Indigenous Self-Government and Criminal Law: The Path Towards Concurrent Jurisdiction in Canada

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Abstract

The past few decades have seen an increase in culturally responsive policies and programs aimed at ameliorating the hardship and disadvantage faced by Indigenous peoples in the Canadian criminal justice system. These policies and programs, however, operate within a criminal justice system that consistently fails Indigenous peoples. What has yet to be tried is a nation-to-nation approach to criminal law jurisdiction where Indigenous peoples have legislative authority to enact and administer their own criminal laws. This paper shows that Indigenous jurisdiction over criminal law is possible within Canada's constitutional framework.

In Part I, I outline the current state of Indigenous self-government over criminal law. Although initiatives such as sentencing circles and Indigenous courts allow Indigenous peoples to exercise greater self-government over the administration of justice, they still do not exercise true criminal law-making authority. In Part II, I analyze existing discussions about separate Indigenous justice systems and identify a framework for how concurrent jurisdiction over criminal law can be exercised. In Part III, I draw on the doctrine of cooperative federalism to argue that Indigenous jurisdiction over criminal law can coexist with the federal government's jurisdiction over criminal law. Lastly, in Part IV, I discuss four ways Indigenous nations can attain jurisdiction over criminal law: (1) a constitutional amendment; (2) a self-government agreement; (3) a claim under section 35 of the *Constitution Act, 1982*; and (4) federal legislation. While a constitutional amendment is the preferable solution, I argue that federal legislation informed by Indigenous peoples is the best alternative.

Introduction

The past ten years of Indigenous-settlor relations have seen a growing use of the term 'nation-to-nation relationship.' On National Aboriginal Day in 2017, Prime Minister Justin Trudeau stated that "[n]o relationship is more important to Canada than the relationship with Indigenous Peoples. Our Government is working together with Indigenous Peoples to build a nation-to-nation, Inuit-Crown, government-to-government relationship – one based on respect, partnership, and recognition of rights."[1] In certain areas, the federal government has worked towards this goal. The coming into force of Bill C-92, for example, marked a turning point in the provision of child and family services and an unprecedented shift in federal policy. "[T]he right to self-determination of Indigenous peoples, including the inherent right to Indigenous self-government" was affirmed, and Indigenous peoples can now enact laws relating to child and family services.[2] Unfortunately, this same enthusiasm for self-government and law-making authority has not been extended to Indigenous jurisdiction over criminal law. This needs to change.

The Canadian criminal justice system has a long history of failing Indigenous peoples. On numerous occasions, courts have called the worsening overrepresentation of Indigenous peoples in correctional institutions a crisis.[3] Caused by a multiplicity of factors including widespread racism,[4] displacement, intergenerational trauma, and poverty;[5] Indigenous overrepresentation is arguably the largest challenge for the criminal justice system today. It shows no signs of abating, "and it has proven remarkably resistant to a wide range of policies and programs directed to its

[1] Office of the Prime Minister of Canada, Statement, "Statement of the Prime Minister of Canada on National Aboriginal Day" (21 June 2017), online: *Government of Canada* <pm.gc.ca/en/news/statements/2017/06/21/statement-prime-minister-canada-national-aboriginal-day>.
[2] *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 [Bill C-92].
[3] See *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385 at para 64. See also *R v Williams*, [1998] 1 SCR 1128, 159 DLR (4th) 493 at para 58 [*Williams*]; *R v Ipeelee*, 2012 SCC 13 at paras 58, 62 [*Ipeelee*]; and *R v Sharma*, 2020 ONCA 478 at para 79.
[4] *Williams*, *supra* note 3 at para 58.
[5] *Ipeelee*, *supra* note 3 at para 60. These factors are not exhaustive.

amelioration."[6] These policies and programs, however, operate within a criminal justice system that has failed Indigenous peoples for decades. What has yet to be tried is a nation-to-nation approach to criminal law jurisdiction where Indigenous peoples have legislative authority to enact and administer their own criminal laws.

In this paper, I show that Indigenous self-government and concurrent jurisdiction over criminal law is possible in Canada. To date, there have been various discussions outlining the different challenges associated with establishing separate Indigenous justice systems. The Royal Commission on Aboriginal Peoples' ("RCAP") Report of the National Round Table, for example, was the culmination of a years-long collaborative effort to identify problems with the Canadian criminal justice system and how those problems could be addressed.[7] One solution was the creation of separate Indigenous justice systems, which was previously suggested "by the Manitoba Aboriginal Justice Inquiry and the report of the Law Reform Commission on Aboriginal Peoples and Criminal Justice."[8] In the Round Table Report, separate Indigenous justice systems were discussed in articles by Jeremy Webber, who focused on why separate justice systems were justified;[9] and Teressa Nahanee, who outlined the female perspective on the requirements of a separate justice system.[10] Although the concept of separate Indigenous justice systems has been the subject of much academic commentary, like the Round Table report, the bulk of that commentary is from the 1990's when the Charlottetown Accord dominated constitutional

[6] Jane Dickson-Gilmore & Carol La Prairie, *Will the Circle Be Unbroken? Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change* (Toronto: University of Toronto Press, 2005) at 31.
[7] *Aboriginal Peoples and the Justice System: Report on the Round Table on Aboriginal Justice Issues* (Ottawa: Minister of Supply and Services Canada, 1993) [RCAP Round Table Final Report].
[8] Zebedee Nungak, "Aboriginal Justice Inquiries, Task Forces and Commissions: An Update" in *ibid* at 7.
[9] See Jeremy Webber, "Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice," in RCAP Round Table Final Report, *supra* note 7.
[10] See Teressa Nahanee, "Dancing with a Gorilla: Aboriginal Women, Justice and the Charter" in RCAP Round Table Final Report, *supra* note 7.

discourse. There has been little modern discussion about how Indigenous peoples can exercise jurisdiction over criminal law within our constitutional system. The most extensive discussion of that issue was by Wayne Mackay in 1992.[11] This paper builds on that discussion and provides a much-needed update on how Indigenous peoples can exercise jurisdiction over criminal law.

This paper is divided into four parts. In Part I, I outline the current state of Indigenous self-government over criminal law in Canada. This includes a discussion about First Nations' policing, sentencing circles, courts, and Band Council by-laws. As will be seen, Indigenous peoples are beginning to exercise greater self-government over administrative aspects of criminal law, yet are prohibited from exercising true criminal law-making authority. In Part II, I analyze existing discussions about separate Indigenous justice systems and identify a framework for how concurrent jurisdiction over criminal law can be exercised. In Part III, I argue that Indigenous jurisdiction over criminal law can coexist with the federal government's jurisdiction over criminal law. This argument focuses on cooperative federalism and addresses various jurisdictional and enforcement issues that will arise. Finally, in Part IV, I discuss four ways Indigenous nations can attain jurisdiction over criminal law: (1) a constitutional amendment; (2) a self-government agreement; (3) a claim under section 35 of the *Constitution Act, 1982*; and (4) federal legislation. While a constitutional amendment is the preferable solution, I argue that federal legislation informed by Indigenous peoples is the best alternative.

Part I: The Current State of Indigenous Self-Government over Criminal Law in Canada

The ability to enact criminal laws falls withing the exclusive jurisdiction of the federal government under section 91(27) of the *Constitution Act, 1867*. A law that prohibits certain acts

[11] See Wayne Mackay, "Federal-Provincial Responsibility in the Area of Criminal Justice and Aboriginal Peoples" (1992) 26 UBC L Rev 314.

or omissions, attaches a penalty to those acts or omissions, and is enacted for a criminal law purpose will be a valid exercise of the criminal law power.[12] The provinces, by virtue of section 92(15), are able "to enact penal sanctions, but the power is understood as an 'ancillary' one, authorizing the use of penal sanctions to enforce provincial regulatory schemes that are validly anchored elsewhere in the s. 92 list of provincial powers."[13] Thus, while provinces are able to regulate morality and public order through legislation,[14] that legislation must be rooted in one of the provincial heads of power under section 92. Stated simply, "the federal Parliament legislates what is and what is not a criminal offence, but the provinces are charged with the application of that criminal law."[15] Provincial application of federally-enacted criminal law is a power granted by section 92(14), which outlines provincial jurisdiction over the administration of justice.[16] This includes policing and the prosecution of offences under the *Criminal Code*.[17]

i) Indigenous Self-Government and Criminal Law

The current state of Indigenous self-government over criminal law is complex.[18] As a starting point, no Indigenous group can enact criminal laws. This includes First Nation reserves established under the *Indian Act*, and self-governing Indigenous nations that exercise legislative powers under a self-government agreement. The powers that Indigenous groups do enjoy vary

[12] *Reference re Validity of Section 5(a) Dairy Industry Act*, [1949] SCR 1, [1949] 1 DLR 433 at 49, 50.
[13] The Constitutional Law Group, *Canadian Constitutional Law*, 5 ed (Toronto: Emond Montgomery Press, 2017) at 485.
[14] *Nova Scotia Board of Censors v McNeil*, [1978] 2 SCR 662, 84 DLR (3d) 1 at 692 [*McNeil*].
[15] Dennis J. Baker, "The Provincial Power to (Not) Prosecute *Criminal Code* Offences" (2017) 48:2 Ottawa L Rev 419 at 426-427.
[16] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(14), reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].
[17] *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*]. The provincial Crown does not prosecute every criminal offence. Terrorism offences, drug offences, and immigration offences are prosecuted by the federal Crown.
[18] For clarity, I use the following identifiers for specific purposes: *First Nation* is used when discussing an *Indian Act* reserve; *Indigenous Nation* is used when referring to a broader Indigenous group that may contain multiple First Nations, for example, Mi'kma'ki or the Anishinabek Nation; and *First Nation Band* or *Band Council* is used when referring to a First Nation governing body established pursuant to the *Indian Act*, RSC 1985, c I-5 [*Indian Act*].

