



Developing First Nations Courts in Canada: Elders as Foundational to Indigenous Therapeutic Jurisprudence +

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Abstract

The purpose of this paper is threefold. First, it introduces the concept of Indigenous therapeutic jurisprudence + processes in Canada in which the “plus” represents the critical roles of Elders and spirituality in court proceedings. Second, it identifies and discusses diverse First Nations court models that exist in Canada, including those known as Healing courts, Gladue courts, Aboriginal and tribal courts and their work to address the over-representation of Aboriginal peoples sentenced to custody in Canada. Third, it considers that First Nations courts could benefit through the provision of equitable capital investment and operating funding supports that are currently provided to the alternative Downtown Community Courts and Drug Treatment Court models in Vancouver, British Columbia.

INTRODUCTION: ELDERS AND FIRST NATIONS COURTS (FNC) IN CANADA

Elders are the embodiment of Indigenous law. Their Indigenous knowledge arises from diverse Indigenous peace-keeping processes that were in effect for millennia prior to the imposition of Euro-Canadian legal systems on Indigenous peoples living on territories now known as Canada. Traditionally Elders fulfilled roles now held by contemporary Euro-Western judges, prosecutors, lawyers, police, juries, and witnesses (G. Gottfriedson, personal communication, May 6, 2012). Over thousands of years, self-determining Indigenous justice and governance systems were created and refined to address the needs of diverse societies. Colonization ruptured these Indigenous systems, but failed to extinguish them. Today, meaningful conversations and decisions about justice for Indigenous peoples in Canada cannot begin until Elders are integral participants at justice tables.

The presence of Elders in some First Nations or Healing Courts in Canada moves Indigenous justice rights toward a place of Indigenous Therapeutic Jurisprudence +, the plus being the value their presence brings to the holistic intent of Indigenous justice initiatives. The plus concept is also identified by Native American judges Flies-Away and Garrow (2013) in relation to American Indian Drug or Healing to Wellness Courts in the United States. The Native American judges identify the plus in relation to the spiritual elements that are added to the psychological and emotional impacts of



Indigenous Justice (IJ) processes. Flies-Away and Garrow (2013) also suggest that “a spiritual revolution swirls amid indigenous peoples and nations, and that something stunningly spiritual is happening to indigenous North American jurisprudence” (p. 404). Holistic examples of the spiritual aspect include “how an individual accepts, finds, defines and nurtures connections and relationships with others, both animate and inanimate” (Flies-Away & Garrow, 2013, p. 424).

From diverse Indigenous standpoints, work to transform Indigenous therapeutic jurisprudence in Canada is politically, socially, and economically urgent. To facilitate this transformation, there is a need to re-establish, recreate and reclaim traditional Indigenous problem solving approaches to conflict resolution and healing. It is critical to do this in ways that address Indigenous legal, social, and economic realities, the self-determining rights of Indigenous peoples in Canada, the overrepresentation of Indigenous peoples in Canadian prisons (Sapers, 2013a; Sapers, 2013b; Walkem, 2007; Whonnock, 2008), and Indigenous under-representation on Canadian juries (Iacobucci, 2013).

This article provides an overview of First Nations Court development in Canada. It uses *FNC* as the collective term to identify a range of Indigenous therapeutic jurisprudence+ initiatives, including alternative, healing, or problem-solving courts. Some of the development of FNC initiatives begins under the leadership of Indigenous peoples, while others begin under the leadership of non-Indigenous peoples in varying degrees of relationship or partnership with Indigenous peoples and nations. Given the diversity of the beginnings and formations of various FNC processes throughout Canada, it is not surprising that they are also known by diverse names such as Aboriginal Courts; Gladue Courts; and Peacekeeping, Healing, Tribal, or specific Nation Courts such as Nunavut, Kahnawá:ke, Teslin-Tlingit, Cree, or Cree Circuit Courts. What follows is a brief overview and discussion of these key FNC initiatives.

