traditions (Borrows 2010; Leonardy 1998). In fact, the right to self-determination provides a foundation for a more thorough implementation of Indigenous legal traditions, since self-determination, or self-governance, creates the space and capacity to develop laws at the local level in light of local realities, as well as pursue and protect cultural practices that support and reaffirm Indigenous legal traditions. Article 5 explicitly supports Indigenous legal traditions, saying, “Indigenous peoples have the right to *maintain and strengthen* their distinct political, *legal*, economic, social and cultural institutions...” (emphasis added). However, UNDRIP does add an important qualification on its support of Indigenous legal traditions in Article 34, stating that Indigenous peoples have the right to exercise their unique legal traditions, but in line with international human rights standards.

The Truth and Reconciliation Commission’s Calls to Action

The Truth and Reconciliation Commission’s Calls to Action represents the most recent mainstream support for Indigenous law in Canada. Much like UNDRIP, the TRC Calls to Action represent a path towards decolonization and reconciliation in the wake of the Indian Residential School experience, which, among other things, attempted to destroy Indigenous cultural traditions, including the values that were integral to the operation of Indigenous legal traditions (TRC 2015b). The TRC Calls to Action contain numerous provisions that either explicitly or implicitly support Indigenous legal traditions. With respect to explicit support, both Calls to Action 42 and 45 call on different levels of government in Canada to work together towards reviving and implementing Indigenous justice systems in ways that line up with Aboriginal and treaty rights, as well as the values embedded in UNDRIP. In other words, the TRC suggests Indigenous legal traditions must be revived and implemented in order to achieve true reconciliation in Canada between Indigenous peoples and non-Indigenous peoples. But it also reaffirms UNDRIP’s requirement that Indigenous legal traditions respect international human rights standards.

In terms of indirect support, the TRC Calls to Action 27, 28, and 50 provide guidance regarding educational and institutional initiatives that can foster the growth of Indigenous legal traditions in Canada. Call to Action 27 encourages the Federation of Law Societies in Canada to have provincial law societies provide their members with cultural competency training in areas such as Aboriginal and treaty

rights, Crown-Indigenous relations, and most significantly, Indigenous law. Call to Action 28 is similar, but calls upon Canadian law schools to require all law students take at least one course that discusses Aboriginal and treaty rights, UNDRIP, and most significantly, Indigenous legal systems. Finally, Call to Action 50 requires different levels of government in Canada to fund Indigenous law institutes, which would develop, analyze, and utilize Indigenous legal traditions.

Indigenous Legal Traditions and Reconciliation

The Truth and Reconciliation Commission's Calls to Action, as well as the TRC Final Report, have much to say regarding the relationship between Indigenous legal traditions and reconciliation in Canada. Indeed, the Calls to Action, but more so the Final Report, contain details discussing how Indigenous legal traditions can contribute to reconciliation, which can be categorized into two general streams.

The first is the symbolic significance of implementing Indigenous legal traditions in Canada. Considering that Canada has historically suppressed knowledge of Indigenous legal traditions (Borrows 2010; Napoleon and Friedland 2014) and has denied the existence of such traditions (Napoleon and Friedland 2014), implementing Indigenous legal systems in would represent a major shift towards reconciliation in the relationship between Canada and Indigenous people (Borrows 2010; TRC 2015). Indeed, it would signal a shift away from ongoing colonialism, towards a nation-to-nation relationship based on respect (Borrows 2010).