depending on the particular group, and not every power amounts to full self-government.[19] However, each group shares a defining characteristic: any legislative or other power that relates to criminal justice is administrative or regulatory, not penal. In this sense, Indigenous groups do not create criminal laws but assist in the administration of justice. They can do this in various ways.

a) First Nations' Policing

Policing generally falls within provincial jurisdiction over the administration of justice, but the federal government, due to its jurisdiction over "Indians, and Lands reserved for the Indians,"[20] is responsible for policing in First Nation and Inuit communities. This has led to considerable controversy due to the heinous conduct of some RCMP officers assigned to this role. While not an exhaustive list, this conduct includes the forceful abduction of Indigenous children as part of the Indian Residential School System;[21] and failing to investigate allegations made by Indigenous peoples, especially Indigenous women.[22] There is a strong distrust of the police in some First Nation communities, and given this troubling history, "it is not surprising that the police are held in low regard by [some] Aboriginal people."[23]

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[19] This paper uses the following definition of self-government: "Indigenous self-government is the formal structure through which Indigenous communities may control the administration of their people, land, resources and related programs and policies, through [legislation, constitutions, or other law-making mechanisms the Indigenous community sees fit, as well as through] agreements with federal and provincial governments." This definition is a modified version of the Canadian Encyclopedia's definition of 'Indigenous self-government': see Historica Canada, "Indigenous Self-Government in Canada" (last visited 30 March 2022), online: *The Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/aboriginal-self-government>.

[20] *Constitution Act, 1867*, *supra* note 16, s 91(24).

[21] See Marcel-Eugène LeBeuf, "The Role of the Royal Canadian Mounted Police During the Indian Residential School System" (2011) online (pdf): *Government of Canada* <publications.gc.ca/collections/collection_2011/grc-rcmp/PS64-71-2009-eng.pdf>.

[22] See e.g. Michelle Mann, "Aboriginal Women: An Issues Backgrounder" (2005) at 3, online (pdf): *Government of Canada* <publications.gc.ca/collections/Collection/SW21-146-2005E.pdf>; *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Aboriginal Justice Inquiry, 1991) at ch 16, online: *The Aboriginal Justice Implementation Commission* <www.ajic.mb.ca/volumel/chapter16.html> [Aboriginal Justice Inquiry]; and *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (Ottawa: NIMMIWG, 2019) at 672 [MMIWG Final Report, vol 1].

[23] Aboriginal Justice Inquiry, *supra* note 22 at ch 16.

To alleviate some of these concerns, the federal government developed the *First Nations Policing Program* ("FNPP") in 1991. As stated by Danielle Magnifico,

> [t]hrough this program, First Nations have two options for funding police services. They could either enter into an agreement to create a standalone police service…or enter into a Community Tripartite Agreement (CTA) to have policing services provided in their community.[24]

While CTA's are more common,[25] the option to establish a standalone First Nation police service gives First Nations some ability to exercise self-government over policing. Unlike the RCMP and provincial police forces, First Nation police services are more receptive to officers using "approaches that resonate with traditional values."[26] This can encourage officers to give more "breaks for minor offences," and suggest that people "settle disputes outside of the justice system" by placing less emphasis on typical retributive approaches to enforcement.[27] With Indigenous overrepresentation being a persistent issue, any police conduct that might reduce incarceration rates should be encouraged.

The FNPP, however, is not an appropriate mechanism for facilitating true self-governance over criminal law. First, First Nations police services are still required to enforce criminal laws enacted by the federal government. Although officers can exercise some discretion in choosing whether to excuse minor offences, they still fall under the purview of a colonial criminal justice system that consistently fails Indigenous peoples. Second, the FNPP is underfunded and under-

[24] Danielle Magnifico, "Bill 5: The Police Services Amendment Act (First Nation Safety Officers)" (2017) 40:2 Man LJ 87 at 91.
[25] *Ibid* at page 92. Magnifico states that the RCMP tries to assign Indigenous officers to First Nations that enter into a CTA.
[26] David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012) at 159.
[27] *Ibid*.

resourced. In 2002, Wes Luloff, former Chief of the First Nations Chiefs of Police Association ("FNCPA"), publicly stated that the FNPP was "designed to fail."[28] Similar concerns were expressed in the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls ("MMIWG"),[29] and in a 2017 report that analyzed self-administered Indigenous police services in Canada.[30] As summarized by the FNCPA, that latter report

> found that Self-Administered First Nations Police Services have been facing a number of serious challenges including limited funds for required equipment, low pay, high personnel turnover, some of the highest crime rates with the lowest number of officers, inadequate infrastructure, declining rates of Indigenous officers, and a lack of stable and consistent funding.[31]

Third, a "formal, professional, and centralized police agency that enforces the law and actively investigates crime on a full-time basis…may not reflect pre-contact Aboriginal practices."[32] Although pre-contact Indigenous communities did "investigate wrongdoing and …employ some measure of force to preserve order,"[33] a police service, as envisioned by the FNPP, is a colonial creation. To exercise full self-government over this aspect of criminal law, an Indigenous community must be able to choose how they will enforce criminal laws, rather than have an enforcement mechanism imposed on them.

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[28] See Paul Barnsley, "Aboriginal policing – Set up to fail?" (2002) at 2, online: *Aboriginal Multi-Media Society* <ammsa.com/publications/windspeaker/aboriginal-policing-set-fail>.
[29] See MMIWG Final Report, vol 1, *supra* note 22 at 655.
[30] See John Kiedrowski, Nicholas Jones & Rick Ruddell, "'Set up to fail?' An analysis of self-administered indigenous police services in Canada" (2017) 18:6 Police Practice and Research 584.
[31] First Nations Chiefs of Police Association, Press Release, "The 'Benign Neglect' of Policing is Failing First Nations Communities" (2017), online: *FNCPA* <www.fncpa.ca/first-nations-chiefs-of-police-call-for-first-nations-policing-to-be-entrenched-as-an-essential-service/>.
[32] Milward, *supra* note 26 at 159-160.
[33] *Ibid* at 159.

b) Sentencing Circles

A sentencing circle is one way an Indigenous community can exercise some control over the criminal trial process. Sentencing circles are not a form of self-governance over sentencing, but rather a mechanism that gives greater effect to restorative, rather than retributive, practices within the existing criminal justice system. The way sentencing circles currently operate does not reflect Indigenous practices; "rather, they are a way the court system has chosen to obtain information from members of the Indigenous community."[34] As Johnathon Rudin states:

> If an Indigenous community or nation were given the ability to design their own justice system very few would likely say, 'What we would like is for the judge to sit with us and listen to what we have to say and then go away and tell us what the sentence will be'.[35]

There are two types of sentencing circles that operate within the criminal justice system: sentencing circles with large-community involvement (referred to as *Moses*-type sentencing circles), and those with less community involvement.[36] The primary difference is that a *Moses*-type sentencing circle will "engage the wider community," whereas smaller sentencing circles do not.[37] Otherwise, they both involve similar participants: (1) an Indigenous Elder, where possible; (2) the offender and their supporters; (3) the victim and their supporters; (4) community "service providers with a knowledge of the offender's history;" (5) Crown and defence counsel; and (6) a judge.[38] The judge participating in the circle observes the process, they do not lead it. That task is

[34] Johnathon Rudin, *Indigenous Peoples and the Criminal Justice System: A Practitioner's Handbook* (Toronto: Emond Montgomery, 2018) at 208.
[35] *Ibid*.
[36] *Ibid* at 209-213, 226.
[37] *Ibid* at 226.
[38] *Ibid*.

left to an Indigenous Elder or a knowledge keeper, if available;[39] or a community member designated for that purpose.[40]

Although sentencing circles provide numerous benefits for offenders, victims, and communities; they fall short of Indigenous self-government over sentencing in many ways. First, a sentencing circle cannot recommend a sentence that contradicts the *Criminal Code*. Mandatory minimum sentences still apply, as do restrictions on the availability of probation and conditional sentences.[41] Second, referral to a sentencing circle is a discretionary decision of a judge. Since there are no *Criminal Code* provisions that outline eligibility, a judge will usually consider the common law factors established in *R v Joseyounen* before deciding whether a sentencing circle is appropriate.[42] The factors are not mandatory prerequisites to using a sentencing circle,[43] but even if an offender, victim, and community request a sentencing circle; a judge retains discretion to reject that request. Third, the recommendations of a sentencing circle are not binding. A judge is free to accept the sentence proposed by circle participants, or "propose a harsher sentence if he or she concludes that the recommendations do not provide a fit sentence."[44] Even if a recommended sentence is accepted, that sentence can still be overturned by a Court of Appeal if it "does not give sufficient emphasis" to the sentencing principles in section 718 of the *Criminal Code*,[45] or deviates