LITERATURE REVIEW

Aboriginal courts are culturally appropriate dispute resolution systems that are inclusive, respectful, and designed by Aboriginal peoples. As there are many diverse Aboriginal peoples in Canada, each Aboriginal court will reflect the local Aboriginal culture and therefore be unique. Prior to contact, all Aboriginal peoples had their own form of governance including their own form of dispute resolution, such as the Big House or Longhouse. Aboriginal Courts would include traditional forms of dispute resolution and may also include Elders and Peacemakers. Traditional forms of dispute resolution may include the use of smudging with sweet grass or sage, or using eagle feathers or eagle down. (Whonnock, 2008, p. 1)

There is very little academic literature on the relatively recent justice innovation in Canada called FNCs. These courts are part of the growing field of Indigenous therapeutic jurisprudence, which simply means to take a problem solving, restorative justice approach for First Nations, Métis, and Inuit peoples. According to Ontario Chief Justice Annemarie Bonkalo in a recent report titled *Problem Solving in Canada's Courtrooms: A Guide to Therapeutic Justice* (Goldberg, 2011), the concept behind problem-solving courts remains "multidisciplinary partnerships between the justice system and the community to promote offender accountability, and to address the underlying issues behind an offender's appearance before the court" (p. v). It is an important distinction to make since the current settler system largely does not recognize that differences in culture, values, language, and traditions directly impact a myriad of events and issues such as court appearances, defense case reasoning, choosing pleas of defense, confronting accusers, and showing emotion in court. Primarily due to a lack of cultural knowledge, awareness, or competency regarding Indigenous peoples on the part of the foreign justice system, and deliberate, systemic racism, there exists a blind assumption that punishment equally affects all persons regardless of background or culture. However, the many reports that document and illustrate that First Nations people are disproportionately represented at all levels of the Canadian criminal justice system paint a different story. For instance, Aboriginal peoples account for just under 4% of Canada's adult population (Statistics Canada, 2014), yet in 2000 accounted for approximately 18% of the population incarcerated in federal correctional facilities (Treveltham, Tremblay, & Carter, 2000). By 2011/12 Aboriginal peoples represented 20% of all adults sentenced to federal custody and 28% of adults sentenced to provincial or territorial custody (Statistics Canada, 2014). This disproportionate number of Aboriginal peoples in custody was consistent across all provinces and territories and particularly true among female offenders. In 2011/12, 43% of females (and 27% of males) in sentenced custody were Aboriginal (Statistics Canada, 2014).

The provincial and territorial sentenced custody statistics provide a devastating picture of Aboriginal populations in contact with the law. In British Columbia (BC), 33% of the provincial and territorial sentenced custody prisoner population consists of Aboriginal peoples, while in Alberta it is 43%, the Yukon is 71%, Manitoba is 76%, Saskatchewan is 78%, the Northwest Territories is 92% and Nunavut is a staggering 100% (Statistics Canada, 2014). Based on these statistics, systemic flaws in the justice system lead to discrimination (Iacobucci, 2013; Sapers, 2012). Certainly the devastating history of colonization, social inequality, racism, and Canada's historic and modern government policies of oppression and alienation of lands and resources contribute to the current socio-economic conditions affecting Indigenous peoples.

The intergenerational, intersectional, and continuing negative effects of Canada's residential school project collaboration with Christian churches is well documented (Miller, 1996; Milloy, 1999; Truth and Reconciliation Commission of Canada, 2013). Developing knowledge regarding widespread nutritional starvation experimentation on vulnerable children interred in those institutions (Mosby, 2013), overwhelming levels of child welfare surveillance, removals and under-funding of on-reserve child protection agencies (Blackstock, 2010), policies of trans-racial adoptions (Sinclair, 2007), low levels of education and Indigenous health care, and high levels of unemployment and poverty, continues (First Call: BC Child and Youth Advocacy Coalition, 2013). This complexity of socio-economic factors directly contributes to First Nations involvement in the justice system; lower life expectancy; and employment, health, education, and literacy rates that result in homelessness and housing hardships, poverty, and risk of being socially excluded. Indigenous peoples are more likely to receive a prison sentence in mainstream courts, resulting in high Aboriginal population representation in prisons. Yet from the vantage point of justice, parole, probation, and correctional officials who can point to myriad special reports, statistics, reviews, and inquiries, widespread change is only being considered at a glacial speed, or not at all. This is not the case with Indigenous Elders, judges, lawyers, and others intent to take action and make change through every means possible, including the development of various forms of FNCs.