The second stream is more substantive and pragmatic, in the sense that utilizing individual Indigenous legal traditions, and approaching them as actual laws, can facilitate healing and reconciliation in a way that is meaningful and relevant to the people and local communities involved. This goes beyond the symbolic significance of what implementing Indigenous legal traditions would represent, since most Indigenous legal traditions contain values, processes, protocols, and ceremonies that actively promote healing and reconciliation by addressing and moving beyond colonialism and its ongoing aftermath (TRC 2015). For example, Haudenosaunee people practise a ceremony, rooted in their own laws and kinship practices, called the Condolence Ceremony. The Condolence Ceremony is usually performed in times of personal and/or nation-wide grief, and done with the intention of restoring balance in the community (TRC 2015a). According to the TRC Final Report,

“The Condolence ceremony allows people who have been through traumatic experiences together—those who are healthy, those who are in mourning, and those who have caused harm—to work together to address losses. Through this ceremony, apologies and restitution are embodied in expressive performances as people are called upon to tell stories and acknowledge losses related to the harms they have suffered. The ceremony occurs in a precise sequence, employing vivid imagery, and can be used in many circumstances where trust and understanding have been broken because of a party's harmful actions” (TRC, 2015a).

The Condolence Ceremony can provide a way for Haudenosaunee people to establish a new and equal relationship with Canadians, especially in the wake of the Indian Residential School experience. Healing and reconciliation would be grounded in Haudenosaunee laws, ceremonies, and diplomatic protocols.

The Mi'kmaq people of the Maritime region, or Mi'kma'ki (Mi'kmaq territory), also have laws and ceremonies that can contribute to healing and reconciliation in the wake of the Indian Residential School experience. Like the Haudenosaunee, reconciliation to the Mi'kmaq people relies on respecting and following Mi'kmaq laws, which means Canada and church officials should engage in Mi'kmaq ceremonies, feasts, protocols, and dialogue with Mi'kmaq people, with the intention of opening up space for a new relationship to develop (TRC 2015a). With that in mind, ceremonies, feasts, apologies, protocols, dialogue, and restitution represent a common approach to reconciliation amongst other Indigenous nations in Canada (TRC 2015a). However, this does not mean that each Indigenous nation's approach to reconciliation is the same. On the contrary, the Final Report stresses that a "one size fits all" approach is counterproductive to achieving reconciliation with Indigenous nations (TRC 2015a). Canada must approach each Indigenous nation as a distinct people, with their own unique histories and cultures, and begin the hard work that reconciliation requires in a way that prioritizes local Indigenous laws and protocols. As the Final Report points out however, Indigenous people should not be coerced to participate in reconciliation processes, but instead, should be able to decide when and how they will engage with Canada (TRC 2015a).

The status of Indigenous Legal Traditions in Canada

Contemporary Realities: Colonialism and its effects on Kinship and Indigenous Law

While the status of restorative justice programs in Canada does not require further elaboration, it is crucial to inform readers about the status of Indigenous legal traditions in Canada, especially colonialism's effect on kinship (Borrows 2010; Chartrand 2013; Napoleon and Friedland 2014; Napoleon and Friedland 2016). As was pointed out earlier, kinship was an important organizing force in historic Indigenous societies, considering it produced multidirectional legal obligations towards everyone and everything. Unfortunately, the residential school experience, the gradual erosion of Indigenous languages, the imposition of band council governments, the destruction of lands and ecosystems, the overall attack on Indigenous legal systems, as well as the prosecution and jailing of Indigenous leaders who fought to maintain their traditional kinship/legal systems, have all had a disastrous effect on the role of kinship in communities, as well as an overall negative impact on general awareness of the importance of kinship (Napoleon and Friedland 2014). Although kinship still functions to a certain degree in most Indigenous communities in terms of providing a loose framework to guide interpersonal and familial relationships, to having an influence on the actions of leaders, and even informing a person's obligations to the land, (Borrows 2010) it cannot be said that kinship mediates all aspects of social and political life in Indigenous communities. Colonialism has been very destructive to Indigenous kinship practices.

As for actual Indigenous legal systems, despite the weakening of kinship, knowledge of the content of Indigenous legal traditions continues to exist in stories, oral traditions, books, scholarship, and most importantly, in the minds and memories of community Elders and leaders. Unfortunately, this knowledge does not mean Indigenous legal systems are the primary legal systems that guide communities. Instead, the *Criminal Code of Canada* applies to First Nations, Inuit, and Metis communities. Moreover, First Nations communities exercise very limited legislative authority under the

Indian Act, which is a federal piece of legislation that gives the Department of Indigenous and Northern Affairs Canada a large amount of bureaucratic oversight over Indigenous communities (Borrows 2010). Under this legislative framework, most laws or resolutions that a band council government passes must receive federal departmental approval, (Borrows 2010) which illustrates how the Indigenous-Canada relationship is still colonial, and therefore makes it difficult if not impossible for such communities to formally exercise their historic legal traditions.