[39] *Ibid*.
[40] Hollow Water First Nation, for example, has a Community Holistic Circle Healing program ("CHCH"). Sentencing circles in Hollow Water First Nation are facilitated by two CHCH members who sit next to the judge: see The Hollow Water First Nations Community Holistic Circle Healing Interim Report, 1994, "The Sentencing Circle: Seeds of a Community Healing Process" in Wanda McCaslin, ed, *Justice as Healing: Indigenous Ways* (Minnesota: Living Justice Press, 2005) at 194.
[41] Probation cannot substitute imprisonment if the offender is convicted of an offence that carries a mandatory minimum sentence, and probation cannot be ordered if the offender is sentenced to a term of imprisonment exceeding two years: see *Criminal Code*, *supra* note 17, ss 731(1)(a)-(b). Similarly, a conditional sentence, which allows an offender to serve their sentence in the community, can only be granted if an offender was sentenced to less than two years' imprisonment for an eligible offence: see *Criminal Code*, s 742.1.
[42] See *R v Joseyounen*, [1995] 6 WWR 438, 1995 CanLII 10830 (SK PC).
[43] Rudin, *supra* note 34 at 214.
[44] Milward, *supra* note 26 at 28.
[45] *Ibid*.

too far from an established sentencing range.[46] Fourth, an accused must plead guilty before they can be referred to a sentencing circle. As stated by David Milward, "[i]f an Aboriginal accused contests the allegations, then Canadian legislation requires adversarial procedures."[47] Lastly, sentencing circles are not available to every Indigenous offender. Not every community has a sentencing circle, and in addition to the *Joseyounen* guidelines, judges appear to apply a threshold requirement for eligibility – if it is impossible to impose a term of imprisonment less than two years, a request for a sentencing circle will likely be denied. This two-year limit is not a mandatory rule, but is based on a decision of the Saskatchewan Court of Appeal in *R v Morin*. In that case, the Court of Appeal stated that

> [i]f a sentence exceeds two years imprisonment, the court is without power to impose any conditions on the accused after he has served his term. There is, accordingly, no means of enforcing any obligations undertaken by an accused as a result of the recommendations of the community through a sentencing circle.[48]

Simply put, sentencing circles do not currently permit the exercise of self-government over criminal sentencing. However, with some minor adjustments, they can. Removing "the circle process from the court altogether" can allow a greater degree of Indigenous control over the process.[49] Non-community members could be excluded, reducing the risk of counsel providing advice that undermines "the goals behind a sentencing circle" and negatively affects the offender.[50] Additionally, if sentencing circles were able to enforce Indigenous-enacted criminal laws, rather

[46] See Rudin, *supra* note 34 at 215; and *R v Morin*, [1995] 9 WWR 696, 134 Sask R 120 (SK CA) [*Morin*].
[47] Milward, *supra* note 26 at 31.
[48] *Morin*, *supra* note 46 at para 18.
[49] Rudin, *supra* note 34 at 231.
[50] Milward, *supra* note 26 at 177.

than the *Criminal Code*, their decisions may be binding and not restricted to the sentencing principles and options outlined in federal legislation.

c) Indigenous and *Gladue* Courts

One way the criminal trial process has moved outside the traditional court system is through the creation of Indigenous and *Gladue* courts. Like sentencing circles, these operate within the existing criminal justice system but outside of the traditional court process. They allow the parties and judge to incorporate Indigenous traditions when addressing criminality, and can result in sentences that better reflect community values and interests. There are three notable examples.

In 2012, after years of collaboration with Indigenous and government stakeholders, the Elsipogtog First Nation's Healing and Wellness Court ("HWC") began operating. Focused on treating the root causes of criminality, the Elsipogtog HWC is, in part, a response to the prevalence of drug and alcohol addiction in the community and high rates of violent crime.[51] The HWC "has two streams: a Conventional Stream and a Wellness Stream."[52] The Conventional Stream deals with preliminary and post-trial matters, such as first appearances, setting trial dates, pleas, and sentencing. These matters are addressed locally in Elsipogtog, while trials are heard in Moncton, New Brunswick.[53] The Wellness Stream, on the other hand, is designed to reduce recidivism and provide "treatment and support for accused person[s] living with an addiction to alcohol or substance, mental health problems, and/or an intellectual disability."[54] This is achieved "though

[51] Don Clairmont, "The Development of an Aboriginal Justice System: The Case of Elsipogtog" (2013) 64 UNB LJ 160 at 173.
[52] Tammy Augustine & Katherine Piercey, "Elsipogtog Healing to Wellness Court" (PowerPoint delivered at the Uniform Law Conference of Canada, 2016) at 6, online (pdf): *ULCC-CHLC* <www.ulcc-chlc.ca/ULCC/media/EN-Other-Documents/Elsipogtog-Healing-to-Wellness-Court.pdf>.
[53] *Ibid* at 7.
[54] *Ibid*.

an intensive, highly-individualized treatment plan" that "combines intensive monitoring with a comprehensive, culturally-sensitive approach to addressing the…needs of participants."[55]

Like sentencing circles, there are prerequisites that limit accessibility to the HWC. First, only certain offences are eligible. When "conviction carries a mandatory minimum or where very serious violence has occurred," the HWC will generally not process the case.[56] That decision is up to the federal or provincial Crown prosecutor, who retains discretion to permit or allow an accused access to the HWC even if there is no applicable mandatory minimum.[57] Second, even if the Crown and accused agree that referral to the HWC is appropriate, a primary case manager can refuse that referral if the accused does not "meet the treatment suitability criteria to be admitted to the HWC program."[58] This involves an assessment of an accused's circumstances, including drug or alcohol addiction, and their "motivation to pursue treatment."[59] Third, although a first-time offender only needs to "accept responsibility for their actions to enter into the wellness stream," repeat offenders must plead guilty before they are referred.[60] An acceptance of responsibility does not prejudice a first-time offender's "right to plead not guilty at a later time,"[61] and if they successfully complete their wellness plan, "the Crown Prosecutor will withdraw the charges."[62] Alternatively, a repeat offender who successfully completes their wellness plan will be given a sentence that can range from an absolute discharge to a conditional, community-based sentence.[63]

[55] *Ibid* at 6.
[56] Clairmont, *supra* note 51 at 185, footnote 60.
[57] *Ibid*. See also Augustine & Piercey, *supra* note 52 at 9.
[58] Augustine & Piercey, *supra* note 52 at 10.
[59] *Ibid*.
[60] *Ibid* at 11. See also Clairmont, *supra* note 51 at 185.
[61] Milward, *supra* note 26 at 28.
[62] Augustine & Piercey, *supra* note 52 at 14.
[63] *Ibid*.

The next example is "the Teslin Tlingit Council peacekeeper court system in the Yukon."[64] In 1993, the federal Crown, Yukon government, and Teslin Tlingit Council signed a self-government agreement granting the Teslin Tlingit Council various legislative and other powers, including, but not limited to, the "power to enact laws of a local or private nature on Settlement Land in relation to" the administration of justice.[65] The self-government agreement was given legal effect in 1995 by the *Yukon First Nations Self-Government Act.*[66] In 2011, the parties further signed an administration of justice agreement, which outlined the powers the Teslin Tlingit Council could exercise pursuant to section 13.3.17 of the self-government agreement.[67] David Milward provides a comprehensive summary of the effect these agreements had in Tlingit communities:

> The Tlinglit people have traditionally been divided into clans. Each clan has a separate peacemaker court. A Tlingit who is charged with a summary offence may be eligible for diversion [to the Teslin Tlingit Council peacemaker court system]. The requirements for diversion are worked out between the accused and the Elders of his or her clan. A justice co-ordinator acts as a facilitator between the clan Elders and the court. For any offences not dealt with by diversion, the clan Elders are allowed to act in an advisory capacity. The clan Elders hear submissions from Crown and defence counsel and are allowed to read a pre-sentence report that provides background information on the accused. The judge then explains what the available sentencing options may be. The case is then adjourned. The clan Elders then work out a recommendation for sentencing, which the

[64] Milward, *supra* note 26 at 29.
[65] *Teslin Tlingit Council Self-Government Agreement*, 29 May 1993, online: *Government of Canada* <www.rcaanc-cirnac.gc.ca/eng/1375812506480/1542825793154> at 13.3.17.
[66] *First Nations (Yukon) Self-Government Act*, RSY 2002, c 90.
[67] See *Teslin Tlingit Council Administration of Justice Agreement*, 21 February 2011, online (pdf): *Teslin Tlingit Council* <www.ttc-teslin.com/application/files/7115/3240/5673/Administration_of_Justice_Agreement.pdf>. See also *Amendment of the Teslin Tlingit Council Self-Government Agreement*, YOIC 2011/75.