Elders serving in the First Nations Court in New Westminster, British Columbia (FNC-NW) argue that the reason for these changes is self-evident. They report that Indigenous peoples coming before FNC-NW are disproportionately affected by poverty, colonization, disrupted family and community experiences, Fetal Alcohol Spectrum Disorder (FASD), impaired emotional skills, emotional abuse and neglect experienced as children, impoverished spirituality, or a total lack of spiritual connectedness (Q. Archibald, personal communication, October 29, 2012). FNC-NW Elders recognize the impact that these factors create in terms of mass fear and generational trauma in Indigenous populations coming before the legal system. They charge that the mainstream Canadian justice system, focused on punitive measures, organized and populated by largely non-Indigenous leadership, and based in a non-Aboriginal worldview, is ineffective in the meaningful rehabilitation of Indigenous peoples. Elders take the position that if the opposite were true, Indigenous peoples would be "fixed" by now. Advocates of FNC-NW identify the need for more humane, restorative, and therapeutic Indigenous processes to help heal Indigenous offenders and victims. One example of the perspective that is evolving in the FNC-NW process is offered by one of its Elders:

Aboriginal Court, when dealing with people does so with respect, loving kindness and compassion. The person is surrounded with a loving atmosphere conveying the message that they are loved and wanted and that they matter in this life. There is no need for fear. (Queenie Archibald, Ojibway FNC-NW elder, personal communication, October 29, 2012)

Indigenous legal scholars write extensively about Aboriginal legal issues in the Canadian context. These include Dr. John Borrows (2002, 2005, 2010a, 2010b, Borrows & Rotman (2012), and Dr. James Youngblood Henderson (2006). Henderson is working on two books: *Indigenous Jurisprudence and Aboriginal Rights*, and *Treaty Rights in the Constitution of Canada* (in press). Non-Indigenous scholars such as Latimer and Foss (2005) found that Aboriginal youth are more likely to receive a longer sentence in custody than non-Aboriginal young people regardless of accepted aggravating factors. Belknap and McDonald (2010) have studied judges' attitudes about using sentencing circles in situations of domestic abuse. There is, however, very little academic literature written by either Indigenous or non-Indigenous scholars on the relatively recent innovation called FNCs in Canada.

One article on the Nunavut Court of Justice, by Clark (2011) addresses funding issues facing the Court that impedes its ability to function effectively. There is also some discussion that expanded community involvement through local court workers is needed to make the court system work. Finally, there is some literature about how complex the issues of Aboriginal over-representation in the justice system are (Welsh & Ogloff, 2008). Beyond this the only literature available is found on websites, in news articles, or in media interviews with court participants. This dearth of academic literature identifies the gap that must be addressed regarding FNCs in Canada. It underscores the potential for learning about their structures, methods, and processes, which may benefit Indigenous peoples involved in the Canadian justice system. Finally, FNCs may offer some insight to positively influence Canadian court processes, address resistance within the system, and advocate for the development of increased resources, policies, and practices to benefit Indigenous peoples.

The following section provides an overview of FNCs in Canada, and alternative problem-solving courts on the west coast of BC.

EXISTING FNCS

While there is no common format for FNCs in Canada, many using the title appear to be focused on criminal, child protection, youth, and traffic court issues. Indigenous peoples (alternately and collectively known as the "accused," "clients" or "participants") must be willing to enter a guilty plea. The purpose of the guilty plea is to facilitate the development of a healing plan (also known as a probation order),

diversion out of the justice system, or to have their sentencing take place within a more Indigenous-oriented process involving Elders, other community members, and both Indigenous and non-Indigenous support service agency representatives. In varying degrees, Gladue reports (Justice Education Society, 2013) or pre-sentencing reports with a Gladue component are ordered by FNC judges to assist with sentencing.