Revitalization and Future Considerations

Despite the limited status of Indigenous legal traditions in relation to Canada's other legal systems, Indigenous legal traditions are currently being revitalized. The revitalization of Indigenous law is in the early stages of development, where knowledge of their content is being uncovered, recovered, and recorded. While knowledge recovery is not the same as law application and enforcement, it is still important, since as this knowledge is gathered over time, this collection of data and knowledge can act as a resource for communities as they explore the possibility of implementing their legal traditions in the future (Friedland 2012; Napoleon and Friedland 2016).

As Indigenous communities look to the future, they will inevitably be confronted with challenges, including, but not limited to, the different ways their legal systems will need to be adjusted to meet contemporary human rights standards (Borrows 2010; Milward 2012; TRC 2015), as well as how their legal systems can address ongoing social problems, particularly violence against women and other vulnerable populations (Snyder 2014). Legal scholars have pointed out that Indigenous communities can implement their legal systems while simultaneously addressing these issues, since Indigenous laws can evolve and change over time (Borrows 2010; Borrows 2016; Napoleon and Friedland 2014). That is, the authenticity of contemporary Indigenous legal systems must not be judged and/or dismissed according to how well they reflect historic practices. Instead, the legitimacy of contemporary Indigenous legal traditions should be determined according to how well they address community conflict, and if the local community accepts the legal system as legitimate (Borrows 2010).

In practice, this would have a more direct impact on the kinds of sanctions Indigenous communities would be able to deliver. Most drastically, communities would not be able to use execution as a penalty, since execution goes against international, as well as Canadian human rights standards (Milward 2012). However, communities may be able to punish certain offenders using corporal punishment, such as lashing or whipping, as long as the community consents to its use as a sanction in a referendum, or some other democratic process. According to legal scholar David Milward, corporal punishment could be an important sanction for Indigenous communities in light of the enormous amount of evidence demonstrating the ineffectiveness of prisons as a deterrent, the physical and psychological harm imprisonment has on individuals, and most importantly, the over-use of incarceration for Indigenous people (2012). However, considering corporal punishment is considered contrary to human rights standards, Milward suggests that offenders could sign a waiver indicating they wish to waive their rights in that particular instance, and be subjected to corporal punishment instead (2012). According to Milward, the types of offences this would apply to would be highly speculative at the current moment,

but it is safe to suggest that corporal punishment as a sanction could apply to instances of assault and sexual assault, but also criminal negligence causing bodily harm (2012).

When looking to the future, Indigenous legal systems must be able to address the effects of colonization that oftentimes manifest in communities. While there are numerous ways to measure the effect of colonization, it is arguably most evident and observable by looking at the levels of violence in Indigenous communities, especially the gendered and sexual violence directed against women, two-spirited people, and other vulnerable populations, especially children (Deer 2015; Snyder 2014). As was discussed earlier, in historical times, a series of cultural institutions and practices encouraged individuals to fulfill their kinship obligations, making gendered and sexual violence, especially within the family/community/nation, truly abhorrent and revolting. In the future, Indigenous legal traditions must address this violence and restore balance in communities, meaning communities might potentially use harsh sanctions, such as corporal punishment alongside imprisonment, to demonstrate deterrence and denunciation (Deer 2015). In this instance, imprisonment would reflect how communities historically banished people that committed sexual violence, although imprisonment is almost always only a temporary form of “banishment”. It would be up to communities to decide how they might address the temporariness of imprisonment.