> judge is not obligated to accept. Most recommendations are accepted, and this in turn has meant a 50 percent decrease in property crime, a 75 percent decrease in break and enters, a 50 percent decrease in assaults, and a 35 percent decrease in overall crime.[68]

The final example, *Gladue* courts, differ from the HWC and the Tlinglit peacemaker court system in one important aspect: they can be utilized by urban Indigenous people and are not confined to First Nations. Limited to addressing guilty pleas, bail, and sentencing;[69] "*Gladue* courts are 'regular' Canadian criminal courts applying Canadian law; they do not represent a distinct Aboriginal form of justice."[70] They do, however, ensure that bail and sentencing dispositions accord with the principles of sentencing and the directions of the Supreme Court of Canada in *R v Gladue* and *R v Ipeelee*. Additionally, *Gladue* courts give an Indigenous accused access to specialized judges, counsel, court workers, and caseworkers who "work exclusively in these courts and receive specialized training"[71] – a degree of specialization rarely available to an accused in most Canadian courts. Pending approval from a Crown prosecutor, they may also divert Indigenous accused away from court and into specialized programs that emphasize rehabilitation. The Community Council Program at the Aboriginal Persons Court in Toronto is one such example, and can be used by repeat offenders or those accused of serious crimes. If an accused successfully completes the program, their charge(s) are withdrawn.[72]

Like the HWC and Tlinglit peacemaker courts, *Gladue* courts fall short of full self-government over criminal law. Each of these three examples are forced to apply the *Criminal*

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[68] Milward, *supra* note 26 at 29.
[69] John Borrows & Leonard Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary* (Toronto: Lexis Nexis Canada Inc., 2018) at 1087, note 4.
[70] Paula Maurutto & Kelly Hannah-Moffat, "Aboriginal Knowledges in Specialized Courts: Emerging Practices in Gladue Courts" (2016) 31:3 Can JL & Soc'y 451 at 460.
[71] *Ibid*.
[72] Milward, *supra* note 26 at 29-30.

Code. Each requires participation from individuals who might not be community members or Indigenous – mainly, judges and counsel – and each are limited to jurisdiction over the administration of justice rather than exercising criminal law-making authority. While undoubtedly beneficial within the existing criminal justice system, these types of courts are only a subset of the criminal law jurisdiction advocated for in this paper.

d) *Indian Act* Offences and Band Council By-laws

A final subset of Indigenous jurisdiction over criminal law – specifically, the administration of justice – are Band Council powers under the *Indian Act*.[73] Unlike the criminal law-making authority enjoyed by the federal government, the powers exercised by Band Councils are more akin to the provincial power to regulate morality and public order. Section 81(1) of the *Indian Act*, for example, allows Band Councils to enact by-laws over a number of areas, including the regulation of traffic;[74] the observance of law and order;[75] the control or prohibition of public games, sports, races, and athletic contests;[76] and the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes.[77] A Band Council can make any contravention of these bylaws a summary conviction offence punishable by a fine not exceeding one thousand dollars, a term of imprisonment not exceeding thirty days, or both.[78]

These powers under the *Indian Act*, as they relate to the administration of justice, are broader than municipal powers delegated by provincial governments. Municipalities in Ontario

[73] *Indian Act*, *supra* note 18.
[74] *Ibid*, s 81(1)(b).
[75] *Ibid*, s 81(1)(c).
[76] *Ibid*, s 81(1)(m).
[77] *Ibid*, s 81(1)(p).
[78] *Ibid*, s 81(1)(r). Section 85.1 also gives Band Councils legislative authority to prohibit the sale and possession of intoxicants on reserve. 'Intoxicant' is defined in section 2(1), and does not include substances prohibited under the *Controlled Drugs and Substances Act*, SC 1996, c 19.

are limited to imposing fines in most cases,[79] and can only require imprisonment for violating very specific by-laws – such as violating a "business licensing by-law dealing with an adult entertainment establishment."[80] A Band Council, alternatively, can require a term of imprisonment for violating any by-law enacted under section 81(1) of the *Indian Act*. Additionally, while municipalities in Ontario have the power to enact by-laws that "regulate or prohibit" certain conduct,[81] the types of conduct that municipalities can regulate or prohibit is less extensive than what is covered by the *Indian Act*. There is no broad 'observance of law and order' power delegated to municipalities, nor is there a power to remove trespassers.[82] This does not mean, however, that Band Councils exercise self-government over laws relating to the administration of justice.

The *Indian Act* withholds adjudicative powers from Band Councils. The Act expressly gives Canadian courts "jurisdiction to enforce band rules and regulations" by allowing the Governor in Council to appoint a justice of the peace to oversee illegal conduct in the First Nation.[83] The "enforcement of band by-laws by fine or imprisonment [is done] through proceedings before a Justice of the Peace,"[84] not an Indigenous court. To have a by-law violation brought before a Justice of the Peace, Bands must often rely "on provincial police and provincial Crown attorneys to prosecute by-law offenders in the provincial court system."[85] RCAP found that Bands often have to hire their own counsel to enforce by-laws, since the heavy workload of police

[79] See *Municipal Act, 2001*, SO 2001, c 25, ss 429(1)-(5). A fine cannot exceed $100,000 except in limited circumstances such as special fines or situations of multiple offences.
[80] *Ibid*, s 430.
[81] *Ibid*, s 8(3)(a).
[82] See *Municipal Act*, *supra* note 79, ss 10(2), 11(2), and 11(3).
[83] Kent McNeil, "Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government" (2003) 22 Windsor YB Access Just 329 at 336. See also *Indian Act*, *supra* note 18, s 107.
[84] McNeil, *supra* note 83 at 336.
[85] *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) at 267 [RCAP Final Report, vol 1].

and Crown attorneys limited their enforcement to cases "of criminal and serious statutory offences."[86]

Although this paints a dim picture for self-government, by-laws enacted under the *Indian Act* may supersede laws enacted by federal and provincial governments. In other words, Band Council by-laws may be paramount over the *Criminal Code*. This argument, stemming from the application of statutory interpretation, has been advanced by Naiomi Metallic.[87] It has not been addressed by the courts, and "[i]t is uncertain whether a by-law under [the *Indian Act*] would supersede the *Criminal Code*."[88] Nevertheless, Metallic states that "in situations of conflict between *Indian Act* by-laws and the *Criminal Code*," the language used in section 81(1) of the *Indian Act* would support a finding that by-laws made under that section are paramount.[89] As between two federal statutes like the *Indian Act* and *Criminal Code,* "[t]he basic principles of law are not in doubt. Just as subordinate legislation cannot conflict with its parent legislation … so too it cannot conflict with other Acts of Parliament … *unless a statute so authorizes*."[90] Metallic argues this authorization can be found in section 81(1) of the *Indian Act*.

An *Indian Act* by-law created under section 81 is similar to a regulation, as per the Quebec Court of Appeal in *R v Stacey*.[91] Regulations and by-laws are subordinate legislation.[92] *Indian Act* by-laws enacted under section 81(1) are therefore subordinate to the *Criminal Code*, and can only

[86] *Ibid* at 267.
[87] See Naiomi Metallic, "Indian Act By-Laws: A Viable Means for First Nations to (Re)Assert Control over Local Matters Now and Not Later" (2016) 67 UNB LJ 211 at 217-218.
[88] Jack Woodward, *Aboriginal Law in Canada* (Toronto: Thomson Reuters, 1989) (loose-leaf updated 25 February 2022), at ch 7:67.
[89] Metallic, *supra* note 87 at 217, footnote 36.
[90] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 88 DLR (4th) 1 at para 50, cited in Metallic, *ibid* [emphasis added].
[91] See *R v Stacey*, [1982] 3 CLNR 158, 63 CCC (2d) 61 ("[t]he powers conferred by s. 81 [of the *Indian Act*] are first of all, powers to regulate, and to regulate only 'administrative statutes'" at para 30), cited in Metallic, *supra* note 87 at 217, footnote 36.
[92] Elmer A. Driedger, "Subordinate Legislation" (1960) 38:1 Can Bar Rev 1 at 2.

conflict with the *Criminal Code* if authorized by statute. Section 81(1), however, "has been interpreted as meaning that *Indian Act* by-laws will be paramount over other federal regulations."[93] Metallic argues that this interpretation "implies that a by-law would [also] be paramount over federal legislation."[94] If correct, this could have significant implications. For example, section 81(1)(d) of the *Indian Act* permits Band Councils to enact by-laws to prevent 'disorderly conduct', a behaviour "already regulated by [section 175(1)(d)] of the *Criminal Code*."[95] If a by-law supersedes the *Criminal Code* and addresses disorderly conduct differently, section 175(1)(d) of the *Criminal Code* would not apply and the Band Council would have effectively exercised jurisdiction over criminal law.[96] This is a promising avenue for Band Councils to explore under the current criminal justice system. However, while promising, any Band Council by-law that is paramount to federal and provincial legislation is still restricted to the subject matters outlined in sections 81(1), 83, and 85.1 of the *Indian Act*. A broader, all-encompassing jurisdiction is needed before we can say Indigenous peoples exercise full self-government over criminal law. How this all-encompassing jurisdiction might look is the subject of the next section.