THE TSUU T'INA PEACEMAKERS COURT IN ALBERTA: FNC-TTP

The FNC-TTP, located in southern Alberta, opened October 2000 and was the first of its kind in Canada. The Honourable Judge L. S. Mandamin was the first from the Alberta Provincial Court to preside over the FNC-TTP, located on the Tsuu T'ina Nation on the outskirts of southwest Calgary. The court was integrated with the Provincial Court, and also with the community and its justice traditions. Judge Mandamin fulfills the requirement of a judge who is a member of the First Nations Bar and bridges the Euro-Canadian legal system and First Nations communities. The court clerks were recruited from the community. Tsuu T'ina/Stoney Corrections Society provided the court worker and probation services. In addition, two Peacemakers, who were Elders, sat in court as community witnesses to the proceedings. The Peacemaker coordinator calls on Peacemakers from the community who hold the trust and respect of the community (Borrows, 2010b). The FNC-TTP was designed to enable people on reserve or those waived into reserve authority to participate in all aspects of the court. It started with jurisdiction over matters involving criminal and youth justice processes. The expectation was that it would expand into family, child welfare, and civil matters as the court developed. According to the former Peacemaker, Ellery Starlight,

This type of justice, it's not something new. People know it better as mediation. It provides a safe area where people can actually talk. Offenders who agree to peacemaking must take responsibility for their actions, and face their victims in a circle setting. Family members, social work professionals and Elders also have the chance to speak. (Komarnicki, 2009, p. 1)

As of 2008, when renovations were required for the Tsuu T'ina court house on reserve, the work of the FNC-TTP was transferred to the Aboriginal courtroom in the Calgary Courts Centre in downtown Calgary, Alberta. The Aboriginal Court is housed in the modern glass and steel Calgary Courts Centre, which requires all entering to pass through a rigorous airport-type of security system prior to taking the glass elevators to the 18th floor. The current Aboriginal courtroom is used for other legal processes, such as Parenting After Separation. The Aboriginal courtroom was designed to reflect the traditions of the Peacemaking Court, accommodates a circular

formation of desks allowing all participants in the FNC-TTP to sit on an equal level, and a ventilation system to allow for smudging. Provincial court representatives cite outstanding resource and infrastructure issues that need to be addressed on the Tsuu T'ina reserve prior to the return of the FNC-TTP. As of July 16, 2013 there is no anticipated timeframe for its return to the Tsuu T'ina community, and the position of Peacemaker coordinator is currently vacant.

THE CREE COURT IN SASKATCHEWAN: FNC-CREE

The FNC-Cree is an initiative of the Saskatchewan provincial court, and Cree First Nation Judge Gerald Morin began its first sittings in Cree circuit points in north-eastern Saskatchewan in October 2001. Recently, Cree Judge Donald Bird was appointed to the Cree Court in Loon Lake, Saskatchewan. He holds sittings in the local Loon Lake Community Centre as well as other small Saskatchewan communities. The court sits in Cree-speaking communities where Cree values regarding respect for family and community are included in addition to the sentencing principles in Canada's Criminal Code and/or Youth Criminal Justice Act. Indigenous peoples appearing before the court can conduct their matters in the Cree language. According to the Saskatchewan provincial court website:

The Cree Court operates in a manner similar to other Provincial Court circuits. The judge, clerks and court workers speak Cree and accused persons may have access to Cree-speaking Legal Aid lawyers. Depending on availability, there may also be a Cree-speaking Crown prosecutor. While lawyers will generally argue in English, the accused may address the Court in either English or Cree. The judge will explain the charge in either language depending on the needs of the accused. (Courts of Saskatchewan, n.d.)

The Aboriginal Court in Loon Lake, Saskatchewan is modelled after the FNC-Cree court and holds sittings in various north central Saskatchewan circuit courts. At times, Judge Bird may be the only Cree-speaking member of the Aboriginal Court, however, when possible efforts are made to identify Cree-speaking Crown Counsel, lawyers, and others to serve in the court.

NEW WESTMINSTER FIRST NATIONS COURT (FNC-NW), A HEALING COURT

The FNC-NW commenced as a pilot project and within existing resources on the unceded, traditional territories of the Squamish, Tsleil Waututh, and Musqueam First Nations peoples, in November 2006 in New Westminster, BC. Cree First Nations provincial court Judge Marion Buller is recognized as the implementer and creator of FNC-NW. For the past two decades, she has been the only First Nations

woman lawyer appointed as a Judge in the BC Provincial Court. In its seventh year of existence, FNC-NW is widely recognized as creating a critical legal path in BC and the inspiration for the development of three additional FNCs located in North Vancouver, Kamloops, and Duncan, BC. Judge Buller refers to FNC-NW as a healing court, which focuses on guilty pleas and restorative justice sentencing. How “clients” accomplish their restorative justice goals depends on their particular orientation to their own social and cultural location. Individuals appearing before FNC-NW may self-identify as Aboriginal or belonging to a First Nations, Metis, or Inuit community across Canada. Clients must apply to have their case heard in the FNC-NW which is located in the New Westminster Courthouse.