The Ongoing Relationship between Indigenous Legal Traditions and Restorative Justice

The relationship between restorative justice and Indigenous legal traditions is more complex and nuanced than this report has indicated so far. While this report has strategically suggested a clear divide exists between “restorative justice” and “Indigenous legal traditions” as a way to emphasize that they need to be discussed and understood independently from each other, the truth is that these justice systems blend into each other. For example, there is plenty of evidence to suggest that Indigenous legal traditions influenced the early development of restorative justice programs. This includes influencing their underlying principles and values, to informing what programs should look like and how they might function (Archibald and Llewellyn 2006; Cameron 2005; Milward 2012; Tomporowski 2014). Likewise, there is evidence to suggest that the influence flows in the opposite direction, in that restorative justice has influenced the modern day implementation of some Indigenous justice programs (Milward 2012; Napoleon and Friedland 2014). Restorative justice has informed some modern Indigenous legal processes, in that it has filled the gaps that colonization created (i.e. when Canadian officials suppressed Indigenous legal systems, most aggressively between the late 19th to early 20th centuries), meaning modern Indigenous justice projects, and possibly future justice projects, may take a more restorative approach, when historically they may have been more punitive and harsh (Deer 2015; Milward 2012).

Going into the future, advocates for both restorative justice and Indigenous legal traditions should recognize the influence each approach to justice has had on the other, and use that awareness to establish a more consistent dialogue with each other. This is especially true for advocates of Indigenous legal systems, who can learn from the journey of restorative justice programs, when they went from being a rather obscure criminal justice strategy in the early 1970s (Tomporowski *et al.* 2011), to

becoming a legitimate alternative to the mainstream criminal justice process. Advocates for Indigenous legal traditions can look at this experience to understand how restorative justice eventually became seen as a legitimate approach to crime and conflict, exploring what they did, who they talked to, etc. Ultimately, the relationship between restorative justice and Indigenous legal traditions will continue to evolve, with each approach to justice likely to continue to influence the other.

Conclusion

This report has explored the relationship between restorative justice and Indigenous legal traditions. It discussed restorative justice and Indigenous legal systems, demonstrating that while these approaches to justice share similarities in terms of underlying principles, and even in terms of processes and protocols, they are ultimately very different. This difference comes down to proactive strategies mediated through kinship, the centrality of spirituality, and the use of sanctions and penalties. These are very material differences, and should not be ignored.

This report also explored other issues, including the support Indigenous legal traditions have received from international and domestic sources, although the United Nations did recognize and support restorative justice in 2003. This led into a discussion of the current status of Indigenous legal traditions in Canada, including how Indigenous communities are currently ordered and governed according to laws that were created by Canada. This report also discussed how Indigenous legal systems are being revived in light of this ongoing oppression, although this report recognized that Indigenous legal systems will likely need to evolve to meet contemporary needs, as well as international human rights standards. However, this report mentioned how future offenders might be able to sign a document to waive their rights, and be subjected to corporal punishment. Finally, this report discussed the evolving relationship between restorative justice and Indigenous legal traditions, suggesting that the relationship will continue to evolve as long as there is continued engagement, dialogue, critique, and support. To conclude this report, engagement between these approaches to justice is fine, if not inherently necessary, since according to many Indigenous worldviews, history and relationships are cyclical, and therefore the way Indigenous legal traditions can learn from restorative justice is simply a rotation of the circle of life.