Part II: Frameworks for Separate Indigenous Justice Systems

i) Some Existing Discussions About Separate Indigenous Justice Systems

After the enactment of the *Charter* and section 35 of the *Constitution Act, 1982*, Indigenous self-government became a frequently discussed political issue in academic and legal fields. A

[93] Metallic, *supra* note 87 at 217, citing *R v Ward* (1988), 93 NBR (2d) 370, 45 CCC (3d) 280 (NB CA) at para 9; *R v Jimmy* (1987), 15 BCLR (2d) 145, [1987] 5 WWR 755 (BC CA); and *R v Lewis*, [1996] 1 SCR 921, 133 DLR (4th) 700.
[94] Metallic, *supra* note 87 at 217.
[95] Woodward, *supra* note 88 at ch 7:67.
[96] This is not meant as saying that a Band Council infringed on the federal government's exclusive jurisdiction over criminal law. Section 81(1)(d) of the *Indian Act*, *supra* note 18, permits legislative action to *prevent* disorderly conduct. Preventative, rather than penal, legislation that "is concerned with criminal morality" is not necessarily "an invasion of the federal criminal field": see *McNeil*, *supra* note 14 at 692

subset of that discussion was Indigenous self-government over criminal law and the creation of separate Indigenous justice systems.[97] The basis for this discussion was twofold: first, some commentators believed that section 35(1) gave "constitutional scope for Aboriginal self-government in matters relating to the establishment of justice systems;"[98] and second, that section 35(1) could "be used as 'a basis to assert an inherent right of [Indigenous] people[s] to live under their own justice systems without the need for any enabling legislation or delegation of power from a legislature."[99]

At the heart of these discussions was how separate Indigenous justice systems would function. Would they exercise greater control over administrative aspects of the existing criminal justice system, or would they exercise complete control over substantive and procedural criminal law? One of the early and oft-cited academic examinations of this issue was by Bryan Schwartz in 1990.[100] Schwartz was critical of establishing separate Indigenous justice systems for a number of reasons, many of which reflect a misguided understanding of Indigenous issues. First, Schwartz suggested that opinions voiced against Quebec separatism would be similar to those advanced against the idea of separate Indigenous justice systems. He expressed concerns that non-Indigenous Canadians might oppose the idea of having Indigenous peoples be "equal partners in national government" if they had "special exemptions from national laws."[101] What Schwartz failed to

[97] This paper uses the terms 'separate' and 'parallel' synonymously. A separate or parallel Indigenous justice system refers "to systems that give Aboriginal peoples full control over the response to criminal behaviour – systems such as the tribal courts in the United States": see Steve Coughlan, "Separate Aboriginal Justice Systems – Some Whats and Whys" (1993) 42 UNB LJ 259 at 259 [Coughlan, "Separate Aboriginal Justice Systems"]. They are separate because they are not part of the existing Canadian criminal justice system, and parallel because they co-exist with the Canadian system.

[98] Craig Proulx, "Current Directions in Aboriginal Law/Justice in Canada" (2000) 20:2 Can J Native Studies 371 at 382, citing *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services, 1996) at 224 [RCAP, *Bridging the Cultural Divide*].

[99] Proulx, *ibid*, citing Johnathan Rudin & Dan Russell, *Native Alternative Dispute Resolution Systems: The Canadian Future in Light of the American Past* (Toronto: Ontario Native Council on Justice, 1993) at 45-46.

[100] See Bryan Schwartz, "A Separate Aboriginal Justice System?" (1990) 19:1 Man LJ 77.

[101] *Ibid* at 79.

recognize was that the creation of separate Indigenous justice systems are not the "equivalent to saying that Aboriginal persons…should not be required to obey the law," but rather a proposal "for a different system of laws."[102] Second, Schwartz also believed that the creation of separate Indigenous justice systems would be too great a departure from the "principle of equality of all citizens."[103] Although Schwartz acknowledged Indigenous overrepresentation in prison, he failed to discuss section 15 of the *Charter* and the concept of ameliorating disadvantage. In 1992, only two years after Schwartz's article, Patrick Macklem analyzed existing case law and stated that

> recent judicial interpretation of s. 15(1) of the Charter suggests that mere differential treatment on the basis of race may not constitute a violation of s. 15(1), and s. 15(2) provides that s. 15(1) does not preclude laws that are aimed at the amelioration of Aboriginal peoples' oppressive conditions.[104]

Thus, while Schwartz did not have the benefit of the Supreme Court of Canada's decision in *R v Kapp*,[105] he nevertheless neglected to consider existing section 15 jurisprudence and the benefits that could arise from separate Indigenous justice systems. Instead, he focused exclusively on potential harms to support his argument for expanding Indigenous participation *within* the existing criminal justice system. Schwartz ultimately preferred the 'administrative control' option over a full criminal law-making jurisdiction, and proposed modifications to the existing approach like those seen above in Part I. His opinion was that it is not

[102] Coughlan, "Separate Aboriginal Justice Systems," *supra* note 97 at 270.
[103] Schwartz, *supra* note 100 at 80.
[104] Patrick Macklem, "Aboriginal Peoples, Criminal Justice Initiatives and the Constitution" (1992) 26 UBC L Rev 280 at 299.
[105] See *R v Kapp*, 2008 SCC 41 ("where a program makes a distinction on one of the grounds enumerated under s. 15 or an analogous ground but has as its object the amelioration of the conditions of a disadvantaged group, s. 15's guarantee of substantive equality is furthered, and the claim of discrimination must fail" at para 3).

> appropriate for [A]boriginal people, or their governments, to acquire any exemption from the *Criminal Code* or an ability, in effect, to supplement it. It would, however, be appropriate for [A]boriginal governments to acquire jurisdiction over more regulatory areas than they currently enjoy, and the power to define offences and penalties in these areas.[106]

In 1988, the Government of Manitoba established the Aboriginal Justice Inquiry. The inquiry was created to examine and make recommendations about the relationship between Indigenous peoples in Manitoba and various aspects of the criminal justice system.[107] Chapter 7 of the Inquiry's Final Report, released in 1991, addresses separate Indigenous justice systems. After hearing from Indigenous organizations and community leaders about the failings of the current system, the Inquiry concluded "that the best method of resolving the problems and following the principles [identified in this Report] involves the establishment of Aboriginal justice systems in all Aboriginal communities, operated and controlled by Aboriginal people."[108]

The conclusions and recommendations of the Aboriginal Justice Inquiry are interesting from the perspective of full self-government over criminal law. At first glance, the Inquiry seems to adopt the approach that gives Indigenous communities the power to exercise law making authority over the administration of justice. This can be seen by the Inquiry's deliberate use of the term "'Aboriginal justice systems' rather than 'Aboriginal courts'," and their recommendation on how these systems would be structured:

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[106] Schwartz, *supra* note 100 at 84.
[107] See *An Act to establish and validate The Public Inquiry into the Administration of Justice and Aboriginal People*, SM 1989-90, c 1, s 3(1).
[108] Aboriginal Justice Inquiry, *supra* note 22 at ch 7.

> …we believe that it is important that it be recognized that the approach that must be taken is a systemic one, and not one which deals with elements of the administration of justice in an isolated way…The important issue is that every component of the justice system operational within an Aboriginal community be controlled by Aboriginal people. That would include everything from police, to prosecutor, to court, to probation, to jails.[109]

One of the Inquiry's recommendations, however, goes a bit further and suggests that Indigenous communities should exercise legislative control over aspects of criminal procedure, a power that falls exclusively under federal jurisdiction.[110] Specifically, the Inquiry recommends that "[w]herever possible, Aboriginal justice systems [should] look toward the development of culturally appropriate rules and processes which have as their aim the establishment of a less formalistic approach to courtroom procedures."[111] As stated by Steve Coughlan, "[t]he procedures governing trial [and trial conduct] are set out in Parts XIX, XX, and XXVII of the *Criminal Code*."[112] If an Indigenous community created rules that expand an accused's ability to attend trial by video-conference, for example, those rules may conflict with section 715.23 of the *Criminal Code*. Even something as minor as removing a trial judge's discretion to decide "where the accused will sit during trial"[113] may infringe federal jurisdiction over criminal procedure. As such, even though the Aboriginal Justice Inquiry does not call for Indigenous criminal law-making power, its

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[109] *Ibid*.
[110] See *Constitution Act, 1867*, supra note 16, s 91(27). The Federal Government has exclusive jurisdiction to legislate "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters."
[111] Aboriginal Justice Inquiry, *supra* note 22 at ch 7. See also Coughlan, "Separate Aboriginal Justice Systems," *supra* note 97 at pp 263-264. Coughlan found that "some Aboriginal peoples are essentially non-adversarial and view criticism of other people as rude and socially unacceptable." He states that "[t]he Indigenous Bar Association reports that traditional Aboriginal peoples will be reluctant to testify, and in particular may be reluctant to tell the court, or even their own counsel, of evidence which is unfavourable to the opposing witness." Coughlan found that "the cultural dissonance argument demonstrates the need for special measures."
[112] Steve Coughlan, *Criminal Procedure*, 4 ed (Toronto: Irwin Law Inc., 2020) at 511.
[113] *Ibid* at 512.

recommendations go beyond greater control over the administration of justice and call for legislative authority over matters of federal jurisdiction.[114]

In 1996, RCAP expanded on this notion of Indigenous criminal-law making authority and outlined the Indigenous perspective on separate justice systems in its Report of the National Roundtable on Aboriginal Justice Issues. This report was a culmination of numerous discussions and suggestions put forward by Indigenous representatives and stakeholders across Canada. From those discussions, Round Table Rapporteur James MacPherson identified points of agreement and disagreement between participants about the creation of separate Indigenous justice systems. MacPherson noticed there was a lack of consensus on whether separate Indigenous justice systems should be created. He identified three common arguments that showed this lack of consensus:

> The first advocated removing Aboriginal people from the current justice system as much and as quickly as possible, establishing separate and fully independent Aboriginal governments, and allowing these governments to establish their own justice systems. The second view was that there should be radical reform of the current justice system and that the experience of developing and implementing these reforms might (or might not) lead to the introduction of separate Aboriginal justice systems. The third view was that reform should be encouraged in an eclectic way and at a grassroots, profoundly local level, with no preconceptions about where they might lead.[115]

Although Round Table participants were unable to agree on whether there should be separate Indigenous justice systems, they did agree on what a separate system might look like.