NORTH VANCOUVER ABORIGINAL COURT (FNC-NV)

The North Vancouver Aboriginal Court (FNC-NV) commenced sittings in February 2012 and is modelled after the FNC-NW. Despite being less than 23 kilometres apart in distance, there are striking differences between the FNC-NW and FNC-NV. While both are located on the unceded traditional territories of the local Squamish and Tsleil Waututh First Nations, the FNC-NV process is led by a non-Indigenous provincial court Judge, Joanne Challenger. Her developmental work to reach out to the local Squamish and Tsleil Waututh Nations at the inception of the FNC-NV demonstrates her ongoing efforts to find collaborative ways to address the over-representation of First Nations adults involved in the BC criminal justice systems. One non-Indigenous Justice and Special Project worker appears in FNC-NV to serve the justice interests of the 500 member Tsleil Waututh Nation, while the legal needs of the 3,000 member Squamish Nation are largely represented by Duty Counsel, lawyers, and the Ayas Men Child and Family Services agency.

“CKNÚCWENTN” FIRST NATIONS COURT, KAMLOOPS, BC, (FNC-C)

Cknúcwentn First Nations Court (FNC-C) takes a problem solving and restorative justice approach to sentencing and commenced sitting in March 2013. FNC-C is located within the provincial courthouse in Kamloops, in the south central interior region of BC, on unceded, traditional Secwepemc territory. The Secwepemctsin word, given by Secwepemc Elders to recognize the work of the court, translates to English as *“the place where help is given.”* It is modelled after the New Westminster provincial First Nations Court and the Aboriginal Peoples Court in Toronto, Ontario. Cknúcwentn sits once per month, includes important roles for Elders, and is open to all Aboriginal peoples in the Kamloops/Thompson area. Currently two provincial court judges share responsibility for the sittings: Judge Cliff Cleavelly (Métis) and Judge Stella Frame (non-Indigenous). Local Cree/Secwepemc

lawyer, Linda Thomas, chairs the local Aboriginal Community Justice Council and is widely acknowledged as the person responsible for the developmental and advocacy work necessary to create FNC-C.

DUNCAN FIRST NATIONS COURT, DUNCAN, BC, (FNC-D)

The First Nations Court in Duncan, BC (FNC-D) opened in May 2013, sits once per month and is presided over by BC provincial court Judge Marion Buller of the FNC-NW and a rotation of approximately ten Elders. Initially envisioned as an Aboriginal youth court by the late non-Indigenous provincial court Judge Josiah Wood, it evolved to include Aboriginal youth and adults when the numbers of local Aboriginal youth in conflict with the law proved insufficient to warrant monthly sittings. Provincial Crown Counsel, Leah Fontaine (a First Nations person, and formerly a Crown Counsel appearing before the FNC – NW), works to ensure that First Nations people consent to appear in the FNC-D. The majority of those appearing before FNC-D are from the local Coast Salish nations on the Vancouver Island area, home since time immemorial to the Quw'utsun' peoples. Plans to move FNC-D out of its small space in the provincial courthouse to the Quw'utsun' Cultural and Conference Centre in Duncan are currently underway.

OTHER FORMS OF ABORIGINAL JUSTICE INITIATIVES

The Teslin Tlingit Council Peacemaker Court in the Yukon came into effect on June 30, 2011 through the Administration of Justice Agreement (AJA) between the Teslin Tlingit Council, the Yukon and Canada. The Peacemaker Court hears all matters arising under Teslin Tlingit law. Some of these include adoptions, inheritance, wills, solemnization of marriage, housing, zoning, land use planning, and natural resources including issues relating to hunting and fishing. Referrals of selected adult and youth criminal cases can be made from mainstream courts to the Teslin Tlingit Justice Co-ordinator. Current violations against Teslin Tlingit legislation are being prosecuted before the Yukon Territorial Court. This is to allow Peacemakers to develop the skills necessary to deal with the cases arising (Government of the Teslin Tlingit Council, 2014).