Bibliography

- Anaya, James. 2007. "Keynote Address: Indigenous Law and its Contribution to Global Pluralism." *Indigenous Law Journal* 6 (1): 3-12.
- Archibald, Bruce and Jennifer Llewellyn. 2006. "The Challenges of Institutionalizing Comprehensive Restorative Justice: Theory and Practice in Nova Scotia." *Dalhousie Law Journal* 29: 297-343.
- Borrows, John. 2016. *Freedom and Indigenous Constitutionalism*. Toronto: University of Toronto Press.
- Borrows, John. 2010. *Canada's Indigenous Constitution*. Toronto: University of Toronto Press.
- Borrows, John. 2006. *Indigenous Legal Traditions in Canada*. Ottawa: Law Commission of Canada.
- Cameron, Angela. 2005. *Restorative Justice: A Literature Review*. Literature Review, Vancouver: The British Columbia Institute Against Family Violence.
- Chartrand, Larry. 2015. "Indigenizing the Legal Academy from a Decolonizing Perspective." Ottawa Faculty of Law Working Paper.
- Chartrand, Larry. 2013. "Eagle Soaring on the Emergent Winds of Indigenous Legal Authority." *Review of Constitutional Studies* 18 (1): 49-87.
- Cousins, Michael. 2004. *The Inherent Right of the Haudenosaunee to Criminal Justice Jurisdiction in Canada: A Preliminary Inquiry*. MA Thesis, Simon Fraser University, Burnaby: Simon Fraser University.
- Canadian Resource Centre for Victims of Crime. 2011. *Working with the Media: A Guide for Canadian Victim Service Providers*: <https://crcvc.ca/publications/media-guide/>
- Criminal Code* (R.S.C., 1985, c. C-46). Retrieved from Department of Justice Canada website: <http://laws-lois.justice.gc.ca/eng/acts/C-46/section-255.html>
- Deer, Sarah. 2015. *The Beginning and End of Rape: Confronting Sexual Violence in Native America*. Minnesota: University of Minnesota Press.
- Friedland, Hadley. 2012. "Reflective Frameworks: Methods for Accessing, Understanding, and Applying Indigenous Laws." *Indigenous Law Journal* 11 (1): 1-40.
- Gray, Barbara and Pat Lauderdale. 2007. "The Great Circle of Justice: North American Indigenous Justice and Contemporary Restoration Programs." *Contemporary Justice Review* 10 (2): 215–225.
- Leonardy, Matthias. 1998. *First Nations Criminal Jurisdiction in Canada: The Aboriginal Right to Peacemaking Under Public International and Canadian Constitutional Law*. Saskatoon: University of Saskatchewan: Native Law Centre.

- Milward, David. 2012. *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights*. Vancouver: UBC Press.
- Milward, David. 2008. "Making the Circle Stronger: An Effort to Buttress Aboriginal use of Restorative Justice in Canada Against Recent Criticisms." *International Journal of Punishment* 4 (3): 124-158.
- Napolean, Val and Hadley Friedland. 2016. "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions." *Lakehead Law Journal* 1 (1): 16-44.
- Napolean, Val and Hadley Friedland. 2014. "Indigenous Legal Traditions: Roots to Renaissance." In *The Oxford Handbook of Criminal Law*, edited by Markus D. Dubber and Tatjana Hörnle. Oxford: Oxford University Press.
- R. v. Gladue*, [1999] 1 S.C.R. 688.
- R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433.
- Snyder, Emily. 2014. "Indigenous Feminist Legal Theory." *Canadian Journal of Women and the Law* 26 (2): 365-401.
- Snyder, Emily *et al.* 2014. *Mikomosis and the Wetiko: A Teaching Guide for Youth, Community, and Post-Secondary Educators*. Teaching Guide, University of Victoria, Victoria: Indigenous Law Research Unit.
- Tompsonski, Barbara *et al.* 2011. "Reflections on the Past, Present, and Future of Restorative Justice in Canada." *Alberta Law Review* 48 (4): 815-829.
- Tompsonski, Barbara. 2014. "Restorative Justice and Community Justice in Canada." *Restorative Justice: An International Journal* 2 (2): 218-224.
- Truth and Reconciliation Commission of Canada. 2015a. *Canada's Residential Schools: Reconciliation* (Vol. 6). Final Report, Montreal-Kingston: McGill-Queen's University Press.
- Truth and Reconciliation Commission of Canada. 2015b. *Truth and Reconciliation Commission of Canada: Calls to Action*.
- UNESCO. *Restorative Justice in Criminal Matters*. 2016, Session, 47th Plen. Mtg., UN Doc E/Res/2016/17.
- UNGA. 2007. *Declaration on the Rights of Indigenous People*. 107th Plen. Mtg., UN Doc 61/295.