[114] The exclusive control of police by Indigenous peoples, as suggested by the Aboriginal Justice Inquiry, may also require legislative control over federal criminal procedure if it included the ability to define police powers, which are currently outlined in the *Criminal Code*: see *Criminal Code*, *supra* note 17, ss 25-33, 494-528.
[115] RCAP Round Table Final Report, *supra* note 7 at 6.

Instead of adopting "a single system like the regimes in place at the federal, provincial and territorial levels," a separate Indigenous justice system would need to contain multiple, individual justice systems "devised and implemented at the local community level."[116] This view recognizes the diversity amongst Indigenous peoples and the fact that a single, uniform justice system – like the one currently in place – would fail to respect Indigenous diversity and meet the unique needs of every Indigenous group.

Since the RCAP Report of the National Roundtable on Aboriginal Justice Issues, numerous commissions and inquiries have expressed the need to establish separate Indigenous justice systems. Call for Justice 5.1 of the MMIWG Final Report, for example, called on the federal government to "immediately implement the recommendations in" RCAP's *Bridging the Cultural Divide*, and the Manitoba Aboriginal Justice Inquiry of 1991. In *Bridging the Cultural Divide*, RCAP found that a necessary component of Indigenous peoples' right to self-government is "the authority to establish Aboriginal justice systems."[117] The Aboriginal Justice Inquiry, as outlined above, called for legislative authority over some aspects of federal criminal procedure. Call to Action 42 of the *Truth and Reconciliation Commission* similarly called upon all levels of government "to commit to the recognition and implementation of Aboriginal justice systems in a manner consistent with the Treaty and Aboriginal rights of Aboriginal peoples, the *Constitution Act, 1982*, and the *United Nations Declaration on the rights of Indigenous Peoples*" ("UNDRIP").[118] UNDRIP, of course, called upon the World to recognize Indigenous peoples' inherent right to self-determination and self-government, which includes the "right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining

[116] *Ibid* at 5.
[117] RCAP, *Bridging the Cultural Divide*, *supra* note 98 at 54.
[118] *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2012).

their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."[119] Each of these sources clearly express the need for separate Indigenous justice systems. The question becomes, therefore, how these systems will look.

ii) Establishing a Framework for Separate Indigenous Justice Systems

The existing discussions about the creation of separate Indigenous justice systems share two common themes. First, the current criminal justice system has failed Indigenous peoples. This failure manifests throughout the entire process, beginning at the police investigative stage before charges are even laid, to the post-conviction stage of incarceration and discriminatory treatment in prison. Second, to alleviate some of these failures, Indigenous peoples must exercise greater control over aspects of criminal justice that directly affect Indigenous peoples. While the discussions do not reach a consensus about whether separate Indigenous justice systems should include a full criminal-law making authority, such a power would help address these two common themes. An Indigenous community could define police powers, trial processes, available sanctions, and the conduct which is criminally prohibited in a manner that accords with community practice, reflects community traditions and values, and ensures that Indigenous offenders are dealt with in a culturally appropriate manner. Thus, although no consensus on the issue was reached, the framework proposed below assumes full Indigenous jurisdiction over criminal law, including the discretion and power for an Indigenous community to enact criminal legislation, or adopt federal criminal legislation, depending on their preferences.

[119] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess (2007) (UNDRIP), Articles 4, 5.

a) Which 'Nation' Should have Criminal Law-Making Authority?

Existing discussions were unanimous on the point that, if separate Indigenous justice systems were established, they would need to enact laws at a local level rather than enforce laws originating from one criminal-law making body. The reason for this is simple. Indigenous peoples are culturally, spiritually, and linguistically diverse; and a uniform criminal law cannot account for this diversity. The issue, however, is what groups of Indigenous peoples should have the authority to enact criminal laws? Should that power vest with individual First Nations, both self-governing and those established under the *Indian Act*? Should it vest with some form of inter-First Nation legislative body that represents numerous individual First Nations? Or, should Indigenous groups, through an exercise of self-determination and their inherent right to self-government, have the discretion to choose between these two options? There is no perfect answer since each community will have unique needs, priorities, and resources. However, an analysis of existing precedent and academic commentary suggests the discretionary option is most appropriate.

The ability to choose which Indigenous body exercises legislative authority over a particular subject matter can be seen in *An Act respecting First Nations, Inuit and Métis Children, youth and families*. Section 20(1) gives "an Indigenous group, community, or people" the ability to exercise legislative authority over child and family services.[120] An Indigenous governing body, meaning "a council, government or other entity that is authorized to act on behalf of an Indigenous group, community, or people;" can give notice to the federal government of pending legislation, but does not exercise legislative authority over child and family services.[121] The Act does not define how extensive or limited an Indigenous group, community, or people can be. In *The Promise*

[120] Bill C-92, *supra* note 2, s 20(1).
[121] *Ibid*.

and Pitfalls of C-92, Metallic, Friedman, and Morales state that Indigenous "communities with shared values and goals may choose to work together on all or some aspects of law development, administration, service delivery, enforcement and dispute resolution."[122] They may also choose to work independently. The Act, therefore, confers a discretionary power to Indigenous peoples to choose who will enact their laws relating to child and family services. A similar approach can be taken to Indigenous criminal justice systems.

Bryan Schwartz, alternatively, preferred the inter-First Nation framework. Schwartz was concerned that community-administered justice systems would lack the 'checks and balances' typically seen in larger legislative bodies – for example, the Canadian Senate acting as a 'sober second-thought' to the House of Commons. Schwartz outlined a risk that, in small communities, "it is fairly easy for one faction to take over, to dominate all aspects of life, to favour its own and discriminate against others."[123] Giving criminal law-making authority to these types of communities might cause more problems than it would eliminate. Schwartz believed that if "[A]boriginal communities participate in a larger federation of [A]boriginal communities, then some of the necessary, mutually correcting interaction of local and larger government can occur."[124] Schwartz did not identify how large this federation needed to be to allow for checks and balances. It should, however, be limited to First Nations from a similar linguistic group to respect regional diversity.

Schwartz's concern about a potential lack of checks and balances in small communities is legitimate. The Band Council system has been criticized for conferring too broad a power on Chief

[122] Naiomi Metallic, Hadley Friedland & Sarah Morales, "The Promise and Pitfalls of C-92: An Act respecting First Nations, Inuit and Métis Children, Youth and Families" (4 July 2019), online (pdf): *Yellowhead Institute* <yellowheadinstitute.org/wp-content/uploads/2019/07/the-promise-and-pitfalls-of-c-92-report.pdf>.
[123] Schwartz, *supra* note 100 at 79.
[124] *Ibid* at 80.

and Council while also providing too few mechanisms to ensure accountability.[125] For example, a Band Council enacting a by-law under sections 81 or 83 of the *Indian Act* does not need to "publish the proposed by-law in advance."[126] They also do not need "to inform or consult with their own [community] members" before it comes into force.[127] A criminal law enacted by the federal government, alternatively, undergoes a process where the text of any proposed law is reviewed by government committees and debated in a public forum. Before receiving Royal Assent, these proposed laws are often publicized and subject to public scrutiny, as was the case for Bill C-75.[128]

While it is inappropriate to suggest that an Indigenous law-making process should follow a western approach, if an Indigenous community were to exercise criminal-law making power at the First Nation level, depending on how jurisdiction is defined, that power may be exercised by a Band Council. Given the liberty interests at stake in the development of criminal laws, community input and consultation, in some form, *must* be a component of that jurisdiction.[129] One way to achieve this, and to eliminate concerns that a Band Council might abuse criminal law-making powers, is to establish an independent tribunal that can assess the Council's legislative decisions. Shin Imai recommended the creation of such an independent tribunal in 2012:

> there must be a tribunal that is independent of Chief and Council that can certify and interpret the laws and can hear appeals from decisions. This tribunal can determine

[125] Shin Imai, "The Structure of the Indian Act: Accountability in Governance" (2012) *Comparative Research in Law & Political Economy, Research Paper No 35/2012* at 1.
[126] *Ibid* at 3.
[127] *Ibid* at 4.
[128] See House of Commons of Canada, "Bill C-75: First Reading" (29 March 2018), online: *Parliament of Canada* <www.parl.ca/DocumentViewer/en/42-1/bill/C-75/first-reading>. See also Michael Johnston, "Bill C-75 & Jury Selection: Recommendations on Jury Selection and for Greater Representativeness" (Paper delivered at the County of Carleton Law Association 30th Annual Criminal Law Conference, Ottawa, 14 October 2018), (2018) CanLIIDocs 10838 < canlii.ca/t/sqvz>.
[129] It should be noted that by-laws dealing with intoxicants on reserve only come into force if "a majority of electors of the band" vote in favour of the by-law at a special meeting: see *Indian Act*, *supra* note 18, s 85.1(2).

> whether the Chief and Council have authority to make the laws, whether there has been adequate community participation and whether the laws are consistent with the First Nations' core principles. … Under a First Nation governance regime, an independent tribunal made up of First Nation people could carry out this function.[130]

Of course, Indigenous peoples have an inherent right of self-government, meaning that the creation of an independent tribunal is a *suggestion*, not an obligation. Indigenous peoples must enact criminal laws through their own processes and not through a framework imposed on them. Therefore, Indigenous peoples should have the discretion to choose whether separate Indigenous criminal justice systems, and the criminal laws that inform those systems, will be created and enforced by individual Indigenous groups, or through a collaborative inter-First Nation body. The next question is how those law will apply.

b) Where, and to Whom, will Indigenous-Enacted Criminal Laws Apply?