The Gladue (Aboriginal Persons) Court, Toronto deals with criminal matters for adults and some young offenders. It accepts guilty pleas, sentences offenders, and presides over bail hearings. Aboriginal Legal Services of Toronto (2013) website lists a number of cases at the Appellate, Superior Court, and other levels. None of the currently sitting judges are Aboriginal peoples.

The Court of Kahnawá:ke is located on the Kahnawá:ke Mohawk Territory, a Mohawk reserve located across the St. Lawrence River from Montreal, Quebec, Canada. The Court is divided into criminal and traffic departments which sit once

per week. A Night Court sits once per month. The Kahnawá:ke Justice Commission, led by Director Ron Skye has a mandate to integrate traditional Mohawk principles into the Kahnawá:ke Justice System. According to its website, this means it must assure “fair and just resolution of conflict through the creation or modification of justice services; plan and implement prevention of conflict, violence, and crime by developing relevant programs; educate the public on justice initiatives; and administer and order the justice system of Kahnawá:ke” (Mohawk Council of the Kahnawá:ke, 2014).

PROBLEM SOLVING COURTS

The Downtown Vancouver Community Court (DCC) partnership pilot was established in September 2008 in Vancouver, BC. It developed in response to a recommendation of the BC Justice Review Task Force and its Street Crime Working Group (Downtown Community Court, 2013) and was built with a \$6.225 million capital infrastructure investment (p. 4). The objective of the DCC is to facilitate the integration of justice, health, and social services; improve outcomes for offenders; implement innovative criminal case management to improve justice efficiencies; and provide new opportunities for community participation in the justice system (DCC, 2013). This court may deal with a number of Aboriginal offenders but the DCC 2013 final evaluation does not identify the number of Aboriginal offenders managed in this environment. Typically people coming before the DCC are charged with summary conviction types of offences, such as theft, assault, possession of drugs, mischief, administrative offences, and domestic violence cases (DCC, 2013). The capital investment funding amount provided to the DCC is in sharp contrast to the FNC-NW, FNC-NV, FNC-C and FNC-D which receive no capital investment resources or funding provided by the government of BC, and must operate within existing budgets.

The Drug Treatment Court of Vancouver (DTCV) is similar to the Vancouver Community Court but focuses primarily on offenders who are charged under the Controlled Drugs and Substance Abuse Act. Somers, Currie, Moniruzzaman, Eiboff, and Patterson (2012), evaluated the Court and determined that it reduced drug related recidivism by 56% over a two-year period. The evaluation does not identify issues specific to Aboriginal offenders but it does indicate a very low 14% completion rate. In the ten years since the DTCV began in 2001, the report identifies over 196 graduates of the program. The DTCV is supported by a \$2 million per year budget, of which \$1.25 million is provided by the government of BC. This level of funding is in sharp contrast to the FNC-NW, FNC-NV, FNC-C and FNC-D which receive no additional resources or funding provided by the government of BC, and must operate within existing budgets.

SUMMARY

FNCs in Canada take diverse Indigenous problem solving and therapeutic jurisprudence+ approaches, including Elders and spirituality, to focus attention on Indigenous healing plans for individuals, families, communities, and nations. It is one legal process that courts can use to address complex social justice issues arising from Indigenous lives that are overwhelmingly impacted by intergenerational effects of colonization, disrupted lives, racism, addictions, mental health issues, internalized violence, and poverty. As such, the work of FNCs and the people that labour within them cannot be viewed in isolation from the web of Indigenous healing supports, additional infrastructure and operating funds that are required to support and make sustainable change. Nor can one FNC process be expected to address all the colonizing issues that Indigenous peoples experience and underlie a lack of well-being and behaviours that bring people into contact with Canada's justice system. In recent years, provincial court systems have dedicated additional infrastructure and operating resources to support courts focused on drug addiction, mental health and domestic violence. The rationale underpinning the need for these additional supports is to make the Canadian justice system relevant, effective, and collaborative. For exactly the same reasons, albeit framed within diverse Indigenous cultural contexts and only until Indigenous justice systems return to good working order, additional resources and actions are required now to support FNC Indigenous therapeutic jurisprudence + initiatives across Canada.

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