In *Canada's Indigenous Constitution*, John Borrows comprehensively discusses the issue of applicability – that is, if Indigenous groups enacted their own laws, where would they apply and who would be subject to follow them? This paper adopts Borrows' recommendations in full. Borrows states that "Indigenous laws are best administered within Canada's constitutional framework on a territorial basis," and suggests these laws must be followed by "First Nations citizens and other people who reside on or visit the reserve."[131] In other words, criminal laws enacted by Indigenous peoples will apply in their respective communities to anyone, Indigenous or non-Indigenous, that allegedly commits a crime in that community. 'Community', in this sense, refers to a First Nation reserve or self-governing Indigenous nation. It does not cover the entirety

[130] Imai, *supra note* 123 at 2.
[131] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 162.

of a traditional territory that may now contain large metropolitan cities, such as Ottawa, which resides on traditional Algonquin territory.[132] As a result, Borrows suggests that "[o]ff-reserve, provincial or federal laws…should create the main obligations for Indigenous peoples and other Canadians."[133] With respect to criminal law, this means legislation like the *Criminal Code* will continue to apply to everyone for crimes allegedly committed outside Indigenous communities. These recommendations, and this paper as a whole, requires a significant reframing of our current criminal justice system and constitutional division of powers. Albeit a significant change, it is nevertheless attainable through the use of cooperative federalism.

Part III: Constitutional Challenges to Indigenous Jurisdiction over Criminal Law

The Supreme Court of Canada, citing Peter Hogg, described cooperative federalism as

> a concept used to describe the 'network of relationships between the executives of the central and regional governments [through which] mechanisms are developed…which allow a continuous redistribution of powers and resources without recourse to the courts or the amending process.'[134]

Cooperative federalism "has been invoked to provide flexibility in separation of powers doctrines, such as federal paramountcy and interjurisdictional immunity," to allow for separate orders of government to enact co-existing legislation and relax "a rigid, watertight compartments approach to the division of legislative power that unnecessarily constrains legislative action by the other order of government."[135] Typically applied to the federal-provincial division of powers, the

[132] *Ibid* at 163.
[133] *Ibid* at 163-164.
[134] *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 at para 17, citing Peter W. Hogg & Wade K. Wright, *Constitutional Law of Canada*, 5 ed (Toronto: Thomson Reuters, 2007) (loose-leaf updated 26 July 2021), at ch 5:27.
[135] *Ibid*.

principles of cooperative federalism can inform constitutional issues that may arise when an Indigenous group exercises criminal law-making power.

The first, most obvious constitutional issue regarding Indigenous jurisdiction over criminal law is the question of paramountcy. In other words, in the event of conflict between Indigenous and federal criminal law, which law prevails? As stated above, John Borrows maintains that Indigenous law would be paramount on reserve, while federal and provincial laws remain paramount off-reserve. It is virtually guaranteed that someone will challenge that assumption, relying on the doctrine of federal paramountcy to argue the *Criminal Code* and other federal legislation applies in the case of conflict. An example of potential conflict with the *Criminal Code* could include an Indigenous group enacting their own video-conferencing laws, as mentioned above. Cooperative federalism, however, posits that "the doctrine of paramountcy is applied with restraint." Legislatures are presumed to have intended that their laws co-exist, and "[a]bsent a genuine inconsistency, courts will favour an interpretation of the federal legislation that allows the concurrent operation of both laws."[136] The difficult situation is when there *is* a genuine inconsistency, for example if an Indigenous community enacted a criminal law whose maximum punishment was a conditional sentence, while under the *Criminal Code* that same conduct carried a minimum sentence of imprisonment. The two laws cannot simultaneously apply since they require a different sentence.

The way this paramountcy issue is resolved will depend on how Indigenous justice systems are established. If a constitutional amendment created a third, Indigenous-order of government within the division of powers, that amendment could specify which laws prevail in situations of

[136] *Alberta (Attorney General) v Moloney*, 2015 SCC 51.

conflict. If Indigenous jurisdiction over criminal law was established in a self-government agreement, the parties could agree, through the terms of that agreement, which laws are paramount in the event of genuine inconsistency. If Indigenous self-government over criminal law was recognized in federal legislation, that legislation could explicitly state that in the event of conflict or inconsistency, an Indigenous-enacted criminal law prevails over federal criminal law. The federal government has already legislated this type of paramountcy recognition in relation to child and family services.[137] Lastly, if jurisdiction over criminal law was established through a self-government claim under section 35 of the *Constitution Act, 1982*, that jurisdiction would be a constitutionally protected Aboriginal right. The federal government would only be able to infringe that right by satisfying the two-prong justification test in *R v Sparrow* – first, is there a valid legislative objective for infringing the Aboriginal right, and second, is the infringement consistent with the honour of the Crown and the federal government's fiduciary obligations to Indigenous peoples.[138] If these two requirements are not met, Indigenous-enacted criminal laws would be paramount to the *Criminal Code* and other federal criminal law legislation.

Another potential constitutional issue with the creation of separate Indigenous justice systems is interjurisdictional immunity. This issue only arises if the manner in which separate justice systems are created is through federal legislation. Specifically, if the federal government enacted legislation granting jurisdiction to Indigenous peoples over policing, prosecutions, and the administration of justice more broadly, a provincial government might argue the legislation is *ultra vires* the federal government due to section 92(14) of the *Constitution Act, 1867*. This argument is

[137] See Bill C-92, *supra* note 2, ss 21(1), 22(1).
[138] *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 at paras 71, 75. See also Naiomi Metallic & Constance MacIntosh, "Canada's actions around the Mi'Kmaq fisheries rest on shaky legal ground" (9 November 2020), online: *Policy Options Politiques* <policyoptions.irpp.org/magazines/november-2020/canadas-actions-around-the-mikmaq-fisheries-rest-on-shaky-legal-ground/>.

without merit. Although each of these matters do fall within exclusive provincial jurisdiction, the federal government, under section 91(24), can legislate in these areas so long as "the law can be characterized as being in pith and substance in relation to 'Indians'" or lands reserved for 'Indians'.[139] Additionally, this legislation would fit within Borrows' vision for Indigenous law applicability, since, for instance, "[a] fully autonomous Aboriginal police force is likely to be jurisdictionally limited to reservation lands."[140] The Supreme Court of Canada was clear that cooperative federalism requires the relaxing of 'watertight compartments' of interjurisdictional immunity, and it would be imprudent for a provincial government to suggest this legislative power is *ultra vires* the federal government. As Wayne Mackay states, "[t]he existing constitutional structure respecting the division of federal and provincial powers under the *Constitution Act, 1867* does not present insurmountable impediments to the establishment of an Aboriginal criminal justice system."[141]

It is also important to recognize that reliance on a federal head of power to intrude into provincial jurisdiction over criminal justice is not unprecedented.[142] The federal government, through their jurisdiction over the military and national defence,[143] created a "separate, constitutionally valid, military justice system [that] operates in parallel with its civilian criminal justice counterpart" in "Part III of the *National Defence Act*."[144] It is difficult to see how, under a

[139] Mackay, *supra* note 11 at 317.
[140] *Ibid*.
[141] *Ibid* at 320.
[142] Coughlan, "Separate Aboriginal Justice Systems," *supra* note 97 at 259.
[143] *Constitution Act, 1867*, *supra* note 16, s 91(7).
[144] Office of the Judge Advocate General, "An Overview of Canada's Military Justice System" (n.d.) at 1, online (pdf): *The Department of National Defence and the Canadian Armed Forces* <forces.gc.ca/assets/FORCES_Internet/docs/en/jag/military-justice-overview.pdf>. The Supreme Court of Canada also held that a separate military justice system was necessary: see *R v Généreux*, [1992] 1 SCR 259, 88 DLR (4th) 110 at para 293.

division of powers analysis, the federal government could not similarly create separate Indigenous justice systems under their section 91(24) power.

A third constitutional issue is that Indigenous criminal laws would have to comply with the *Charter*. This issue has been the subject of an entire book,[145] and is too extensive to adequately cover in this paper. It is also somewhat speculative, and would depend on the measures Indigenous peoples take to address criminality in their communities. Suffice to say it is a valid issue Indigenous peoples will have to consider when exercising criminal law-making power. It also emphasizes the fact that, albeit separate, Indigenous justice systems, and "First Nations' governance powers" more generally, "would still be exercised within a perverse colonial framework."[146] This list of potential constitutional issues is not-exhaustive, and more issues will likely arise depending on the path taken to establishing Indigenous jurisdiction over criminal law.

Part IV: The Path Forward

There are four ways Indigenous peoples can obtain jurisdiction over criminal law: (1) a constitutional amendment; (2) a self-government agreement; (3) a self-government claim under section 35 of the *Constitution Act, 1982*; and (4) federal legislation. There are advantages and disadvantages to each option, but as the law currently stands, federal legislation is the most promising path forward.

i) Constitutional Amendment

A constitutional amendment that grants Indigenous peoples legislative jurisdiction over criminal law, criminal procedure, and the administration of justice in Indigenous communities is

[145] Milward, *supra* note 26.
[146] John Borrows, "Canada's Colonial Constitution" in John Borrows & Michael Coyle, ed, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) at 35-36.

the most effective way of establishing separate Indigenous justice systems. Although the most effective, it is also the most unlikely. The general constitutional amending formula in section 38(1) of the *Constitution Act, 1982*, is a significant hurdle that would need to be overcome before the division of powers can be altered. It requires approval from the Senate, House of Commons, and "at least two-thirds of the provinces that have, in the aggregate…at least fifty per cent of the population of all the provinces."[147] Given their population density, if Ontario and Quebec acted together they can veto an amendment. There has only been one successful attempt to use the general amending formula to change the Constitution.[148] There have also been notable failed attempts, albeit outside of the general amending formula, including the Charlottetown Accord of 1992. If successful, the Charlottetown Accord would have, among other things, recognized the inherent right of Indigenous self-government.[149] It was "rejected by Canadian voters in a referendum."[150] Simply put, a constitutional amendment is not a realistic option for recognizing Indigenous self-government over criminal law in our current political climate.

ii) Self-Government Agreements

Due to the current policy objectives of the federal government, self-government agreements are not a viable means of obtaining full self-government over criminal law. The Inherent Rights Policy, which outlines the federal government's approach to self-government negotiations, contains a list of subject matters that may arise during negotiations with Indigenous peoples. According to the Inherent Rights Policy, policing, "administration [and] enforcement of

[147] *Constitution Act, 1982*, s 38(1), being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[148] See *Constitution Amendment Proclamation, 1983*, SI/84-102.
[149] See e.g. Mary Ellen Turpel, "The Charlottetown Discord and Aboriginal Peoples' Struggle for Fundamental Political Change" in Kenneth McRoberts & Patrick Monohan, ed, *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993) at 125, 127. (pp. 117-151).
[150] Gerald L. Gall, "Charlottetown Accord" (last modified 13 July 2021), online: *The Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/the-charlottetown-accord>.

Aboriginal laws, … the establishment of Aboriginal courts or tribunals and the creation of offences of the type normally created by local or regional governments" are "matters that the federal government would see as subjects for negotiation."[151] These offences would be similar to those created by a Band Council for contravening by-laws enacted under the *Indian Act*. Jurisdiction over substantive criminal law, however, including the ability to make criminal offences, is explicitly non-negotiable. The federal government will not consider claims of self-government over substantive criminal law, and is of the opinion that "[i]n these areas, it is essential that the federal government retain its law-making authority."[152] This positional bargaining approach to self-government negotiations ignores recommendation 2.2.11 of the RCAP Final Report,[153] and has caused some Indigenous nations to forego their inherent right to self-govern criminal law.

The Nisga'a Final Agreement, for example, has been called "a movement toward a 'postcolonial sovereignty'" – that is, "an idea of nationhood that is not organized on the logic of colonial oppression ... [and] cannot operate upon principles of european cultural (legal, linguistic, social) superiority."[154] However, at Chapter 11 of the Nisga'a Final Agreement, it explicitly states that, "[f]or greater certainty, Nisga'a Government authority does not include authority in respect of criminal law."[155] The Westbank First Nation Self-Government Agreement contains a similar provision, which states that, "[f]or greater certainty, the jurisdictions to be exercised by Council

[151] Crown-Indigenous Relations and Northern Affairs Canada, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" (last modified 15 September 2010), online: *Government of Canada* <rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136#scopn>.
[152] *Ibid*.
[153] See *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) at 75 ("[t]he Commission recommends that…[t]he following matters be for discussion in treaty implementation and renewal and treaty-making processes: governance, including justice systems").
[154] Tracie Lea Scott, *Postcolonial Sovereignty? The Nisga'a Final Agreement* (Saskatoon: Purich Publishing Limited, 2012) at 143, 146.
[155] *Nisga'a Final Agreement*, 27 April 1999 at 176, online (pdf): *Nisga'a Nation* <nisgaanation.ca/sites/default/files/Nisga%27a%20Final%20Agreement%20-%20Effective%20Date.PDF>.

set out in this Agreement do not extend to matters…including: (a) criminal law, including the procedure in criminal matters."[156] Thus, while self-government agreements are viable paths towards self-government over the administration of justice, they will not lead to full self-government over criminal law in the near future.

iii) Section 35(1) of the *Constitution Act, 1982*

In *R v Pamajewon*, the Supreme Court of Canada recognized the ability to claim, as an Aboriginal right under section 35(1) of the *Constitution Act, 1982*, self-government over specific matters. To establish that right, an Indigenous group must satisfy the 'integral to a distinctive culture' test created in *R v Van der Peet*.[157] This test "has been severely criticized by legal academics and other commentators," in part, due to its piece-meal approach to Aboriginal rights.[158] Like self-government agreements, a successful claim under section 35(1) would only recognize self-government rights for an individual Indigenous group rather than all Indigenous peoples.

The continuity component of the 'integral to a distinctive culture' test is particularly problematic for self-government claims over criminal law. In *Van der Peet*, the Supreme Court of Canada states that for an Aboriginal right to be recognized under section 35(1), an Aboriginal group must "demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times."[159] There does not have to be an "unbroken chain of continuity between…current practices, traditions and customs, and those which existed prior to contact," but

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[156] *Westbank First Nation Self-Government Between Her Majesty the Queen in Right of Canada and Westbank First Nation*, 3 October 2003 at 15, online (pdf): *Westbank First Nation* <wfn.ca/docs/self-government-agreement-english.pdf>.
[157] *R v Pamajewon*, [1996] 2 SCR 821, 138 DLR (4th) 204 at para 23 [*Pamajewon*].
[158] Kent McNeil, "The Jurisdiction of Inherent Right Aboriginal Governments" (2007) *Research Paper for the National Centre for First Nations Governance* at 13.
[159] *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 at para 63.

there does need to be a resumption of those practices by the rights-claiming group at some point.[160] For an Indigenous group claiming a criminal law-making power, proving this continuity is effectively impossible. The *Criminal Code* arguably extinguished Indigenous peoples' ability to enact and enforce criminal laws, even though, pre-contact, "[n]o society…Aboriginal societies included, has ever been able to fully escape the need to investigate wrongdoing and to employ some measure of force to preserve order."[161] Additionally, a self-government claim under section 35(1) cannot be excessively general.[162] As Milward states, this means that "[c]laiming a right to a separate justice system would be…unacceptable."[163] Instead, Indigenous peoples would be limited to "claiming rights to individual practices within that justice system."[164] In sum, as currently interpreted, section 35(1) provides a piece-meal approach to self-government that is incapable of realizing full Indigenous jurisdiction over criminal law.

iv) Federal Legislation

The final path towards Indigenous self-government over criminal law is federal legislation. Like the options above, federal legislation has shortcomings. First, the federal government's current stance on Indigenous criminal law-making authority, as seen in the Inherent Rights Policy, leaves little hope that federal legislation granting jurisdiction over criminal law will be enacted any time soon. Second, if enacted, there would be conflict between that legislation, explicitly recognizing Indigenous criminal law-making authority, and existing self-government agreements which prohibit that authority, like the Nisga'a Final Agreement. Those existing agreements would need to be renegotiated since it would be inappropriate for the federal government to unilaterally

[160] *Ibid* at para 65.
[161] Milward, *supra* note 26 at 158-159.
[162] *Pamajewon*, *supra* note 157 at para 27.
[163] Milward, *supra* note 26 at 32;
[164] *Ibid*.

alter their terms through legislative action. Third, if the legislation did not expressly recognize Indigenous peoples inherent right to self-government over criminal law, and instead *granted* that right, the legislation would perpetuate current views of Indigenous peoples as non-sovereign. The right is inherent, not delegated, and like Bill C-92, new federal legislation must recognize that fact.

Despite these potential shortcomings, federal legislation recognizing the inherent right of self-government over criminal law could avoid many of the problems identified throughout this paper. The right would extend to all Indigenous peoples, rather than to specific communities. If properly drafted, the federal paramountcy issue could be resolved, and a framework could be established to resolve cases of conflict. It could define where, and to whom, Indigenous-enacted criminal laws would apply; and like Bill C-92, it could allow Indigenous groups to choose whether they will enact criminal laws at an individual community level or through some form of inter-First Nation agreement. It can recognize the right to self-govern substantive *and* administrative aspects of criminal law, and permit the creation of truly separate Indigenous justice systems that co-exist with the current system. As the law currently stands, it is the best path towards concurrent jurisdiction over criminal law in Canada.

Conclusion

In the Aboriginal Justice Inquiry of 1991, Al Hamilton and Murray Sinclair stated that

> Aboriginal communities must have the right, as part of self-government to establish their own rules of conduct, to develop means of dealing with disputes (such as courts and peacemakers), appropriate sanctions (such as holding facilities or jails), and the full range of probation, parole, counselling and restorative mechanisms once applied by First Nations…This means that in establishing a system of justice for Aboriginal people, the

> laws enacted by Aboriginal peoples themselves, or deliberately accepted by them for their purposes, must form the foundation of the system's existence.[165]

This paper has shown this type of justice system is possible. Although numerous advances have been made within the existing criminal justice system, there is room within the Canadian constitutional framework for Indigenous jurisdiction over criminal law. The doctrine of cooperative federalism creates room within the division of powers for Indigenous jurisdiction over criminal law, and federal legislation is currently the most viable means for establishing separate Indigenous justice systems. Indigenous self-government over criminal law has been discussed for nearly 40 years. It is time for it to become a reality.

[165] Aboriginal Justice Inquiry, *supra* note 22 at ch 7.